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Opening Schumer's Box: The Empirical Foundations of Modern Consumer Finance Disclosure Law

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OPENING SCHUMER'S BOX: THE EMPIRICAL FOUNDATIONS OF MODERN CONSUMER FINANCE DISCLOSURE LAW

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This Article explores the fundamental failure of Congress' twenty-five-year quest to utilize disclosure as the primary tool to both regulate credit card issuers and educate consumers. From inception until present, reforms to this disclosure regime, even when premised on judgment and decision-making behavioralism, were nomothetic in orientation and ignored clear differences in population behavior and the heterogeniety of consumers. Current law prohibits credit card issuers from acquiring consumer socio-demographic data and prevents issuers and regulators from using market and policy experimentation to enhance disclosure's efficacy. To explain why this regime was structured this way and why it must change, this Article contains four key sections: (1) a comprehensive review of the creation of our modern consumer credit card regulatory scheme; (2) a survey of the empirical evidence used to update and expand that disclosure-centered regime over twenty-five years; (3) an account of why the existing scheme's disclosure function substantially fails, notwithstanding recent reforms; and (4) an argument that to achieve optimal credit card disclosure efficacy, the law must permit issuers to acquire and utilize customer socio-demographic information, including race, gender, and other characteristics.

Introduction

In 1985, New York City experienced one of the worst crime waves in its history. In a desperate attempt to deter theft from cars, New Yorkers posted signs in their car windows reading "no radio."[1] One November night in Brooklyn, Representative Charles E. Schumer parked his car under a streetlight for the night.[2] His maroon sedan was filled with boxes beautifully wrapped in green and red.[3] The

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1. George L. Kelling, *How New York Became Safe: The Full Story*, City Journal, July 2009 *available at* http://www.city-journal.org/2009/nytom_ny-crime-decline.html (last visited October 9, 2014).
2. Surprise Holiday Gift for a Brooklyn Thief, N.Y. Times, Nov. 29, 1985, at B8.
3. *Id.*

next morning Schumer found his car with a broken window and the boxes gone.[4] As it turned out, the boxes were empty—they were mock presents that Schumer had planned to use as props at a news conference the next morning. At that news conference, Schumer addressed what he saw as an even greater consumer crime—the high rates and unclear disclosure practices of consumer credit card issuers.[5]

Schumer's news conference and his subsequent well-publicized campaign against credit card issuers first drew attention to interest-rate capping.[6] Schumer was motivated by a general trend where credit card interest rates were moving inversely proportional to market interest rates for other types of loans[7] and the ballooning of credit card interest rates to roughly fifteen percent greater than the Consumer Price Index (CPI).[8] Soon after it became clear that Schumer's rate-cap legislation would never pass,[9] he proposed that Congress help consumers choose the right credit cards and learn how to use these cards more effectively and efficiently. Schumer's new proposal was enacted as the Fair Credit and Charge Card Disclosure Act of 1988 (the Disclosure Act).[10] The Disclosure Act's chief reform to credit card law was the Schumer box, a tabular format that displayed required information in credit card advertising and in credit card billing statements and that was intended to educate and inform consumers.[11] Whether consumers would find Schumer's model gift to consumers—his tabular box—to be full of value or empty promises remained an open question.

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4. *Id.*

5. *Id.*

6. Susan Harrigan, How High Is Too High For Credit Cards? The Mixed Record of Rate Caps, Newsday, Feb. 16, 1987, at 1.

7. S. Rep. No. 100-259, at 2 (1987) (citing Functional Cost Analysis, published annually by the Federal Reserve).

8. *See, e.g.,* Tim Chen, *Historical Credit Card Interest Rates*, Nerdwallet, http://www.nerdwallet.com/blog/credit-card-data/historical-credit-card-interest-rates/ (last visited February 15, 2014).

9. Harrigan, *supra* note 6 ("Schumer [had] called for national credit-card interest rate ceilings in the past, but this year he's backing off. 'We don't have the votes in Congress,' he said . . . .").

10. Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, 102 Stat. 2960.

11. The Disclosure Act provided "for more detailed and uniform disclosures of rates and other cost information in applications and solicitations to open credit and charge card accounts. The act also required issuers to disclose pricing information, to the extent practicable as determined by the Federal Reserve, in a tabular format. This table is also known as the Schumer box, named for the Congressman that introduced the provision requiring this disclosure into legislation." U.S. Gov't Accountability Office, GAO-06-929, Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers, 17 n.21 (Sept. 2006).

Schumer believed that if credit card companies were required to explain more—both at the card-acquisition and card-use stages—consumers would a) be more educated, b) pick the most interest-rate efficient cards from issuers who would now (in theory) compete for users by dropping fees,[12] and c) use credit cards in a more optimal, debt-reducing fashion once they better understood how their balances accrued. The Disclosure Act built upon the information-centered model deployed in the Truth in Lending Act (TILA),[13] a model that discloses key contract terms to educate and protect consumers. Schumer and others who proposed similar reforms simply assumed that if supply-side disclosure worked in other contexts, it was an appropriate policy prescription for consumer credit cards as well. But what if disclosure in this context was not an appropriate prescription, and this logical extension of TILA was, in fact, unhelpful or harmful to consumers?

To answer that question, this Article reexamines the history of consumer finance disclosure lawmaking, focusing particularly on the Disclosure Act and its legacy and then continuing to the development of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the CARD Act)[14] and the Consumer Financial Protection Bureau (the CFPB).[15] Congressional credit card policy reforms of the past twenty-five years rest on the assumption that one-size-fits-all disclosure regimes actually educate consumers, produce net-positive results in the marketplace, and enable consumers to navigate both card acquisition and card usage more efficiently.

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12. Naturally, assumptions about the abilities of consumers to pick the cheapest or best products are problematic for a variety of reasons. *See, e.g.*, Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 741–3 (2006).

13. Some of TILA's basic provisions already applied to credit cards, but the Disclosure Act significantly extended this reach. Congress has previously amended TILA, 15 U.S.C. §1601 et seq., to focus on a variety of consumer-credit issues, but reforms prior to the Disclosure Act, such as the Consumer Leasing Act of 1975 and the Truth in Lending Simplification and Reform Act of 1980, built upon disclosure of terms as the primary regulatory device. *See, e.g.*, FEDERAL RESERVE, REGULATION M CONSUMER LEASING 1 (2008), *available at* http://www.federalreserve.gov/boarddocs/caletters/2008/0805/08-05_attachment2.pdf (describing the CLA's purpose as "to assure that meaningful and accurate disclosure of lease terms is provided to consumers before entering into a contract"). *See, also,* Consumer Leasing Act of 1976, Pub. L. No. 94-240, § 2 90 Stat. 257, 257 (amending Section 102 of TILA, and describing the 1975 leasing reforms as helping to "assure a meaningful disclosure of the terms[,] compare more readily[,]. . .and to assure meaningful and accurate disclosures . . . in advertisements").

14. *See* Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734.

15. The CFPB was created under Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1955, 1964 (2010).

This Article's analysis of the evidence informing this history suggests that this core assumption is false. Further, the current model assumes a monolithic consumer—a "generic man"—would respond to disclosure regimes and their educational function uniformly. Congressional advocates for consumer reform made policy decisions based on anecdotal evidence, which reinforced the view that they could model a complex policy designed to educate consumers and change their behavior on the examples of a few non-representative consumers. As the regime developed, advocates proposed smaller, incremental reforms, each with a similar nomothetic approach to consumers and consumer behavior. This legislating style became path-dependent, as new reforms were simply incorporated within the same overall disclosure model—easing the cost of transition from each change but also decreasing the likelihood of a more comprehensive remodeling of the entire regime. As described in this Article, Congress's initial credit card disclosure regimes were not built upon the rigorous data analysis of policy analysts or government agencies nor the empirical claims or normative arguments of law scholars and other academics.[16]

This Article's analysis of various iterations of consumer credit card law reforms and the methodologies and evidence informing such laws suggest that generic credit card disclosures are not an effective solution for any of the problems associated with credit card use. Whether the problem is excessive interest rates, poor short-term consumer choices (such as overspending), consumers' inability to understand their long-term usage and debt management options, or something else, consumer finance disclosure regimes have not proven to be an effective consumer intelligence-building tool.[17] The Federal Reserve even agrees and suggests that consumer financial education—not disclosure—is the most effective tool for influencing credit card holder outcomes.[18] Nonetheless, the primary legislative focus for consumer credit card finance law and policy was—and still is—rooted in the disclosure-based idealism derived from TILA, which informed Schumer and his colleagues in the late 1980s. More recent interventions, such as the CARD Act and the CFPB, have proposed more direct regulation of credit card issuers' practices and called for more research in an

16. Whether the CFPB's (eventual) large-scale data crunching proves a useful counterpoint is currently unknown.

17. In other contexts, disclosure regimes are undoubtedly valuable. As explained in Part III.C, *infra*, the efficacy of *financial* disclosures is empirically different than other types of disclosures; for example, prescription drugs.

18. *See discussion infra* note 192 (where the Federal Reserve finds that making further changes to disclosures is "unlikely to be helpful").

attempt to right this ship. However, even these reforms leave the existing disclosure-to-consumer solution regime in place.

This Article posits that lawmakers should abandon portions of disclosure reforms modeled on a mythical generic consumer and instead deploy both disclosure and financial education regimes that permit, encourage, and facilitate disclosure targeted to a particular consumer's demographics. This change will increase the likelihood that issuers can craft effective disclosures that are relevant to end-users from a variety of demographic groups and will facilitate more robust consumer-behavior research by academics and interested policymakers, such as the CFPB. Although proponents of more recent reforms have understood the limits of one-size-fits-all disclosure, their arguments have not gone far enough in tailoring disclosure and financial education to a consumer's socio-demographic characteristics. Instead, more recent proposed reforms focus on a model of personalized disclosure that does not directly distinguish consumers based on gender, race, or other socio-demographic characteristics. This failure to distinguish between groups could be why credit-card disclosures do not fully accomplish consumer advocates' long-term goals.

Evidence-based policymaking advocates have long focused on the nexus between science and optimal outcomes in fields such as public health. But Congressional scholars have argued that applying such approaches to the legislative process may be impractical at best and naïve at worst.[19] This is possibly why legal scholars framing the disclosure debate have generally avoided applying an evidence-based policymaking framework and have instead focused on other key questions, such as the extent to which consumers read or do not read disclosures or whether disclosure regimes are economically efficient methods of modifying consumer behavior.[20] While

19. *See* DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 15 (1974)*; see, also,* Dennis C. Mueller et al., *Representative Government via Random Selection,* 12 PUBLIC CHOICE 57 (1972). Many scholars believe that a research focus on Congress using evidence to make good policy is more of a utopian ideal than a real solution. These scholars point to the works of authors like Mayhew and others who suggest that Congressional members are mostly interested in re-election and career enhancement and will thus propose the most minimally invasive regulations possible in order to secure political goodwill and capital back home. Further, Congressional members may find greater financial support from industry if they deflect more aggressive proposals by proposing less invasive solutions. Thus, those scholars who share this view of policymaking find a focus on evidence to be wishful thinking. Where some see these factors as reasons to abandon an evidence-based policymaking framework, this framework is utilized as an ideal—one that should at least inform the policy-making discussion.

20. *See, e.g.*, OREN BAR-GILL, SEDUCTION BY CONTRACT 30–32 (2012) (describing the efficacy of product sellers' attempts to educate consumers and the scholarly discourse highlighting resulting market imperfections).

these scholarly discussions have been rich and informative, policymakers have not applied the core insights from the evidence-based policy literature to reform consumer credit card acquisition and usage.

This Article's contributes to the growing body of consumer finance law and policy analysis by providing the first broad assessment of the legislative history and evidence for Congress's twenty-five year quest to improve consumer credit card behavior and the outcomes of that pursuit. The evidence suggests that Congress and federal regulators initially lacked a robust, scientifically informed understanding of consumer behavior regarding key credit card reform initiatives.[21] Further, the evidence suggests that the few models and studies of consumer behavior that advised such reforms should have produced a functionally different regime; the current system does not disaggregate consumers into definable groups, which would facilitate different messaging, segmented education, and advanced research. With respect to functionally different regimes, international studies rely on a variety of schema and metrics to show that consumers respond differently to various credit and spending scenarios for various reasons, including socioeconomic and psychological factors.[22] Solving for optimality while controlling for such complexity in consumer decision-making would require a consumer-side tailoring of both financial education and credit card disclosure regimes, which includes—even targets—customers based on socio-demographic variables.[23] Compared to a

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21. *See infra* note 74 and accompanying text. Evidence reviewed for this Article includes all evidence Congress cited in hearings pertaining to various iterations of such reforms as well as evidence directly introduced into the Congressional record. This is not to say that Congress could have known in, say, 1968, what is now known about consumer behavior or BLE. But, it should suggest that over time, as evidence grew, Congress's disclosure discourse could and should have been more enriched by evidence suggesting its sub-optimality and pointing the way toward other, alternative, solutions.

22. *See, e.g.,* Fin. Serv. Auth., Consumer Research 42: Mortgage Disclosure: Mystery Customer Research Report (2005), *available at* http://www.fsa.gov.uk/static/pubs/consumer-research/crpr42.pdf; Fin. Serv. Auth., Consumer Research 34: UCITS: Charges Disclosure-Presenting Product Charges to Customers (2005), *available at* http://www.fsa.gov.uk/static/pubs/consumer-research/crpr34.pdf; Financial Services Authority; Fin. Serv. Auth, Consumer Research 44: Young People (18–24) and Their Financial Information Needs (2005), *available at* http://www.fsa.gov.uk/static/pubs/consumer-research/crpr44.pdf.

23. *See, e.g.,* Ariel Porat and Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 Mich. L. Rev. 1417, 1433–53 (2014) (describing a broad general framework for deploying personalized default rules across a variety of commercial contexts). While this work engages an impressive breadth, its focus on credit card disclosure rules is limited and proposes personalized solutions that rely on conventional metrics of consumer credit behavior (e.g. FICO scores). Instead, this Article focuses on personalized-disclosures using observable socio-demographic characteristics that federal law presently forbids.

generic-man approach, tailoring across multiple factors is more likely to reach and influence consumers and to improve the efficacy of disclosure for all end-users. However, the Equal Credit Opportunity Act (the "ECOA") currently prohibits card issuers from both acquiring and using many consumer socio-demographic variables.[24]

This Article contributes to and links two previously unconnected scholarly trajectories: those scholarly works that suggest that evidence-informed policymaking can and should be the focus of lawmakers[25] and those that suggest that disclosure, as the primary commercial law vehicle for educating consumers, produces sub-optimal consumer outcomes.[26] The key difference between this Article's targeted socio-demographic personalized approach and the approaches of such scholars such as Thaler[27] and Bar-Gill[28] is its focus on the issuers' ability to predictively and empirically tailor disclosures to consumers in ways that federal law currently forbids. This approach is distinct from advocates of "smart" disclosure, who attempt to empower consumers through disclosure of customers' actual habits that takes into account individual consumer demographics. Further, both smart regimes and existing generic regimes—still modeled on engaging a generic consumer with further post-use disclosure tailored to general psychological profiles—could produce problematic outcomes for consumers who are not part of that policy norming. Consumers think and act differently depending on a multitude of socio-demographic variables (race and gender, for example).[29] These differences in thinking influence how people perceive financial choices and financial decision-

24. 15 U.S.C. §§ 1691-l691f. Among other things, the ECOA bans creditors from discriminating on the basis of race, color, religion, national origin, sex, marital status, and age. Therefore, the gathering, analysis and issuer's and lenders' use of this information in the solicitation and credit-granting process is strategically avoided to prevent triggering potential liability.

25. *See generally*, KAREN BOGENSCHNEIDER & THOMAS J. CORBETT, EVIDENCE-BASED POLICYMAKING: INSIGHTS FROM POLICY-MINDED RESEARCHERS AND RESEARCH-MINDED POLICYMAKERS (2010) (gathering insights from researchers and policymakers about optimal ways to gather, use, and evaluate research and evidence during policymaking debates).

26. *See generally*, OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

27. *See, e.g.,* Richard H. Thaler and Will Tucker, *Smarter Information, Smarter Consumers*, HARV. BUS. REV., Jan.–Feb. 2013, at 8. (describing smart disclosure as falling into four broad categories: "(1) government release of data it collects on products and services; (2) government release to individuals of their personal data (such as Social Security contributions and tax returns); (3) government-facilitated electronic disclosure by private sector companies of price or attribute data on products and services; and (4) government- facilitated release to consumers of personal data held by the companies providing the products and services").

28. *See* Oren Bar-Gill, SEDUCTION BY CONTRACT, *supra* note 20, at 106–10 (2012).

29. *See, e.g.,* Studies in Public Opinion: Attitudes, Nonattitudes, Measurement Error, and Change (William E Sarisand & Paul M. Sniderman eds., 2004).

making and should factor into financial disclosure and education regimes. Simply providing more detailed information to a group of imperfectly rational and heterogeneous consumers may not only be unhelpful, it could be financially harmful.

Further, this Article questions whether the CARD Act and similar recent reforms modeled on this mythical generic consumer will help or harm the constituencies that the reforms claim to target. Finally, this Article suggests that federal law permit financial institutions to use customer socio-demographic information.

Part I of this Article introduces the historical backdrop of credit card policymaking and the first major piece of disclosure-based reform. Part II gathers and reanalyzes the field of evidence policymakers for major iterations of credit card finance reform cited, analyzed, created, or otherwise utilized and then compares the results and conclusions of such studies with the policy prescriptions that emerged. Part III focuses on the CARD Act and its continued reliance on disclosure as a consumer-education tool and regulatory framework. Finding the evidentiary basis for continued reliance on the existing disclosure regime still unsubstantiated, this Article concludes by a) defining the harms the existing disclosure regime causes, b) proposing more robust evidence-based policy prescriptions, and c) calling for Congress to revisit laws that prevent financial institutions from acquiring and utilizing certain socio-demographic customer information. Reexamining this prohibition will lead to two broad results. First, issuers could integrate evidence-based policymaking into credit card reforms through sustained and expanded consumer research, particularly focused on marginalized constituencies whose behavioral norms have not previously been integrated into policy proposals. Second, rather than solely focusing on providing consumers with more personalized information, issuers and regulators could utilize socio-demographic information about individual cardholders to both educate and inform cardholders about their consumer financial behavior and outcomes.

I. The Creation of the Disclosure Act and its Aftermath

The existing generic-consumer credit card disclosure framework is rooted in the well-intentioned ideals of early 1970s Congressional reformers. The Truth In Lending Act (TILA) was the beginning and the "crown jewel of the Disclosure Empire."[30] TILA, ["u]nlike

30. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647, 665 (2010).

some disclosure regimes, . . . was actually given thought."[31] TILA and its implementation through Regulation Z were built on a consumer-friendly disclosure-based regulatory framework, as were other federal statutes developed within a disclosure-based framework.[32] Many normative reasons explain the rapid deployment of disclosure models in contracts and commercial law. Broadly, law scholars agree that disclosure's purpose at its best was to correct bargaining imbalances and market failure, primarily by reducing information asymmetries, thereby improving the quality of the contractual decisions made.[33] Thus, the significance of TILA as a consumer-friendly statute must be balanced against its role as a model for Schumer's eventual proposals for credit card reform. Further, scholars would soon question the TILA model, despite its rapid adoption by Congress as a policy norm.[34] The 1980s economic expansion led to rapid credit card usage throughout the country,[35] and by 1984 seventy-one percent of American families had some type of credit card.[36] Thus, political urgency conflicted with effective data gathering.

Schumer's frontal attack on the credit card industry was rooted in his belief that issuers' high-profit margins and higher-than-desired interest rates suggested that credit card consumers were being "ripped off."[37] Schumer's solution to the market-maintenance of these high interest rates was interest-rate cap legislation.[38] He was the primary sponsor of legislation directing the Federal Reserve Board to study credit card interest rates as part of what he hoped was the first step toward a nationwide mandatory interest-rate cap on credit card issuers.[39] To offer consumers more immediate relief,

31. *Id.*

32. *See, e.g.*, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, §§ 101-112, 88 Stat. 2183, 2183-92 (1975) (codified at 15 U.S.C. §§ 2301-12 (2000)).

33. See, e.g., Larry T. Garvin, Small Business and the False Dichotomies of Contract Law, 40 WAKE FOREST L. REV. 295, 308–313 (2005).

34. *See, e.g.*, CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 33 (William Whitford et al. eds., 2003) (describing the historical background integrating disclosure with TILA and credit card regulations and noting both that there is "little evidence that the introduction of disclosure provisions has had significant impact on over-indebtedness" and that disclosure models that failed to learn from behavioral insights about irrational consumers might be "limited" in success).

35. David S. Evans & Joshua D. Wright, The Effect of the Consumer Financial Protection Agency Act of 2009 on Consumer Credit, 22 LOY. CONSUMER L. REV. 277, 299 (2010).

36. Lewis Mandell, The Credit Card Industry: A History 153 (1990).

37. Stephen Chapman, *Credit Card Fraud in Congress*, CHI. TRIB., Nov. 22, 1985, at 23.

38. *Low-Cost Credit Cards*, U.S. NEWS AND WORLD REPORT, Dec. 2, 1985, at 14.

39. *Id.*

Schumer ordered his staff to spend weeks calling "banks throughout the country to compile the first list of low interest rate credit cards."[40] Schumer mentioned the list on a morning talk show and, as a result, claimed to have received over 40,000 letters from consumers asking for a copy of the list.[41] He released the list to the public on November 19, 1985.[42] As the first publicly available interest rate survey of its kind, the Schumer list allowed consumers to easily compare credit card interest rates nationwide.

However, in 1987, Schumer backed off his rate cap proposal when an array of forces resisted his proposed legislation.[43] First, too few Congress members co-sponsored the legislation.[44] Second, the Federal Reserve Board rejected the need for rate-capping legislation, finding that "certain credit card rate cap proposals would result in a bath of red ink for card issuers."[45] The American Bankers Association[46] and Senator Richard Shelby[47] raised various concerns. However, most Americans still supported interest rate cap legislation, even if it meant credit cards would be harder to obtain.[48]

Schumer's rate-capping quest was futile[49] and was only used as a foil for law and policy scholars over the ensuing decades.[50] Consequently, Schumer pursued other ways to build on his previously

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40. Credit Card Disclosure Acts: Hearing Before the Subcomm. on Consumer Affairs of the S. Comm. on Banking, Housing, and Urban Affairs, 100th Cong. 71 (1987) [hereinafter Credit Hearing] (statement of Rep. Charles E. Schumer) ("In fact, 1$^1/_2$ years ago, I went on one of the morning talk shows to talk about credit cards, and I mentioned that my staff had spent weeks up at night, calling all the banks throughout the country to compile the first list of low interest rate credit cards. It was just mentioned on the show. We got something like 40,000 letters asking us for a copy of the list. So anyone who says consumers aren't interested in finding out what the interest rates are is just not telling the truth.")

41. *Id.*

42. Institutions Across the Nation Offering Low Credit Card Rates, The American Banker, Nov. 19, 1985, at 8.

43. Harrigan, *supra* note 6.

44. *Id.*

45. S. Rep. No. 100-323, at 15 (1988)

46. Arkansas Democrat-Gazette, Nov. 19, 1985 (reporting that, if it passed, "there would be a substantial reduction in the number of banks issuing cards").

47. Credit Hearing, *supra* note 40, at 75 (arguing that Schumer's plan would shrink or curtail the accessibility of credit to so many working people that credit-strapped consumers would "go underground to loan sharks").

48. *Id.* at 29 (statement of Alan Fox, Legis. Rep. of Consumer Fed'n of Am.) ("A survey conducted by NBC News in April, 1986 asked Americans if 'Congress should pass legislation limiting the amount of interest credit card companies can charge, *even if that means it would be much harder for people like you to get credit?* . . . Consumers replied 'Yes' by a 74-20% margin.").

49. Harrigan, *supra* note 6 ("Schumer [had] called for national credit-card interest rate ceilings in the past, but this year he's backing off. 'We don't have the votes in Congress,' he said . . . .").

50. *See, e.g.*, Ronald J. Mann, Charging Ahead: The Growth and Regulation of Credit Card Markets (2006).

successful approach of empowering credit card seekers with market-savvy information. His revised and more limited focus led to a form of regulatory intervention that defines his Congressional legacy. His proposed solution to the market-information gap required credit card issuers to disclose key terms in an easy-to-read tabular format because he thought that existing disclosures were too difficult for consumers to understand.[51] Schumer believed that more disclosure would better educate consumers about the market, resulting in better choices.

Schumer knew that, by the late 1980s, consumers were receiving over 2.4 billion solicitations for credit cards, most of which did not disclose basic cost information.[52] Senate hearings related to Schumer's prior proposal found that "[t]his lack of disclosure at the time of application or solicitation may help explain why credit card profits remain so high despite the large number of card issuers."[53] According to Schumer, "[i]f the diagnosis [was] credit card fiction, [then] the cure [was] easy to prescribe: increased availability of credit card facts."[54] However, this focus on how best to educate credit card consumers was guesswork, backed more by theory than fact and limited by an absence of data.

This switch in Schumer's regulatory approach—from a command-control of interest rates to a less invasive disclosure model—relied on the assumption that disclosing information could make credit card acquisition or use more efficient, even though disclosure's reliability as a teaching and learning tool was not clear. Nevertheless, Schumer's legislation, enacted as the Fair Credit and Charge Card Disclosure Act of 1988 (the "Disclosure Act"), mandated the tabular format—now known as the "Schumer box"—to display pricing information in credit card disclosures.[55] By enacting the Disclosure Act, Congress again chose disclosure as the primary tool for regulating credit card issuers and, by not providing an alternative vehicle or methodology, disclosure continued to be used as

51. See U.S. Gov't Accountability Office, GAO-06-929, Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers, 17 n.21 (Sept. 2006).

52. S. REP. NO. 100-259, at 2 (1987).

53. *Id.* at 3.

54. Credit Hearing, *supra* note 40, at 71.

55. "The Schumer box is the result of the Fair Credit and Charge Card Disclosure Act, Pub. L. No. 100-583, 102 Stat. 2960 (1988), which amended TILA to provide for more detailed and uniform disclosures of rates and other cost information in applications and solicitations to open credit and charge card accounts. The act also required issuers to disclose pricing information, to the extent practicable as determined by the Federal Reserve, in a tabular format. This table is also known as the Schumer box, named for the Congressman that introduced the provision requiring this disclosure into legislation." U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 11, at 17 n.21.

the primary Congressional tool for educating credit-card consumers.

Following the Disclosure Act's passage, evidence from the market suggested that it had "helped to significantly increase[ ] consumer awareness of credit card costs."[56] Increased awareness allowed customers to comparison shop, increasing competition among credit card issuers.[57] Increased competition created incentives for issuers to offer more competitive interest rates, which in turn caused rates to drop.[58] According to Schumer, "[g]ood old fashioned American competition did the job."[59] At the same time, even though credit card issuers moderately lowered their interest rates, they still enjoyed record profits.[60] This surprising result is partially explained by the failure of the Disclosure Act's drafters to predict the ways in which card issuers would modify their practices to fit the letter of the law, if not its spirit, in order to find additional consumer profit centers. While the Disclosure Act specified certain disclosures, it did not regulate an array of other matters, including interest rates, pricing structures, and various types of solicitations. Further, Schumer and other advocates of this legislation underestimated the expansion of supply at the same time they overestimated their influence on shaping consumer demand.

Thus, while Schumer's strategy was well intentioned, card issuers found various ways to circumvent the Act's objectives. The Disclosure Act indirectly led to the more widespread use of teaser rates, promotional rates, and a variety of other customer inducements and incentives—along with an array of fees and penalties that Schumer and other champions of the Disclosure Act did not foresee.[61] Card issuers could follow the requirements of the Disclosure Act by developing and disclosing low interest rates only at the opening of

56. *Id.* at 17.

57. See Modernizing Consumer Protection in the Financial Regulatory System: Strengthening Credit Card Protections: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, 111th Cong. 8 (2009) [hereinafter Consumer Protection Hearing] (statement of Rep. Charles E. Schumer).

58. *Id.*

59. *Id.*

60. Credit Hearing, *supra* note 40, at 76. But, of course, multiple factors, including Federal Funds rate movements, influenced the declining rates, so it is unclear to what extent the Disclosure Act influenced that result. It is possible that the Disclosure Act actually caused an increase in rates, but the drop in the Federal Funds rate provided a greater downward pressure. In short, there is no easy way to know, suggesting that there is no evidence either way as to whether the Disclosure Act worked as a market-pressuring tool.

61. These sorts of maneuvers would be the logical consequence of credit card issuers recognizing how their consumers behave and/or misperceive disclosure and structuring products accordingly. *See, e.g.*, Oren Bar-Gill, Seduction By Contract 2 (2013) ("Put bluntly, competition forces sellers to exploit the biases and misperceptions of their customers.").

the account. After this initial period, they could then raise the rates to a market-supporting level.[62] In addition, issuers whose margins the Disclosure Act had limited could also incorporate a myriad of other "rates and fees"[63] to make "credit cards appear to be much cheaper than they actually" were.[64] While some issuers met the letter and intent of the Disclosure Act, many others exploited loopholes to maximize fees and revenues.[65]

At the same time that issuers were assessing the limits of the Disclosure Act's reach, they were also increasing access to credit to consumers who were new to the market. The combination of the growth in securitization and market competition that the Disclosure Act partially enabled led to a rise in consumer solicitations. The increased solicitations resulted in the predictable responses among advocates and opponents of credit card utilization.[66] Opponents suggested that credit card issuers were "pumping out solicitations in . . . search [of] new people to get [into] debt."[67] Over five billion solicitations were being sent to American homes annually during the early 2000's, nearly twice the number roughly a

62. This is an example of an unintended outcome for Schumer and proponents of disclosure, but it is certainly possible that a more robust evidence-based policymaking process would have anticipated this result and pro-actively foreclosed it. For example, if leading academics (or even issuers for that matter) had been asked how they might still find ways to maximize acquisition while still enabling higher rates, it seems obvious (at least in hindsight) that this approach could happen.

63. Credit cards now have "annual fees, merchant fees, teaser interest rates, purchase interest rates, balance transfer interest rates, cash advance interest rates, overdraft advance interest rates, default or penalty interest rates, late fees, over-limit fees, balance transfer fees, cash advance fees, international transaction fees, telephone payment fees, and probably several other fees." Consumer Protection Hearing, *supra* note 57, at 10 (2009) (statement of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center).

64. *Id.*

65. For example, Providian Bank decided to locate its payment-processing office in New Hampshire—where it took the longest on average for a letter to be mailed from any point in the country—in an effort to maximize late fee revenue. When that did not trigger enough late fees, Providian tampered with bar codes on its payment envelopes so payments would never reach the payment-processing center in New Hampshire. Providian's example, while not the norm, served to harm other issuers because future regulation of these and other practices was premised on the rogue bad faith actions of just a few issuers like Providian. *Id.* at 14 (statement of James C. Sturdevant, Principal, The Sturdevant Law Firm).

66. *See, e.g.*, Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 375-76. (2007) (describing the sweeping tide of reform of the early 2000s, concluding that the "most important effect will be to facilitate the credit card lending business model, by slowing the time of inevitable filings by the deeply distressed and allowing issuers to earn greater revenues from those individuals.").

67. Regulatory Requirements and Industry Practices of Credit Card Issuers: Hearing Before the Comm. on Banking, Housing, and Urban Affairs, 109th Cong. 45 (2005) [hereinafter Regulatory Requirements and Industry Practices Hearing] (statement of Sen. Christopher J. Dodd).

decade prior.[68] Advocates suggested that competition in the credit card market was fierce, and that this renewed competition in a free market was good as it "lowers costs for consumers."[69] Those who saw the need for different—or better—regulation, pointed to evidence that "the tremendous expansion and increase of credit card interest rates and fees [had] precipitated an unprecedented growth of consumer bankruptcies.[70] Various studies from this period also suggested that rising consumer debt, specifically credit card debt, was the primary cause of consumer bankruptcy.[71] In fact, revolving credit (as a portion of non-mortgage consumer credit) had more than doubled in the previous decades.[72] This increase was in part because credit had become easier to obtain and use, even if consumers did not understand how to acquire and use credit efficiently.[73]

II. Credit Card Disclosure Policy: Evidence and Efficacy (2000-2008)

Congress did respond to efforts to circumvent both the spirit and letter of the Disclosure Act, but it did so without the type of rigorous evidence-based policymaking expected in an area dependent on data analysis. If Congress's evidence was faulty, what might its reforms have looked like? If the evidence had been sound, what would the optimal result have been? Though many scholars have studied the problems of disclosure as a regulatory strategy, no work has thoroughly examined the actual development of the next new piece of legislation addressing credit cards. To this end, I searched the Congressional Record for a ten-year span to identify all of the "evidence" influencing later legislation.[74] The only direct way to

68. *Id.*

69. *Id.*; *see generally* Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. Rev. 1373 (2004).

70. Regulatory Requirements and Industry Practices Hearing, *supra* note 67 (statement of Robert D. Manning, University Professor and Special Assistant to the Provost, Rochester Institute of Technology).

71. *See* Michelle J. White, *Bankruptcy Reform and Credit Cards*, 21 J. Econ. Perspectives 175, 178–79 (2007) (gathering studies).

72. *Id.* at 181.

73. There are a number of potential explanations for this phenomenon, but the general trajectory is clear. Between 1970–1998, the proportion of U.S. households having at least one bank credit card rose from sixteen to sixty-eight percent. *See* Thomas Durkin "Credit Cards: Use and Consumer Attitudes, 1970–2000." Federal Reserve Bulletin, September 2000, pp. 625.

74. To quantify and qualify the scope of evidence and the intersection of such evidence with behavioral theories of disclosure efficacy, the Congressional Record for the ten year span 2000–2010 was searched and evaluated for key terms: among them "TILA," "credit cards," "disclosure," and "consumers" and then examined for evidence lawmakers cited or

evaluate the credibility of such reforms is to examine the evidence that legislators requested or cited. As this Section demonstrates, the "evidence" available to Congress consisted entirely of anecdotes and studies of questionable methodology. The evidence used to justify the proposed reforms is the focus of the following Sub-Sections.

A. *The Political Backdrop to Policy Reform*

Congressional efforts to reform the bankruptcy system during the period of 2000-2005 were the political backdrop to credit card policy reform. Though the resulting legislation, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA"), didn't directly address credit card debt, the Senate's continued concern with credit card debt led it to study the effectiveness of the Disclosure Act. This sub-section examines that effort.

By 2005, "it was the best time in history to be in the credit card business."[75] Credit card issuers were making more money than ever before.[76] However, critics charged that the credit card market was "not working for millions of Americans who [found] themselves on the wrong end of a credit card deal."[77] More simply, "the credit card market [was] broken" and "the average credit card agreement [had] gone from about a page long in 1980 to more than [thirty] pages long."[78] According to then-Professor Elizabeth Warren, the market's dysfunction was due to a shift in credit card agreements that reflected a business model that had "changed from its earlier simple roots."[79] Issuers responded that regulatory regimes like the Disclosure Act caused the growth in complicated disclosures and that the market for consumer options was actually quite robust.

The connection between changing consumer bankruptcy laws and any subsequent effect on credit card acquisition and efficiency

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committee reports discussed. Citations to outside evidence were reviewed, and any evidence either a committee or a legislator cited as proof of a reform's viability or efficacy was gathered. Then, such evidence, such as Federal Reserve studies, GAO analyses, or white papers, was examined and compared to the citation to determine the link, if any, between statements and such evidence.

75. Regulatory Requirements and Industry Practices Hearing, *supra* note 67, at 44 (statement of Sen. Christopher J. Dodd).

76. *Id.* at 19.

77. Examining the Billing, Marketing, and Disclosure Practices of the Credit Card Industry, and their impact on Consumers: Hearing Before the Comm. on Banking, Housing, and Urban Affairs, 110th Cong. 18 (2007) [hereinafter Billing, Marketing, and Disclosure Practices Hearing] (statement of Elizabeth Warren, Leo Gottlieb Professor of Law, Harvard Law School).

78. *Id.*

79. *Id.*

was not empirically clear. Yet scholars suggested that issuers stood to gain from BAPCPA's reforms because heavily indebted consumers now took longer to file bankruptcy and continued to pay increased credit card fees in the meantime.[80] As a result, Congress had an opportunity to analyze the consequences of bankruptcy reform and simultaneously revisit credit card laws. For example, responding to BAPCPA, credit card issuers expanded the supply of credit, which coupled with heightened barriers to accessing bankruptcy and caused severe financial distress to the least sophisticated credit card holders.[81] Critics of bankruptcy reform argued that BAPCPA lacked substantive consumer protection reform and that such protection deserved immediate consideration and implementation.[82]

As a result of political compromises shaped during debates over bankruptcy reform, the Republican-led Senate agreed to convene a series of hearings about potential credit card reforms.[83] In March 2005, Chairman Shelby held a hearing to "consider the nature of the existing legal framework, [that] is the body of laws and regulations, which govern credit card issuer and consumer interaction."[84] Senator Feinstein and others, who had opposed bankruptcy reform while championing credit card reform, argued that the recently signed BAPCPA made it "easier for credit card companies to send out solicitations, but it [did] nothing to provide the kind of information that a minimum payer really should know when they make a minimum payment."[85] During that time, the average monthly household charge had expanded to $1,100,[86] compared to only $125 in 1970.[87] By 2005, there were 700 million credit cards in the United States, or five credit cards per household.[88] However, as Congress turned toward directly revisiting the Disclosure Act, credit card policy, and regulatory frameworks surrounding efficient card acquisition and use, it did not acquire sufficient evidence about consumer behavior in the market generally and in particular with

80. *See, e.g.*, Mann, *supra* note 66 at 379.
81. White, *supra* note 71, at 189.
82. *See Regulatory Requirements and Industry Practices of Credit Card Issuers: Hearing Before the Comm. on Banking, Housing, and Urban Affairs*, 109th Cong. 51 (2005) (Prepared Statement of Sen. Daniel K. Akaka).
83. *Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 109th Cong. at 641–42 (2005) at 3 (statement of Sen. Dianne Feinstein) ("You said you would hold this hearing when the bankruptcy bill was on the floor, and you have held it.").
84. *Id.* at 1 (statement of Richard C. Shelby, Chairman, Comm. on Banking, Housing, and Urban Affairs).
85. *Id.* at 5 (statement of Sen. Dianne Feinstein).
86. Bar-Gill, *supra* note 69, at 1384.
87. *Id.*
88. *Id.*

respect to disclosure. The following evidence, gathered from a review of the complete Congressional record during this time span, proved a problematic basis for future reforms.

B. Anecdotal Evidence: The Tale of Wesley Wannemacher

The first piece of evidence on which Congress relied in examining credit card debt in the 21st century was the sad story of one man's credit card catastrophe. The appeal of anecdotal evidence with respect to credit card reform is clear. Legislators live amid demands for action.[89] "'Trouble stories'—tales of someone's misfortune that might represent a systematic problem"[90] often inspire these demands. "Indignation, political pressure, and a sense of duty" to try to prevent the story from recurring frequently drive legislators.[91] The "defrauded consumer is conspicuous; the people who can be saved by suppressed research, or the consumers who pay for regulation remain anonymous."[92] The story of the swindled consumer evokes "sympathy and anger"[93]—strong emotions that "politically charge[ ]" an issue and make it a time-sensitive concern.[94]

The danger with using anecdotes to effectuate reform is two-fold: 1) it encourages extremes from both ideological vantage points to baseline reforms (or opposition to reforms) on non-representative samples and 2) anecdotes represent a particularly inefficient empirical baseline on which to model the expected effect of legislative reforms on consumer outcomes.[95] Given the particular importance of gathering evidence for such an impactful reform, Congress

89. Ben-Shahar & Schneider, *supra* note 30, at 679.

90. *Id.*

91. *Id.* at 680.

92. *Id.* at 681.

93. *Id.* at 679–80.

94. *See id.* at 681. This rapid response to one notable galvanizing incident may be part of a larger phenomenon of legislating by anecdote. *See* Theresa Glennon, *Choosing One: Resolving The Epidemic of Multiples in Assisted Reproduction*, 55 VILL. L. REV. 147, 149 n.13 (2010) ("Legislative responses to highly unusual but extremely salient events often address issues of immediate public concern but typically ignore larger or more common structural issues."); *see also* Kimberly McLarin, *Trenton Races to Pass Bill on Sex Abuse*, N.Y. TIMES, Aug. 30, 1994, at B2, *available at* http://www.nytimes.com/1994/08/30/nyregion/trenton-races-to-pass-bills-on-sex-abuse.html (discussing the New Jersey Assembly's "rush[ ]" to pass seven sex abuse bills in the aftermath of the death of Megan Kanka, a seven-year-old child who was killed by a twice-convicted sex offender).

95. The practice of legislating by anecdote is both a liberal (Wesley Wannemacher) and conservative ('welfare queen') issue and likely has high empirical costs.

should have, at a minimum, gathered broad statistical data of a variety of types to begin efforts to normalize a set of policy reforms. Instead, Congress chose the path of least resistance—soliciting individual anecdotes that were not necessarily typical of an average consumer's problems with existing laws and market practices.

In an early attempt to use anecdotal evidence to frame the policymaking process for further reform, Senator Carl Levin invited credit card consumer Wesley Wannemacher of Lima, Ohio to testify at a congressional hearing titled *Credit Card Practices: Fees, Interest Charges, and Grace Periods*.[96] Wannemacher had contacted Levin after reading a news article encouraging those who had "paid excessive [credit card] fees and charges" to contact Levin's office.[97] According to the article, Senator Levin had a desire "to look into cases like [Wesley's]."[98] Wannemacher agreed to tell his credit card trouble story for all the "swindled American consumers"[99] out there.[100]

Wannemacher testified that he had obtained a new credit card in 2001 to pay for wedding expenses.[101] Shortly after receiving the card, Wannemacher reached and exceeded his credit limit of $3,000 by paying for just flowers and a photographer, the total costs of which were $3,200.[102] Nothing else was ever charged on the card.[103] Between 2001 and 2007, Wannemacher made an honest effort to repay his debt, "averaging payments of about $1,000 a year."[104] Yet, after paying "about $6,300 on his $3,200 debt," his February 2007 billing statement indicated that he still owed $4,400.[105]

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96. Credit Card Practices: Fees, Interest Charges, and Grace Periods: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Security and Governmental Affairs, 110th Cong. 14 (2007) [hereinafter Fees, Interest Charges, and Grace Periods Hearing] (statement of Wesley Wannemacher, Consumer, Lima, Ohio).

97. *Id.*

98. *Id.*

99. *See generally* Regulatory Requirements and Industry Practices Hearing, *supra* note 67, at 5 (statement of Sen. Dianne Feinstein) ("An Ohio resident who tried for 6 years to pay off a $1,900 balance on her Discover card, sending the credit company a total of $3,492 in monthly payments from 1997 to 2003, yet her balance grew to $5,357. A Virginia resident who had a Providian Visa bill increased to $5,357, even though they used the card for only $218 in purchases and made monthly payments totaling $3,058. And an individual from my State, California, who actually worked a second job to keep up with the $2,000 in monthly payments she collectively sent to five banks to try to repay $25,000 in credit card debt. Even though she had not used the cards to buy anything more, her debt had doubled to $49,574 by the time she filed for bankruptcy.").

100. *See* Fees, Interest Charges, and Grace Periods Hearing, *supra* note 96, at 14 (statement of Wesley Wannemacher, Consumer, Lima, Ohio).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 2 (statement of Sen. Carl Levin).

105. Fees, Interest Charges, and Grace Periods Hearing, *supra* note 96.

At the hearing, Senator Levin asked the Committee: "how is it possible that a man pays $6,300 on a $3,200 credit card debt, but still owes $4,400?"[106] On top of his $3,200 debt, Wannemacher was charged about $4,900 in interest, $1,100 in late fees, and $1,500 in over-the-limit fees.[107] By going no more than $200 over his credit limit only three times, Wannemacher was "hit 47 times with over-the-limit fees," amounting to $1,500.[108] In total, "these fees and the interest charges added up to $7,500 which, on top of the original $3,200 credit card debt, produced total charges of $10,700."[109] Although Wannemacher didn't blame "the credit card issuers for putting [him] into debt, [he did] blame them for keeping [him] there."[110] The story was a moving call to action, but it was just a singular example. No attempts were made to ensure that Wannemacher's story was representative of the "average" consumer or to balance his story with others' positive stories.

Therefore, the record is silent as to why Wannemacher's story was the focus of these hearings, as opposed to the analysis of existing countrywide data or other broad data trends divorced from anecdote. Was Wannemacher a typical cardholder? Did his story represent an example of the failure of the Disclosure Act or the failure of a card issuer to follow its terms? Did it show that rate capping would now be a good policy solution? Or, was his story simply good countervailing political theater to balance the debate after enactment of the BAPCPA where voices like Wannemacher's were absent? Whatever the intended effect of his testimony, one person's example, divorced from the context of millions of other accountholders, should not constitute the basis for policy reform. However, as Sections II.C–II.E describe, the non-narrative evidence before Congress was not necessarily more compelling.

C. GAO Study: Failure of Methodology

During the period of the original BAPCPA debates, Congress requested that the Government Accountability Office (GAO) review a number of issues related to credit card fees and practices, including, among other things,[111] "how effectively the issuers disclose the

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106. *Id.* at 1.
107. *Id.* at 2.
108. *Id.*
109. *Id.*
110. *Id.*
111. U.S. Gov't Accountability Office, *supra* note 11, at 12 ("This report discusses (1) how the interest, fees, and other practices that affect the pricing structure of cards from the

pricing structures of cards to their cardholders."[112] The GAO released its findings on the adequacy of current credit card disclosures in 2006 and offered recommendations for future legislation.

To determine the effectiveness of credit card disclosures, the GAO contracted with UserWorks, Inc.,[113] a private usability-consulting firm.[114] The UserWorks usability consultant "conducted three separate evaluations of a sample of disclosure materials" from four major credit card issuers.[115] First, the usability consultant conducted a readability assessment using "computer-facilitated formulas to predict the grade level required to understand the materials."[116] Second, the consultant conducted "an heuristic evaluation"[117] to assess how well the disclosures adhered to "industry best practices."[118] Finally, the consultant tested twelve consumers[119] to determine "how well actual consumers were able to use the documents to identify and understand information about card fees and other practices."[120] Ultimately, UserWorks identified various problematic practices[121] in credit card disclosures "that reduced their usefulness to consumers."[122]

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largest U.S. issuers have evolved and cardholders' experiences under these pricing structures in recent years; (2) how effectively the issuers disclose the pricing structures of cards to their cardholders; (3) whether credit card debt and penalty interest and fees contribute to cardholder bankruptcies; and (4) the extent to which penalty interest fees contribute to the revenues and profitability of issuers' credit card operations.").

112. *Id.* at 82.

113. UserWorks, Inc. is located in the metropolitan Washington, DC area and "offers a wide range of services, including user interface design support, usability evaluations, and accessibil[i]ty evaluation services for both hardware and software products. [UserWorks] help[s] organizations design and test products, assist[s] them in developing their own usability and accessibility capabilities, and provide[s] both fixed and portable lab facilities on a rental basis." UserWorks, http://www.userworks.com/default.asp?page=services&sub (last visited Jan. 1, 2013).

114. U.S. Gov't Accountability Office, *supra* note 11, at 82.

115. *Id.*

116. *Id.* at 83 ("Readability formulas measure the elements of writing that can be subjected to mathematical calculation, such as average number of syllables in words or numbers of words in sentences in the text.").

117. Id.

118. *Id.* ("In the absence of best practices specifically applicable to credit card disclosures, the consultant used guidelines from the U.S. Securities and Exchange Commission's 1998 guidebook *Plain English Handbook: How to Create Clear SEC Disclosure Documents*.").

119. *Id.* at 83 n.2 ("According to the consultant, testing with small numbers of individuals can generally identify many of the problems that can affect the readability and usability of materials."); *see also id.* at 83 ("To ensure sample diversity, the participants were selected to represent the demographics of the U.S. adult population in terms of education, income, and age.").

120. U.S. Gov't Accountability Office, *supra* note 11, at 83.

121. *See generally*, *id.* at 36–55.

122. *Id.* at 36.

The UserWorks study indicated that disclosures were "written at a [reading] level too high for the average individual to understand."[123] The average disclosure was written at an eleventh-grade reading level,[124] and "nearly half of the U.S. population reads at or below the eighth-grade level."[125] Furthermore, comprehending several parts of the disclosure documents required a minimum of a "fifteenth-grade education."[126] Still, most solicitation letters "required only a seventh- and eighth-grade reading level,"[127] most likely because solicitation letters "included more information in a tabular format than card member agreements."[128] A single consultant then used "knowledge of plain language, publications design guidelines, and industry best practices"[129] to identify design aspects that "could cause consumers using them to encounter problems."[130] More specifically, large amounts of information typically presented in the Schumer box were not grouped appropriately and "compromised the benefits of using a tabular format."[131] The usability consultant opined that this could "distract readers from more important messages."[132] Disclosure documents contained too much detail and used "unfamiliar or complex terms to describe simple concepts."[133] One card member agreement used the phrase "rolling consecutive twelve month billing cycle," instead of saying "over the course of the next 12 billing statements" or "next 12 months."[134] Lastly, the consultant noted that most of the samples did not use favorable presentation techniques.[135]

The UserWorks study was severely flawed. First, the study began with a thrice-reviewed analysis of the disclosure literature of only *four* issuers.[136] At the time, there were roughly 800 card issuers throughout the entire world and at least several hundred in the

123. *Id.* at 37.

124. *Id.* at 38 ("fifteenth-grade education . . . is the equivalent of 3 years of college education").

125. *Id.* (according to a "1992 National Adult Literacy Survey" "cited by the usability consultant").

126. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 11, at 38.

127. *Id.*

128. *Id.*

129. *Id.* at 39.

130. *Id.*

131. *Id.*

132. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 11, at 43.

133. *Id.* at 46.

134. *Id.*

135. *Id.*

136. It is not clear how these particular four issuing banks were chosen or whether their disclosures were normed within an existing model that was universal to all issuers. For example, if Bank A and Bank B, both VISA issuers, issued identical disclosures because VISA mandated as such, then this difference might not matter. But, if issuing banks or credit-

United States.[137] To sample less than one percent of all available disclosures as a norming device is not empirically justified unless the same issuer or bank wrote or designed all disclosures—something that did not seem true.[138] Second, the usability consultant evaluated the Schumer box separate from its deployment to actual consumers, without evaluating its use in the context of an actual solicitation or bill. Third, following both assessments, the company sampled a total of twelve consumers to evaluate the experiences of actual consumers. It then embedded the observations of those twelve consumers into its report and announced its prescriptions aligned with the consumer evidence. Typical survey-data analysis in political polling generally seeks slightly over 1,000 participants in order to secure a reasonable margin of error of plus or minus 2.5% regarding the extrapolation of sample data observations across relatively simple topics compared to the actual "real" opinion about such topics across an entire population. While there is not a universally agreed-upon minimum level of survey or sampling data to assess the cognitive impact of consumer disclosures, it seems clear that the disclosure regime mandate for 150 million cardholders should be based on research involving more than twelve individuals. Therefore, while the UserWorks study might constitute evidence in the loosest sense, it falls below an acceptable standard for a reform of this type—or any reform, for that matter.

The GAO may have had its own doubts about the UserWorks study because it later hired a different consultant to do essentially the same thing. This consulting firm was tasked with creating an evidentiary record by a statistically supported sampling method—gathering a random sample of consumers that would allow for reasonable extrapolation of the sample's findings to the general public at large. But this study was also flawed.[139] The study's goal was to lay the empirical foundation for a broad, generalized analysis of consumer-acquisition, use, and understanding of credit card terms in order to understand the then-present need for policy reform. For

unions were able to craft bank-specific disclosures, then this sample would be highly problematic.

137. *See* The Nilson Report, Special Report: Largest Payment Card Issuers and Merchant Acquirers (2014), *available at* http://www.nilsonreport.com/publication_special_report.php and http://www.cartera.com/newsevents/pdf/_978[1].pdf (The issuer ranked one hundred in the U.S. has more than $80 million in receivables).

138. It is not clear what percentage of the overall market these issuers captured or what issuers' agreements were used in the study.

139. U.S. Gov't Accountability Office, *supra* note 11, at 83.

this additional study, the GAO contracted with OneWorld Communications,[140] a market research organization, "to recruit a sample of cardholders that generally resembled the demographic makeup of the U.S. population in terms of age, education levels, and income."[141] OneWorld "gathered information about the cardholders' knowledge of credit card terms and conditions and assessed cardholders' use of card disclosure materials by asking them a number of open- and closed-ended questions."[142]

The GAO intended OneWorld's research to be a more scientifically valid assessment of the state of the field; yet, these efforts were not successful. First, rather than recruiting and deploying a conventional sample, OneWorld conducted in-depth, structured interviews with a total of 112 adult cardholders.[143] To achieve a scientifically valid sample of the entire U.S. population, OneWorld would have needed to gather individuals from a variety of predictable socio-demographics (e.g. gender, race, age) as well as regional demographics (e.g., from various parts of the United States and different income and employment sectors). OneWorld did not gather the minimum numbers required for differentiating any of these groups; thus, they admitted "the cardholders recruited for the interviews did not form a random, statistically representative sample of the U.S. population and therefore cannot be generalized to the population of all U.S. cardholders."[144] Because OneWorld's sample did not include a representative pool of cardholders, its recommendations were not useful for creating a nationally deployed model based on a broad understanding of typical card-user behavior. And since the primary goal of its research was precisely to test a "neutral" cardholder response to various disclosure reforms, OneWorld was unable to tell the GAO, and by extension Congress, what about existing card disclosure—if anything—needed to change.

The above studies were the only two empirical analyses solicited and utilized for the GAO's report. The GAO nonetheless concluded that reforms to the Disclosure Act's mandate were needed.

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140. "OneWorld Communications is a small San Francisco public relations company that provides public relations advice, marketing[,] and promotional materials." OneWorld Communications, SOURCEWATCH, http://www.sourcewatch.org/index.php?title=OneWorld_Com munication (last updated Dec. 23, 2007).

141. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 11, at 83–84 (In addition, "[c]ardholders had to speak English, have owned at least one general-purpose credit card for a minimum of 12 months, and have not participated in more than one focus group or similar in-person study in the 12 months prior to the interview.").

142. *Id.* at 84.

143. *Id.* at 83.

144. *Id.* at 84.

The GAO concluded that "[t]he expansion and increased complexity of card rates, fees, and issuer practices has heightened the need for consumers to receive clear disclosures that allow them to more easily understand the costs of using cards."[145] The GAO then recommended that the Federal Reserve Board ensure "that such disclosures, including model forms and formatting requirements, more clearly emphasize those terms that can significantly affect cardholder costs, such as the actions that can cause default or other penalty pricing rates to be imposed."[146] Ultimately, more effective disclosures should be "simpler [and] better organized [with] designs and formats that compl[ied] with best practices and industry standards for readability and usability."[147]

The GAO studies further embedded disclosure as the primary solution and proposed a re-examining of its use as a method of improving consumer outcomes.[148] But these studies were not representative of the average consumer's experience, and they acknowledged as such. The GAO could have deployed a more rigorous national sample, found more rigorous outside research partners, or used a variety of other schema to validate its recommendations. In the absence of any scientifically valid evidence, the GAO's push for various disclosure-based changes is difficult to explain. This push is an example of the disconnect between a) scientific evidence of consumer credit card behavior and b) the drive toward further disclosure-based regimes as a solution for the perceived shortcomings of consumer credit card behavior.

D. The Federal Reserve Board's Ambiguous Evidence

Given the GAO's unsuccessful efforts, Congress still needed some evidentiary support for its nascent policy reforms. At the same time of the GAO's efforts, the Federal Reserve Board, nearly twenty years after its last comprehensive disclosure review,[149] began plans to conduct "a comprehensive review of the federally mandated disclosures provided to credit card and other open-end credit consumers."[150] The goal of the Fed's review was to "improve the effectiveness and

145. *Id.* at 77–78 ("[P]art of the reason that current disclosure materials may be less effective is that they were designed in an era when card rates and terms were less complex.").

146. *Id.* at 79.

147. *Id.* at 78.

148. As explained *infra* note 192, the Federal Reserve ultimately engaged in this research and found "improving disclosure" to be a problematic goal.

149. Mark Furletti, Payment Cards Center, Fed. Res. Bank of Phila, Federal Consumer Protection Regulation: Disclosures and Beyond, Conference Summary 12 (2005).

150. *Id.* at 4.

usefulness" of credit card disclosures.[151] The Fed would have to "arm themselves with . . . information" and focus on the TILA's fundamental principles.[152] Card issuers believed that the Fed's lack of specificity was the result of minimal Congressional effort and a lack of sustained research, with one joking that the Schumer box was "probably developed on a budget of just a few hundred dollars."[153] This skepticism of the empirics and research methodology behind the Schumer box suggested that it was not the sort of consumer data-driven and evidence-based approach that card issuers were already using to achieve more optimal issuer-side results.

The Fed's study was initially rooted in an anecdotal policy roundtable approach to a complicated subject; it requested "feedback on the disclosure requirements from all those with an interest in revolving credit products."[154] To inform the debate, the Federal Reserve Bank of Philadelphia hosted a one-day symposium entitled "Federal Consumer Protection Regulation: Disclosures and Beyond."[155] The symposium debate revolved around two basic questions:[156] how could "regulators and policymakers improve the current set of regulatory disclosures,"[157] and "[w]hat other tools should regulators and policymakers consider using to protect consumers?"[158] Stakeholders in the debate frankly acknowledged that little "empirical work had been done with respect to credit card disclosure, and the literature [on the subject was] nearly nonexistent."[159] The day's discussion produced four recommendations.

First, disclosures needed to improve because they contained too much information, making them less informative.[160] Despite overall consensus on design and some consensus on timing, participants could not agree on which specific terms to include in the Schumer box.[161] Second, the Board needed to use market-based evidence to "improve the process by which disclosures are created and revised."[162] Third, the Board needed to use technology to "improve

151. *Id.*
152. *Id.* at 16.
153. *Id.* at 10 (quoting Scott Hildebrand, Vice President of marketing, Capitol One).
154. Furletti, *supra* note 149, at 6.
155. *Id.* at 4. ("The one-day event brought together economists, legal scholars, [credit card industry leaders], consumer advocates, and federal regulators to discuss the merits of standardized consumer credit disclosures and other tools that federal regulators use to protect credit card consumers.").
156. *Id.* at 7.
157. *Id.*
158. *Id.*
159. *Id.* at 16.
160. Furletti, *supra* note 149, at 7.
161. *Id.* at 7–11.
162. *Id.* at 10.

the accessibility and reliability of disclosures and to educate consumers about the use of credit."[163] The last, polarizing recommendation was that Congress should "change the current 'mix' of card industry regulation, modifying the extent to which disclosure requirements, self-regulation, market-based regulation, direct regulation, and agency-based regulation are used."[164] However, issuers opposed that recommendation and "favored a more market driven approach, in part, because they believe most consumers understand the intricacies of credit card pricing and are capable of finding good deals on their own."[165]

At the time, legal scholars argued that existing evidence did not support the Fed's existing framework. Todd Zywicki, a George Mason University law professor, who was a leading advocate of the BAPCPA, argued that "[w]ithout a coherent theory of the credit card market and the market failure [the Board was] seeking to cure, how [does one] know whether TILA's regulatory intervention . . . actually work[s]?"[166] Thomas Durkin, a senior economist at the Board of Governors, suggested that TILA's thirty-eight different underlying policy goals would lead to legislative incoherence and would not produce a regime that would efficiently lead consumers to choose the right methods for acquiring and optimally using credit cards.[167] Zywicki and Durkin's comments thus could have set the stage for Congress—and agencies tasked with evidence gathering—to become more rigorous and thorough in their empirical approach. In addition, these agencies could have begun to consider the heterogeneity of both the existing law's competing goals as well as heterogeneity and imperfect rationality in the market of credit card consumers. Perhaps in response to these concerns, more rigorous attempts were made to gather more sophisticated evidence. Unfortunately, these attempts also fell short.

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163. *Id.* at 12.

164. *Id.* at 13.

165. *Id.* at 14 (" 'Our models consistently show that consumers are sophisticated,' explained one issuer representative. 'They know when to transfer their balances; they figure out how to ensure favorable payment allocations; and they respond to rebate and reward ceilings.' ").

166. Furletti, *supra* note 149, at 14.

167. *Id.* at 7 ("Cited goals include enhancing card market competition, enabling consumers to decide between using credit and delaying consumption, and enhancing the stability of the overall economy. 'Because the act is perceived to have so many goals,' Durkin remarked, 'some people will say the act has worked and others will say it has not. Depending on how you define success, both can be right.' ").

E. The Fed's Follow-Up Study: Design and Testing of Effective Disclosures

Two years after the Fed announced its plans for disclosure review, and the forum described above, it sought empirical baselines for reform and hired Macro International Inc. ("Macro")[168] to conduct consumer testing and design improved credit card disclosures.[169] The review's goal[170] was "to ensure that the regulations lead to disclosures that consumers would most likely to pay attention to, understand and comprehend, and be able to use in their decision-making."[171]

Macro's study methodology was straightforward, but flawed. Working with a statistically generalizable sample of 1,022 participants in seven major cities, Macro conducted eight rounds of cognitive interviews, four rounds of focus groups, and one "mall intercept"[172] study.[173] Focus group and cognitive interview participants "were recruited by telephone using a structured screening instrument . . . designed to ensure the selection of a range of

168. Since the Fed study, Macro International has sold its business to the Opinion Research Corporation. Prior to its sale, "Macro International was a privately held company that had approximately $60 million in annual revenues. Most of its business was derived from performing research and evaluation services in connection with a wide variety of social services programs funded by the Federal Government. The company was one of the few major players performing these services within the Government niche. Macro also performed market research for private sector clients in the financial, telecommunications and consumer products vertical markets." *Macro International*, OUTCOME CAPITAL, http://www.wwccapital.com/transactions_macro/ (last visited Aug. 11, 2014).

169. Macro International, Design and Testing of Effective Truth in Lending Disclosures 1 (2007) [hereinafter Design and Testing of Effective Truth in Lending Disclosures].

170. The goal of review announced in 2004 was to "improve the effectiveness and usefulness" of credit card disclosures. Furletti, *supra* note 149, at 4.

171. Design and Testing of Effective Truth in Lending Disclosures, *supra* note 169, at 1.

172. *Id.* at i.; Macro International, Design and Testing of Effective Truth in Lending Disclosures: Findings from Experimental Study 1 (2008) [hereinafter Findings from Experimental Study]. "A mall-intercept is a survey whereby respondents are intercepted in shopping in malls. The process involves stopping the shoppers, screening them for appropriateness, and either administering the survey on the spot or inviting them to a research facility located in the mall to complete the interview. While not representative of the population in general, shopping mall customers do constitute a major share of the market for many products." *Mall Intercept*, Survey Analytics, http://www.surveyanalytics.com/mall-intercept-method.html (last visited Aug. 11, 2014).

173. *See* Design and Testing of Effective Truth in Lending Disclosures, *supra* note 169, at 1; Macro International, Design and Testing of Effective Truth in Lending Disclosures: Findings From Qualitative Consumer Research 1 (2008) [hereinafter Findings from Qualitative Consumer Research]; Findings from Experimental Study, *supra* note 172, at 1. The research model in the first report was broad, with report number two an attempt to distill key insights and follow-up on general findings from the first report. As explained below, when the second report proved insufficient, Macro revisited its methodology and approach in an attempt to provide further insights. These insights, in Report 3, are also discussed below.

participants in terms of gender, age, ethnicity, and level of education."[174] The project consisted of two phases.[175]

Phase one began in 2006 and focused on "how consumers use credit card disclosures that they currently receive."[176] Macro conducted four focus groups, which "gathered information about the types of information that consumers currently use for financial decision-making," while one-on-one cognitive interviews studied how consumers "read and use specific credit card disclosure forms."[177] Phase two "was devoted to the development and testing of new forms."[178] This phase consisted of seven additional rounds of one-on-one cognitive interviews.[179] For each round, a "set of revised model forms [were] developed."[180] In each interview, researchers asked participants to "think aloud" while using the "mock forms just as they normally would, and data was collected on which aspects of each form were most successful in providing information clearly and effectively."[181] The findings after each round of interviews "led to revisions to the models for the next round."[182] Macro concluded its research and presented its preliminary results to the Fed. Despite the time and expense, none of these methods led to conclusive results or recommendations for the Fed.

Thus, in 2008, in an attempt to answer some of these remaining questions, Macro conducted a quantitative study using mall intercept methodology "to get a more definitive answer to these remaining questions."[183] The follow up testing in Macro's "mall-intercept" studies focused on a subset of the original six types of disclosures related to credit card accounts:[184] (1) solicitation and

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174. Design and Testing of Effective Truth in Lending Disclosures, *supra* note 169, at 4, 8; *see also id.* app. A: Demographic and Background Information About Participants ("Prospective participants were also asked questions about their credit card history and credit card behavior, such as how often they paid the full balance on their card or whether they had opened a new account in the last 12 months. These questions made it possible to ensure that the study encompassed a variety of credit card user populations (for example, new versus experienced credit card users).").

175. *Id.* at 1.

176. *Id.*

177. *Id.*

178. *Id.* at 2.

179. *See id.*; Findings from Qualitative Consumer Research, *supra* note 1733, at 1.

180. Design and Testing of Effective Truth in Lending Disclosures, *supra* note 169, at 2.

181. *Id.* at 2, 8.

182. *Id.* at i.

183. Findings from Experimental Study, *supra* note 172, at 1.

184. Design and Testing of Effective Truth in Lending Disclosures, *supra* note 169, at ii.

application disclosures (often referred to as "Schumer Box" disclosures);[185] (2) initial or account-opening disclosures;[186] (3) periodic statements;[187] (4) change-in-terms notices;[188] (5) convenience checks;[189] and (6) solicitation letters.[190] Macro used the sample to craft policy solutions, identifying a subset of concerns. The Fed then reviewed their findings and all other available evidence to provide an empirical baseline for proposed changes.

This methodology was also flawed. Mall-intercept studies are typically used to gather baseline consumer opinion about products that a typical consumer can process or understand through touch, taste, or smell. In other words, the studies are used to determine whether various consumer products sold in places like malls might appeal to the typical mall shopper. In exchange for evaluating the relative strength of a hypothetical new blanket, cola, or pizza, shoppers are typically given a small cash reward or gift. The use of this methodology to create or modify a federal regulatory disclosure-centered framework for a complex financial instrument, which is neither purchased nor typically acquired in a mall, is somewhat unusual and not considered a broadly reliable scientific method even in its more conventional context.[191]

Notwithstanding the flawed techniques, the Fed utilized these studies and recommendations to propose changes to disclosure

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185. *Id.* (Solicitation and application disclosures "are provided on or with direct-mail solicitations and applications for credit cards to help consumers compare and shop for credit cards. Of the disclosures addressed in this study, this is the only one for which a specific tabular layout is required by the Board.")

186. *Id.* (Initial or account-opening disclosures "are provided when the credit card account is opened to inform consumers about the terms of the account. These disclosures are mostly provided in cardholder agreements, along with other legal and contractual information that issuers opt to include.")

187. *Id.* (Periodic statement disclosures "are usually provided to consumers on a monthly basis to inform them about transactions, fees, and interest charges incurred in the previous billing cycle. These statements inform consumers of when they must make a payment in order to avoid additional charges, as well as how large their payment must be. Periodic statements also include the interest rates that apply to the account.")

188. *Id.* (Change-in-terms notice disclosures "are given to consumers whenever a change is made to the terms of the account. They are either included as an insert with periodic statements or sent in a separate mailing.")

189. *Id.* ("[Convenience] checks (sometimes called 'balance transfer checks') are given to consumers as additional devices to access their credit card accounts. They are usually included with periodic statements or sent to cardholders in a separate mailing.")

190. Design and Testing of Effective Truth in Lending Disclosures, *supra* note 169, at ii. (Solicitation letters are "[c]redit card offers that are sent in the mail usually include a solicitation letter, along with a required Schumer Box. This letter is primarily for marketing the offer to consumers, but it usually includes a description of some of the account terms.")

191. *See, e.g.*, 1 PAUL J. LAVRAKAS, ENCYCLOPEDIA OF SURVEY RESEARCH METHODS 448–49 (2008) ("Mall intercept studies rarely use probability sampling methods, and therefore the results of such a survey cannot be used to determine scientifically the attitudes and opinions of the target population.").

laws. Three years after beginning its disclosure review, the Fed released some redesigned model disclosures and proposed revisions to Regulation Z. The Fed paradoxically concluded that the redesigned disclosures were "unlikely to be helpful"[192] to the people with "the most at stake in understanding how [credit card] charges are calculated and how they can be avoided."[193] The Fed found that "there [were] a number of consumers who lack[ed] fundamental understanding of how credit card accounts work[ed]."[194] These consumers "tended to be those with lower educational levels, and were likely subprime consumers (i.e., those with low credit scores)."[195] In particular, a large number of participants misunderstood (1) how to calculate interest charges,[196] (2) the difference between fees and interest rates,[197] and (3) the allocation of balances from different types of transactions.[198] According to the Fed, consumers required more basic education about how credit cards work

192. Bd. of Governors, Fed. Reserve Sys., Design and Testing of Effective Truth in Lending Disclosures, ii (2006) at 53.

193. *Id.* at 52.

194. *Id.*

195. *Id.*

196. *Id* ("Most participants understood that the Annual Percentage Rate was associated with the calculation of their interest charges, and that a lower APR generally corresponded to lower charges. However, very few participants could accurately describe how interest charges were actually calculated. Many did not understand the balance that would be used in the calculation each period; some thought it was the new balance on the card, while others thought it was the sum of new purchases. Others thought that the APR itself was used in the monthly calculation of interest, rather than a periodic rate. Most participants who could not describe how interest was calculated were not concerned by their lack of understanding. They indicated that they trusted that their issuers would perform the calculations correctly, and that they would call them if the amount looked incorrect. However, in many cases it was unclear that these participants would be able to identify a mistake if it appeared on their statement.").

197. Bd. of Governors, Fed. Reserve Sys., *Design and Testing of Effective Truth in Lending Disclosures, ii (2006)* ("When shown a credit card offer and asked to consider the potential costs of the account, there were some participants who had difficulty distinguishing between fees and interest rates (for example, a 5% APR on balance transfers versus a 5% fee on balance transfers). In some cases, there was a lack of understanding that fees were tied into a specific action or occurrence, while interest rates would be applied to a balance each period. Internal references were added to the Schumer Box to try to direct consumers' attention to both fees and APRs to help them distinguish between the two. However, testing showed that while these references helped some consumers, there were others who were still unaware of the difference between the two.").

198. *Id.* at 53 ("Most participants understood that they could be charged different interest rates on purchases, balance transfers, and cash advances. However, testing showed that while they were aware of this at a conceptual level, many were unable to apply this knowledge when making decisions. For example, while looking at Schumer Boxes interview participants were asked to imagine a scenario in which they transferred a balance to their card at a 0% introductory rate, then made purchases on the same card at a higher rate, and then made a payment. They were asked whether they thought this issuer would use their payment to pay off their balance transfer or their purchases. Although the Schumer Box indicated that lower-APR balances would be paid off first, less than half of participants were able to answer

to address these misunderstandings.[199] The Fed concluded that "[o]bviously, addressing the problem of consumer understanding at this level is far outside the scope of this particular project."[200] In other words, changing disclosure to achieve one of its key goals—educating vulnerable consumers—was not possible. The Fed's final recommendations and the evidence described above formed Congress's empirical dataset, with which it would soon made sweeping changes in U.S. credit card policy.

F. An Alternative Evidence-Gathering Framework

Some policymakers close to the debate recognized the weaknesses in the GAO and Fed studies. For example, the Acting Comptroller of the Currency recommended that Congress rethink its "approach to credit card disclosures . . . of critiquing information practices affecting particular issues and then pushing for correction on a piecemeal basis."[201] In a letter to the Federal Reserve Board, the Office of the Comptroller of the Currency (the "OCC") recommended examining "precedents for thorough consumer testing [that] exist[ed] elsewhere in the financial services world."[202] As the OCC explained, the federal government should conduct an extensive evidentiary expedition, modeled after the "Financial Services Authority (FSA) in the United Kingdom, [which] used extensive testing in developing revised disclosure requirements for a variety of financial products."[203] The FSA study concluded, among other things,[204] that effective disclosures should "[f]ocus on key information that is central to the consumer's decision-making."[205]

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correctly—some, for example, thought the issuer would pay off transactions in the order that they occurred. In order to alleviate these misunderstandings, the proposed model includes text in the Schumer Box describing how payments will be allocated.").

199. *Id.*

200. *Id.* at 54.

201. Regulatory Requirements and Industry Practices of Credit Card Issuers: Hearing Before the Comm. on Banking, Housing, and Urban Affairs, 109th Cong. 70 (2005) (prepared statement of Julie L. Williams, Acting Comptroller of the Currency), available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=cf91f5df-ed9c-48ff-bdf9-3d5f47f5c83e.

202. *Id.* at 68 (recommending, additionally, that the Board look to "the development of the Food and Drug Administration's (FDA's) 'Nutrition Facts' label as illustrative of the consumer research needed to produce a highly effective disclosure document.") .

203. *Id.*

204. *Id.*

205. *Id.* (Some might suggest that recent reforms do indeed focus on this information by placing additional information in key areas or providing a minimum payment warning designed to alert a consumer about potential missteps. Notwithstanding that such warnings

In contrast to the relatively limited consumer research and evidence acquired prior to creating the Disclosure Act and its amendments, the FSA recognized that understanding consumer decision-making first requires understanding the consumer. Rather than presupposing that consumers need transparent credit card disclosures and that transparent disclosures will inevitably lead to market equilibrium,[206] the FSA began its research by defining consumers' needs.[207] The FSA's 2005 consumer-study, *Towards Understanding Consumers' Needs,* explored a variety of philosophies, methodologies, and international regulatory frameworks to develop an in-depth understanding of consumer decision-making.[208] This study was one of many studies collectively aimed at revising disclosures associated with various financial products in the U.K.[209]

The FSA's *Consumers' Needs* study resulted in a model identifying three factors, which "played a role in shaping consumers' decision making:"[210] (1) "personal triggers,"[211] (2) "external environmental factors,"[212] and (3) "behavioral factors."[213] FSA researchers utilized a combination of qualitative primary research, desk research, focus groups, and one-on-one in-depth interviews with consumers, industry experts, and scholars.[214] In related studies, the FSA recruited "key ethnic groups in the UK" to compare research findings from "an ethnic minority" to the "'mainstream respondents" "in order to

might be effective, *see infra*, the point remains that such designs, warnings, and changes to disclosures were not prospectively tested, evaluated, or otherwise benchmarked prior to implementation. Thus, while one can be pleased with the results, that doesn't mean the reform is correct or even optimal. For example, a warning that failure to pay more each month might subject the cardholder to jail-time would likely increase payments even more, but reformers surely would not advocate such a technique.)

206. *Id.* at 47 (testimony of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center) ("It is a bedrock principle of economics, the price theory of demand, that demand is a function of price. When prices go up, demand goes down, and vice versa. This is what makes markets work. But in order for markets to work, prices must be transparent.").

207. *See* Fin. Serv. Auth., Consumer Research 35: Towards Understanding Consumers' Needs, 1–57 (2005), *available at* http://www.fsa.gov.uk/static/pubs/consumer-research/crpr35.pdf.

208. *Id.*

209. *See, e.g.,* Fin. Serv. Auth, Consumer Research 42, *supra* note 22; Fin. Serv. Auth, Consumer Research 34, *supra* note 22; Fin. Serv. Auth, Consumer Research 44, *supra* note 22.

210. Fin. Serv. Auth., Consumer Research 35, *supra* note 207, at 6.

211. *Id.* ("Personal triggers are defined as (usually) non-financial events that have some financial consequences that may or may not be recognized by the consumer . . . .").

212. *Id.* ("[T]he external environment reflects changes outside the direct control of the individual which are enough to compel that individual to actively seek out a financial product or service . . . .").

213. *Id.* ([B]ehavioral factors are contingent on the consumer's underlying attitudes, motivations and culture.").

214. *Id.* at 3.

identify any differences."[215] The FSA's various studies acknowledged "the enormous diversity . . . of consumers"[216] and recruited consumers from various geographic locations with a range of "financial sophistication/interest in financial services," "range of attitudes towards debt," "range of attitudes towards savings," and "[a]t least half in full-time employment."[217] To develop an understanding of behavioral factors, FSA researchers "examined a wide range of published academic and marketing studies, corporate literature and websites, and university and college dissertation archives as well as research and analysis which other parties had previously undertaken."[218] Researchers also explored "different theories about consumer attitudes and behaviors . . . predominantly from the academic fields of Psychology, Sociology, Anthropology[,] and Economics, as well as from work published by commercial marketers."[219] In short, the FSA undertook the sort of rigorous, complex, data-driven analysis expected from a government regulator determined to develop an efficient, comprehensive, and coherent policy consistent with consumer behavior and economic growth.

Reviewing Congress's approach and comparing it to the FSA's efforts yields a few broad conclusions. While Congress was attempting to determine what sort of policy solution would best educate consumers on how to acquire and use credit cards, it relied on minimal evidence gathering and disclosure as an effective tool amidst growing research about the ineffectiveness of both approaches. Congress sought to gather evidence over a period spanning more than a decade about how to improve the existing disclosure-based credit card regulatory scheme. Such evidence was not particularly forthcoming and suffered from an array of flaws and uncertainty about the future direction of the law. Much of the evidence Congress gathered suggested that a continued march toward more disclosure—absent other change—would not lead to definitively better outcomes. In contrast, FSA's more studied reforms had predictable results that produced a regulatory regime more attuned to consumer decision-making research and optimal policy behavior.[220]

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215. *See, e.g.*, FIN. SERV. AUTH, CONSUMER RESEARCH 44, *supra* note 22, at 7.

216. FIN. SERV. AUTH., CONSUMER RESEARCH 35, *supra* note 207, at 12.

217. *Id.* at 5.

218. *Id.* at 4.

219. *Id.*

220. Through a variety of metrics, the FSA's long-term strategy appears to have resulted in several successes, judged by a variety of metrics. *See, e.g.,* FIN. SERV. AUTH., DELIVERING CONSUMER PROTECTION (2012)*, available at* http://www.fca.org.uk/static/documents/annual-report/fsa-annual-report-12-13-section-4.pdf. The FSA's report described how it learned lessons from behavioral economics in order to better understand consumer decision making

However, those engaged in the reform debate still sought to create and eventually pass a comprehensive credit card reform, which eventually became the CARD Act. The reform has two parts: a substantive change in rules about what issuers could charge in certain cases and a series of changes in disclosure.[221] The substantive credit card rule changes have proven somewhat successful in mapping policy changes to desired consumer outcomes.[222] But scholars have given less attention to the nexus between the evidence available at the time of the CARD Act, and the connection between that evidence and continued focus on disclosure as an education and behavior-modifying solution.[223] While possibly too optimistic or impractical to demand perfection in empirical research prior to implementation of such reforms, it is nonetheless helpful to prospectively evaluate the connection between the above-evidence and Congress's next major reform, the CARD Act.

III. TOWARD MORE DISCLOSURE: POLICY OPTIMIZING AND THE CARD ACT

Anecdotal evidence and a series of flawed studies had an oversized role in influencing congressional information-gathering regarding credit card consumer matters in recent years. But that evidence-gathering, flawed as it was, served a broader purpose. Advocates of sweeping changes to the existing credit card disclosure and regulation policy started to develop a broad proposal designed to curb practices they deemed harmful and to provide consumers with information that they perceived to be better than the existing disclosure regime. The CARD Act emerged from this iterative evidence-gathering process, and its impact—along with the creation of

and then applied those insights toward a new framework and set of regulations, enforcement actions, and policies more aligned with these new behavioral insights.

221. A third change that soon followed, the creation of the CFPB, focused on regulating the supply-side, is discussed *infra* at Part III.D.

222. *See* Lauren Jones et. al. *The Effects of CARD Act Disclosures on Consumers' Use of Credit Cards* 40 (2014) (unpublished manuscript) (on file with the author) at 40 (Early evidence suggests that the CARD Act "produced some positive effects in its mission to improve credit card payment behaviors.").

223. For example, White hints that a robust education in financial literacy, at least as applied to credit card use and abuse, could have a net positive impact on the consumers who are most vulnerable to credit card misuse and inefficient behavior. Yet such education-based reforms, while mandated by BAPCPA for bankruptcy filers, were not seriously considered by those advocating credit card reforms. *See* White, *supra* note 71 (comparing the absence of such education in credit card reform proposals to the BAPCPA education mandates and suggesting that consumer financial education should occur prior to consumer financial distress caused by credit card misuse, among other things).

the CFPB—was assumed to be uniformly positive across all consumer groups, particularly those who were most economically vulnerable. While these last two reforms built upon a growing awareness that consumers had certain predictable behavioral limitations, the reforms did not directly confront the robust heterogeneity within this large and diverse group. As a result, recent reforms have left much on the table. This Section revisits the process and proposes a new solution that requires Congress acknowledge the heterogeneity of consumers and allow card-issuers, regulators, and academics the ability to gather socio-demographic information about customers in order to improve the impact of these reforms.

This Section proceeds as follows. Section III-A imagines what Congress might have done differently prior to recent reforms discussed in the previous section. Section III-B focuses on evidence gathered after the Disclosure Act that informed lawmakers prior to the CARD Act. Section III-C compares this evidence to reforms proposed during debate and drafting of the CARD Act's key provisions. Turning to the period after the CARD Act, Section III-D reviews the development of the CFPB and the weakness of financial literacy regimes—both modeled on the generic-consumer. Finally, Section III-E rejects the generic-man approach and calls for consumer-differentiated disclosure and education.

A. *After the Disclosure Act: Alternative Policymaking Frameworks*

What did scholars suggest or predict should have happened following implementation of the Disclosure Act, and what should lawmakers have done as a policymaking alternative? Some scholarship suggests that lawmakers should have incorporated the evidence connecting actual consumer use into policy changes while others suggest that lawmakers should have called the reliance on disclosure as a market-efficiency tool into question. However, in the decades since the Disclosure Act, neither analytical approach was broadly applied to credit card reform.

First, scholars who focus on evidence-based policymaking typically rely on a quasi-experimental policy-feedback loop approach to lawmaking.[224] The credit card space should be no exception to this general rule. This approach would have policy makers first clearly

224. See generally, Jean Bae et al., Child Passenger Safety Laws in the United States, 1978-2010: Policy Diffusion in the Absence of Strong Federal Intervention, 100 SOCIAL SCIENCE & MEDICINE 30, 31–32 (2014).

identify the problem. Then, by mapping the policy's proposed goals against the problem, lawmakers would create a policy solution. Over time, outcomes pursuant to that law's mandates would be evaluated against the law's goals. As the complexity of law, policy, and outcomes grows, lawmakers would use more sophisticated measurements to further refine the policy. If the lawmaking process were purely scientific, this policy-learning process could incorporate a range of evidence from a variety of sources.[225] The use of such evidence, in other policy contexts, has led to improved policy outcomes.[226] For example, the evolution of child-auto restraint laws began by identifying a common problem: the impact of car-vehicle accidents on child passengers.[227] Initially, a range of public-policy approaches were taken to try to reduce the harms caused by these accidents.[228] But, over time, as research evaluated the impact of various interventions on the problem, states and lawmakers revisited their reforms, made changes, and saw greater improvement in outcomes.[229] This evidence-based policy learning process approach could have been used to inform credit card lawmaking in the decade(s) following the Disclosure Act, but it was not.[230]

Some legal scholars suggest that focusing on an ideal nexus between laws and market outcomes is both hopeless and naïve.[231] According to these scholars, policymakers receive far too much information already[232] and, within that already expansive space, lack the time, resources, or expertise necessary to interpret what the information means or how it should be deployed in policymaking.[233] What these scholars overlook is that evidence-based lawmaking does not require perfection; it should simply be the preferred approach in the consumer credit context. This approach would

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225. *See, e.g.*, Ross C. Brownson et al., *Understanding Evidence-Based Public Health Policy*, Am J Public Health 99 (9): 1576–83 (2009).

226. See, e.g., Scott C. Burris and Evan D. Anderson, Legal Regulation of Health-Related Behavior: A Half-Century of Public Health Law Research. Annual Review of Law and Social Science 95 (2013).

227. *Id.* at 98–99.

228. Id.

229. Id.

230. If the problem is imagined as credit card debt growth or inefficient acquisition, one could imagine a series of iterative reforms learning from what causes the problem and what can actually reduce the problem and/or its impact on various populations.

231. *See generally* Ruth V. Aguilera and Cynthia A. Williams, *Law and Finance: Inaccurate, Incomplete, and Important*, 2009 BYU L. Rev. 1413, 1418 (2009); Mark J. Roe, *Corporate Law's Limits*, 31 J. Legal Stud. 233, 262–63, 267 (2002).

232. *See, e.g.*, Colby, D. C., B. C. Quinn, C. H. Williams, L. T. Bilheimer, and S. Goodell, *Research Glut and Information Famine: Making Research Evidence More Useful for Policymakers*, Health Aff (Millwood) 27 (4):1177–82 (2008).

233. *See, e.g.*, Brownson, R. C., C. Royer, R. Ewing, and T. D. McBride, *Researchers And Policymakers: Travelers In Parallel Universes*, Am J Prev Med 30 (2):164–72 (2006).

encourage a more comprehensive sample of existing and potential data and demand testing on whether the deployment of certain policy-reforms yields ideal consumer outcomes. Given that this policy-space affects 150 million U.S. cardholders, it is not economically or fiscally reasonable to divorce evidence from policy-making.

With respect to an issue of this scope and importance, the federal government could and should benefit from an overabundance of information. Indeed, during the period studied here, Congress had an entire apparatus dedicated to this task—the GAO.[234] With respect to economic policy, Congress could also rely on the research arms of an array of qualified experts, including the Fed, the Treasury, and the Council of Economic Advisors. In other contexts, such as health policy, researchers have developed methods to sift through reams of data from a variety of populations and contexts to determine whether a given policy intervention might yield optimal results.[235]

Congress could deploy similar methodologies with respect to credit card regulations over time. The problem could be clearly defined (debt vs. income, aggregate amount of interest payments over a consumer's lifetime, low credit scores, high credit-utilization, etc.). Ideal outcomes could be envisioned (i.e. what is the ideal level of consumer spending or card-interest rates, or card features, or utilization, etc.)[236] A range of defined problems could benefit from an evidence-based policy-making structure, which deployed existing data to measure the potential effect of the policy-solution on the defined problem.

Regulators or policymakers could apply this structure, agree on a common set of consumer credit problems, and then hypothesize a series of ideal outcomes. For example, with respect to debt/income ratios, FICO scores, and similar measures, regulators could set an "ideal" value ratio (e.g. 1:100) and a value ratio after which a potential cardholder would be considered too risky (e.g. 10:1). Congress or regulators could gauge the median ratio and then deploy both education and disclosure regimes designed to target that ratio. Similarly, card issuers and lenders have bright line cut-offs for credit

234. And now, as a matter of law, the CFPB, which is mandated to produce research – although the scope and direction of this research are unclear. Future work assessing the CFPB's impact should provide evidence of the success of this approach.

235. *See, e.g.*, Moher, D., J. Tetzlaff, A. C. Tricco, M. Sampson, and D. G. Altman, *Epidemiology And Reporting Characteristics Of Systematic Reviews*, PLoS MED 4 (3):e78 (2007).

236. *But see* Lauren Willis, *Evidence and Ideology in Assessing the Effectiveness of Financial Literacy Education*, UNIV. OF PA FACULTY SCHOLARSHIP PAPER 197 (at 15–19) (critiquing FLE and FLM models and questioning whether any consumer financial decisions and ideal outcomes can be normed, given the diversity of such decisions and competing values influencing consumer behavior).

scores,[237] and others utilize an efficiency model where a lower credit score results in a substantially higher interest rate.[238] Policymakers could set an ideal goal or target number and create disclosure or education regimes designed to meet or achieve that number. Regarding spending, Congress could similarly decide to use existing industry baselines or simply decide (as it does for other issues) an optimal range of social vs. household spending and then set out to achieve that balance through education or micro-targeted disclosures.[239] For example, a disclosure mandate could produce warnings or suggestions when the balance of "positive" vs. "negative" spending reached a certain proportion. All of these solutions rely on empirical research segmenting groups but could also be deployed in a generic-man framework.

Moreover, extending that research within a demographically attuned framework might allow for targeted messaging designed to stimulate positive behavior from members of certain sub-groups. Such messaging could range from cultural- or language-specific messaging or helpful guidance pitched to members of a target group. For example, an issuer might offer the following language-customized note in a statement: "Having difficulty making minimum balance payments? Local Community/Language Group X [for which the cardholder might be a demographic-match] holds free financial planning information seminars on Tuesdays at 101 Main St." Banks that wanted to enhance their CRA rating could utilize their local credit card customer socio-demographics to micro-target potential first-time home or car buyers or to create, staff, and manage branches that better fit the socio-demographic profile of their local user base. More broadly, an issuer with customers of various ethnic backgrounds clustered in five cities could cross-deploy advertising, education, or disclosure regimes across multiple markets that focused on common financial-decision making problems within these groups.

However, this focus on reaching members of various socio-demographic groups with hyper-targeted messaging presupposes that

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237. *See, e.g.,* Hussein A. Abdou & John Pointon, *Credit Scoring, Statistical Techniques and Evaluation Criteria: A Review of the Literature*, 18 Intelligent Systems in Accounting, Finance & Management 59 (2011), *available at* http://usir.salford.ac.uk/16518/4/Credit_Scoring_Statistical_Techniques_and_Evaluation_Criteria_A_Review_of_the_Literature_-_USIR_Version_(2).pdf.

238. *See, e.g.*, *Capital One Important Disclosures*, Capital One, https://www.capitalone.com/credit-cards/secured-mastercard/disclosures (last visited Aug. 11, 2014) for an example of an industry-standard approach to acquisition of a card by a consumer with a poor or low credit score.

239. This was one of the approaches taken by the FSA. *See supra* notes 207–19 and accompanying text.

Congress intends to bring evidence to bear on the problem of optimal credit card acquisition and use. To do so, it must close the gap between the mere commission of research and its actual use to inform policies over time.[240] Even assuming full congruence between evidence and policy proposals, the political environment must be ripe to identify the problem and then bridge the gap between evidence and Congressional action.[241] With respect to credit card policy between the Disclosure Act and the CARD Act (a twenty-one year span), Congress could have marshaled evidence and aligned policy goals and solutions. Instead, the opposite happened.

Critics may suggest that Congress did not have good evidence but might have still made good policy decisions. The CARD Act's success is not primarily rooted in its disclosure regime, but instead in a novel supply-side command-control model of directly regulating card issuer practices and business models. That approach was not the subject of the key studies cited above, yet it emerged as a key—successful—policy solution.[242] On the other hand, the CARD Act's disclosure mandates were created without taking into account the necessary evidence.

Evidence, in a variety of other ways, could have informed reforms embedded in the CARD Act. Examining the facts that were available but not utilized in policymaking discussions, the fraction of non-mortgage debt based on credit cards increased from 1.3% to 38.1% during the period before and after the Disclosure Act.[243] Further, by 2001, the number of households with one or more credit cards increased from sixteen percent before the Disclosure Act to seventy-three percent.[244] Due to the efficiency and ease of lending, consumers had essentially substituted credit cards for cash purchases in the years following the Disclosure Act.[245] By 1995,

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240. *See, e.g.*, JA Weiss, *The Powers of Problem Definition: The Case of Government Paperwork*, POLICY SCIENCES 22 (2): 97–121 (1989).

241. JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2nd ed. 2003).

242. The success of this solution, absent evidence, was not guaranteed and in fact could have made matters worse.

243. Federal Reserve Statistical Release G19, *Consumer Credit Historical Data*, *available at* http://www.federalreserve.gov/releases/g19/hist/ (last visited Feb. 10, 2010).

244. DAVID S. EVANS & RICHARD SCHMALENSEE, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING 88–89 (2d ed. 2005).

245. Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79, 85, 88 (2000) (noting that "[s]ome commentators have incorrectly ascribed this explosion to the efforts of deregulated card issuers to 'push' credit cards on unsuspecting consumers. This argument lacks merit and will be discussed in some detail below. A more plausible explanation for the rise of credit cards as a transactional medium is their convenience and the other benefits they offer. In particular, credit cards have increasingly supplanted checks as the preferred medium for transactions traditionally conducted by check.").

credit cards had surpassed cash as the preferred method of consumer payment.[246] The ubiquity of consumer lending enabled Americans to spiral into debt and bankruptcy that rivaled the Great Depression.[247] For instance, credit card debt rose to $683 billion in 2000,[248] with 1.3 million Americans filing for bankruptcy in 1997.[249]

Additionally, low-income individuals were able to obtain credit due to the loosened standards.[250] These consumers included high-risk individuals who were previously denied credit[251] and lower-income individuals who were now able to spend well beyond their means.[252] Studies also suggested that credit card usage encouraged additional spending.[253] Households with credit cards held more debt on average than households without credit cards.[254] Credit card debt soon became a significant component of consumer debt and one key vehicle leading to consumer bankruptcy.[255] Over the decades following the 1980s, household revolving debt expanded from roughly three to more than twelve percent of median family income.[256] By the time of Congressional debates in the mid-2000s, households holding credit card debt had an average of more than $15,000 per household.[257]

These events and such evidence all happened after the Disclosure Act, affording Congress an opportunity to improve the acquisition and use of credit. However, nothing suggests that these

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246. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, The Fragile Middle Class: Americans in Debt 108 note 2 (2000).

247. Vikas Bajaj & Julie Creswell, *Mortgages Give Wall St. New Worries*, N.Y. Times, Jun. 19, 2007, at C1.

248. U.S. Census Bureau, Statistical Abstract of the United States, § 25, at 1165 (2002), http://www.census.gov/prod/2003pubs/02statab/banking.pdf.

249. 144 Cong. Rec. E88 (daily ed. Feb. 4, 1998) (statement of Rep. George Gekas, Chair of the House Judiciary Subcommittee on Commercial and Administrative Law).

250. Angela Lyons, *How Credit Access Has Changed Over Time for U.S. Households*, 37 The J. of Consumer Affairs 231, 231–32, 301–02 (2003).

251. Ellen Florian Kratz, *The Risk in Subprime*, Fortune, Mar. 1, 2007, http://money.cnn.com/2007/02/28/magazines/fortune/subprime.fortune/index.htm?postversion=2007030117.

252. Tom Brown & Lacey Plache, *Paying with Plastic: Maybe Not So Crazy*, 73 U. Chi. L. Rev. 63, 73–74 (2006).

253. Lloyd Klein, It's in the Cards: Consumer Credit and the American Experience 26 (1999).

254. David I. Laibson et al., A Debt Puzzle in Knowledge, Information, and Expectations in Modern Macroeconomics 228, 231 (Philippe Aghion et al. eds., 2003).

255. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, The Fragile Middle Class: Americans in Debt 129 (2000) (stating, "As the fastest growing proportion of consumer debt, credit card debt has led the way to bankruptcy for an increasing number of Americans"). *But see* Himmelstein et. al., Am. J. Med. 2009 Aug; 122(8): 74–6 (medical problems contribute to almost half of all U.S. bankruptcies).

256. Michelle J. White, *Bankruptcy Reform and Credit Cards*, 21 Journal of Econ. Perspectives 175 (2007).

257. *Id.*

facts and trajectories played a substantive role in recent reforms, and no evidence supports that disclosure was better at educating consumers. While it became increasingly apparent that the law's key goals were not being met, evidence about the limited efficacy of disclosure as a market-enhancing consumer tool was also widely available by the time Congress revisited reform in the form of the CARD Act and its various provisions.

A second broad strand of legal scholarship developed during this period suggested that disclosure-based reforms would fail due to the complexity of individual psychology—evidence notwithstanding. In the years following Schumer's initial efforts, scholars coalesced around a few key areas where disclosures were likely to fail consumers. One of those areas was the abundance and volume of the disclosure itself.[258] TILA and the Disclosure Act required banks and issuers to provide consumers with excessive information that was not only time consuming[259] but also psychologically overwhelming.[260] Mounting evidence from other consumer credit-granting regimes suggested that consumers, overwhelmed with information, would act irrationally and ignore information to simplify their choices.[261] For instance, a study of TILA disclosures found that less than half of consumers read their statements carefully.[262] Scholars also demonstrated that consumers' ability to recall information was challenged when they were provided with unnecessary terms, while they ignored other critical terms.[263]

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258. Michael S. Barr, Sendhil Mullainathan, & Eldar Shafir, *Behaviorally Informed Financial Services Regulation*, NEW AMERICA FOUNDATION 3–4 (Oct. 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121199.

259. *Castellana v. Conyers Toyota*, 200 Ga. App. 161, 407 (Ga. App. 1991) (noting that it took a consumer nearly three hours to read the car purchase and financial documents).

260. Jessica M. Choplin, *Doomed to Fail: A Psychological Analysis of Mortgage Disclosures and Policy Implications*, 32 No. 10 BANKING & FIN. SERVICES POL'Y REP. 11, 12 (Oct. 2013).

261. Eldar Shafir, Itamar Simonson, & Amos Tversky, *Reason-Based Choice*, 49 COGNITION 11 (1993) (providing that this simplification might lead a consumer to make a decision based on only one or two variables and focus more on the short-term, at the expense of all other variables and information); Lauren E. Willis, *Decision-Making and the Limits of Disclosure: The Problem of Predatory Lending*, 65 MD. L. REV. 707, 780–81 (2006).

262. Thomas A. Durkin, *Consumers and Credit Disclosures: Credit Cards and Credit Insurance*, FED. RES. BULL. 201, 209 (table 9) (April 2002) (finding that forty-nine percent of consumers read their statements carefully in the 2001 survey, compared with only twenty-nine percent of consumers in the previous 1997 survey).

263. Jessica M. Choplin, *Doomed to Fail: A Psychological Analysis of Mortgage Disclosures and Policy Implications*, 32 No. 10 BANKING & FIN. SERVICES POL'Y REP. 11, 16–17 (Oct. 2013) (finding that consumers are vulnerable to selective memory when they are reviewing a home loan disclosure form, demonstrating that disclosures alone are unlikely to protect consumers); William N. Eskridge, *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083, 1133 (1984) (referencing psychological studies that suggest consumers can only digest "five to seven 'chunks' of information – beyond that, processing problems occur").

The illusion of educating consumers through increased disclosure may have resulted in an overall increase in credit-based disclosures without a commensurate increase in the sophistication of consumers in the card acquisition or use markets.[264] Evidence suggests that the Disclosure Act had not increased competition in the credit card industry, and interest rates and funding costs did not exhibit any measurable improvement following the Disclosure Act."[265] At the same time that evidence challenged the evidentiary basis for the Disclosure Act, other scholars generally questioned the efficacy of disclosure as a policy solution for *any* consumer problem.

The complexity of disclosures and the way that card issuers and lenders focused the consumer's attention on certain terms while avoiding others were problematic. In the context of home lending, for example, employees of the lending institution often led consumers through the documentation in a biased fashion.[266] This in-person focus on selectively identifying key terms and avoiding others[267] could, in a parallel context, create uncertainty about which of the many mandated disclosures was most important—assuming that all but a few of them were displayed equally. Some studies also showed that consumers were more likely to focus on a particularly memorable feature than absorb and consider additional details.[268] As many disappointed and frustrated consumers have discovered in other contexts, hidden and surprising terms are not always unenforceable.[269]

Scholars also argued that behavioral anomalies drive consumers' inability to fully read and understand disclosures. For instance, consumers may suffer from behavioral biases, which cause them to

264. In a different context, Hoffman and Wilkinson-Ryan explain that disclosure-as-education is an illusory form of regulation, in part, because it shifts policy and legal attention away from policing terms and it provides consumers with information that they cannot accurately process. *See* David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 435 (2013) (stating, "Thus, mandated transparency provides an illusory form of regulation; it discourages more substantive policing of terms while inundating consumers with information that they cannot, and will not, process").

265. Ben-Shahar & Schneider, *supra* note 300, at 16, 23. An ideal, if imperfect, effect would have led disclosure of interest-rates to promote consumer shopping for lower-rate credit cards that would then, in theory, cause a general lowering of card rates for new acquirers.

266. Jessica M. Choplin, *Doomed to Fail: A Psychological Analysis of Mortgage Disclosures and Policy Implications*, 32 No. 10 BANKING & FIN. SERVICES POL'Y REP. 11, 12 (Oct. 2013).

267. *Id.*

268. Eskridge, *supra* note 263, at 1117–18.

269. For a more recent discussion of this phenomenon, *see* Hoffman and Wilkinson-Ryan, *supra* note 264 at 428. *See also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) (holding that an arbitration term within a lengthy standard cruise purchase contract was enforceable despite its lack of immediate visibility to a typical consumer).

underestimate their future borrowing or deny warning signs of financial troubles.[270] Other scholars argue that future policies should consider socioeconomic implications in addition to traditional law and economic theories.[271] Too much information might also cause consumers to shortcut their acquisition or use strategies, leading to imperfect outcomes.[272] Despite all of the critiques building from the evidence-based lawmaking and behavioral law and economics tradition, Congress, in the CARD Act, continued to rely on the educating function of the existing disclosure framework as one tool in its regulatory arsenal.

B. Evidence as Applied: The CARD Act Reforms

The CARD Act, which Representative Carolyn B. Maloney authored and 128 members of the House cosponsored, was originally proposed in 2008 as The Credit Cardholders' Bill of Rights.[273] In 2009, the Senate Banking Committee reviewed and offered amendments to the bill. These amendments, however, were based on policy ideas and prescriptions that predated all of the studies described in Section III and thus do not appear to be linked to any of the aforementioned empirical evidence Congress gathered to evaluate the effectiveness of existing disclosures.[274] Subsequently, Congress passed the CARD Act, which incorporated the Senate Banking Committee's amendments and also "codified and strengthened various Federal Reserve regulations" issued in 2008.[275]

In short, the CARD Act targeted the following practices: (1) "universal default;" (2) "unilateral change in terms/'Any Time, Any Reason' Provisions;" (3) "retroactive interest rate increases;" (4) "allocation of payments;" (5) "unreasonable and excessive fees;" (6)

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270. Bar-Gill, *supra* note 69, at 1418 (2004) (determining that credit disclosures are meaningless if a consumer is in denial of his own financial situation).

271. William K. Black, The Imperium Strikes Back: The Need to Teach Socioeconomics to Law Students, 41 SAN DIEGO L. REV. 231, 236–37 (2004).

272. I. Janis & L. Mann, *Decision Making: A Psychological Analysis of Conflict, Choice and Commitment* (1977) (noting that a stressful financial decision may cause the consumer to procrastinate, shift the responsibility of the decision onto another, perhaps inadvertently shifting the decision to a predatory lender, or defensively avoiding the decision-making process).

273. BILL SUMMARY AND STATUS, H.R. 627, 111th Cong. (2009) http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.00627.

274. *Senator Dodd Wants to Expedite the CARD Act*, GET DEBIT (2009) http://www.getdebit.com/debit-news/senator-dodd-wants-to-expedite-the-card-act. (describing Senator Dodd's efforts to enact similar provisions in 2004, 2005, and 2008).

275. Darryl E. Getter, Cong. Research Serv., RL34393, THE CREDIT CARD MARKET: RECENT TRENDS AND REGULATORY ACTIONS 9 (2009).

"unfair methods of computing finance charges;" and (7) "minimal notice and lack of disclosure."[276] The CARD Act's reforms included two distinct categories: command-based reforms[277] that changed rules or mandated market and disclosure-based reforms[278] that provided new or differently-worded information. The command-based reforms have proven successful, in part, over time.[279] But evidence of the efficacy of the disclosure-centered portions of the reforms is less certain.

Congress did not develop the CARD Act's disclosure-based reforms as a response to evidence from Congressional studies or the psychology of disclosure. For example, payoff-timing disclosures were a solution for at least five years prior to the CARD Act.[280] Democratic Congress members unsuccessfully advocated the approach as an amendment to the BAPCPA.[281] When debate opened for the CARD Act legislation, they reintroduced the payment-focused solution.[282] Consumer advocates supported the solution as "one of the few disclosures that [would rise] above the clutter and [would]

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276. S. Rep. No. 111-16, at 4–8 (2009).

277. These reforms included attempts to outlaw "risk-based pricing" and to prohibit "retroactive interest rate increases, forced issuers to re-allocate payments in a fashion designed to pay-off the highest-interest purchases first. It allowed consumers to reject a recently issued card prior to use, limited issuers from charging various types of fees, required a review of increased account rates, and eliminated a practice known as "double-billing," prohibited credit card issuers from increasing rates in the first year after a credit card account is opened, except under certain circumstances.

278. Mark Jickling, Cong. Research Serv., 7-7784, Credit Card Bills: H.R. 627 as Passed the House and the Senate Amendment in the Nature of a Substitute 2 (2009).

279. *But see, e.g.*, Sumit Agarwal et al. *Regulating Consumer Financial Products: Evidence from Credit Cards* (October 3, 2013), *available at* http://ssrn.com/abstract=2330942; Jones et al., *supra* note 222, at 41 (suggesting that the "Minimum Payment" provision is a disclosure and resulted in net consumer savings).

280. Kathleen Day & Carline E. Mayer, *Credit Card Penalties, Fees Bury Debtors*, Washington Post, Mar. 6, 2005, at A1.

281. Regulatory Requirements and Industry Practices Hearing, *supra* note 67, at 7 (statement of Sen. Daniel K. Akaka); see also *id.* at 117 (prepared Statement of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group) ("We were disappointed when the Senate rejected the similar Akaka amendment during floor consideration of the draconian bankruptcy bill, S. 256, successfully and aggressively sought by the credit card industry and enacted into law at lightning speed this Congress, despite no evidence of bankruptcy abuse. Instead, that new bankruptcy act includes yet another virtually worthless generic disclosure. That disclosure was approved and signed off on by the industry simply because it will not work to reduce the credit card debts that cripple many American consumers.").

282. *Id.* at 7 (statement of Sen. Daniel K. Akaka) (The CCMPWA: (1) required a "minimum payment warning notification on monthly payments stating that making the minimum payment will increase the amount of interest that will be paid and extend the amount of time it will take to repay the outstanding balance[;]" (2) "require[d] companies to inform consumers of how many years and months it would take to repay their entire balance if they make only minimum payments[;]" (3) required disclosure of "the total costs in interest and principal if the consumer pays only the minimum payment[;]" (4) required "that credit card

make a difference, and that [was] the reason banks vehemently oppose[d] this proposal."[283]

During the CARD Act hearings, credit card issuers opposed mandatory payoff timing disclosures[284] and disputed their potential efficacy.[285] In response to a congressional request for information on minimum payment disclosures, the GAO conducted another study in 2006 on the feasibility, usefulness, and design of customized minimum payment disclosures.[286] Ultimately, the GAO study concluded that customized minimum payment disclosures would provide more information to consumers but that the impact of these disclosures was not consistent across different sets of consumer groups.[287] Generally, cardholders and others "found customized disclosures on the consequences of making minimum payments useful; however, opinions on the extent to which the disclosures would influence cardholders' payment behavior varied."[288] Nonetheless, the provision survived.

The solution was enacted as a "Minimum Payment Warning,"[289] but five years of additional evidence did not sway policymakers away from disclosure as the solution. Despite the GAO study and relevant Congressional testimony, the CARD Act enacted disclosures that

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companies provide useful information so that people can develop strategies to free themselves of credit card debt[;]" (5) required that consumers would . . . be provided with the amount they need to pay to eliminate their outstanding balance within 36 months[;]" and (6) required that creditors establish a toll-free number so that consumers can access trustworthy credit counselors.").

283. *Id.* at 117 (prepared Statement of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group).

284. *See id.* at 71 (prepared Statement of Antony Jenkins, Executive Vice President, Citi Cards) (asserting that low minimum payment requirements "offer customers the flexibility to adjust their monthly payments to reflect their preferences and monthly cash-flow situation.").

285. *Id.*

286. U.S. Gov't Accountability Office, GAO-06-434, Credit Cards: Customized Minimum Payment Disclosures Would Provide More Information to Consumers, but Impact Could Vary 4 (2006).

287. *Id.* at 37.

288. *Id.* at 9; *id.* at 4, 9–10 ("Credit card users can be characterized into two groups—those who use their cards for purchases but consistently pay their outstanding balance in full every month (convenience users) and those who carry a balance on their cards (revolvers). Different data sources report that in 2004 revolvers represented between approximately 46 and 55 percent of cardholders . . . Among the 112 cardholders we interviewed, when offered a choice of receiving either a customized disclosure, the generic disclosures of the Bankruptcy Act, or no disclosure at all, 57 percent of the revolver cardholders—who typically carry balances on their cards and thus would be most likely to find information on minimum payment consequences useful—preferred to receive customized disclosures. While several convenience users—who pay their balances in full each month—also preferred the customized disclosure, the majority (60 percent) said they would be satisfied with receiving either generic disclosures or none at all.").

289. Mark Jickling, Cong. Research Serv., 7-7784, Credit Card Bills: H.R. 627 as Passed the House and the Senate Amendment in the Nature of a Substitute 1 (2009).

were nearly identical to the provisions of Senator Dodd's earlier proposals, bypassing all of the "evidence" described in Sub-Sections II.C-II.E above.[290] The CARD Act's other substantive disclosure-based reform "require[d] issuers to provide 45 days advance notice of interest rate increases, and grant[ed] cardholders the right to cancel the card and pay it off under the old terms."[291] The empirical validity of these reforms was uncertain. However, Congress bundled all of the reforms together and approved them collectively soon after the 2008 elections.

In May 2009, President Obama signed the CARD Act, which he suggested would include the "most sweeping changes" in decades, regulating "how credit cards [would be] marketed, advertised[,] and managed."[292] Nevertheless, whether the CARD Act would achieve any of its proposed goals or whether its soon-to-be-implemented solutions were aligned with existing evidence remained ambiguous. The CARD Act, while ultimately successful in many respects, still left the work of aligning existing and future consumer-based evidence with more optimal policy-making or regulatory reforms. Section III-C discusses the future of such reform, builds on the recent work of legal scholars, focuses on revisiting financial literacy and challenges the universal-nature of current disclosure models.

C. Beyond the CARD Act

When assessing the future direction for credit card law and policy reform, Professors Oren Bar-Gill and Elizabeth Warren's influential work is the obvious starting point because it has driven much of the academic dialogue concerning credit product problems during the past decade.[293] The extent of Bar-Gill and Warren's influence to date includes thousands of responsive comments and articles from both domestic and international law reviews.[294]

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290. S. 499, 109th Cong. 3 (2005).

291. S. Rep. No. 111-16, at 8 (2009).

292. Connie Prater, *Obama Signs Credit Card Reforms Into Law*, CreditCards.com (May 22, 2009), http://www.creditcards.com/credit-card-news/obama-signs-credit-card-law-1282.php#ixzz23PVKgKHK.

293. *See* Oren Bar-Gill and Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1 (2008).

294. See, e.g., Ronald J. Mann, Regulation in the Fringe Economy Symposium: After the Great Recession: Regulating Financial Services for Low- and Middle-Income Communities, 69 Wash. & Lee L. Rev. 729 (2012); Todd Zywicki, Striking the Right Balance: Investor and Consumer Protection in the New Financial Marketplace: Article: The Consumer Financial

Bar-Gill and Warren's 2008 article *Making Credit Safer* included a laudably innovative approach to credit card reform and new "product safety" regulations for the industry that could improve consumers' experience in the market.[295] The article also acknowledged that most consumers are imperfectly informed, imperfectly rational, or both. The authors' exhaustive research of consumer behavior illustrated the complexity—perhaps futility—of disclosure's potential impact. The article called for the creation of an entity, later the CFPB,[296] which could engage in a host of both regulatory and research actions.[297] Advocates—and the CFPB itself—seized first on creating the structure of the regulatory framework and have only more recently focused on engaging the consumer research portion.[298] This renewed focus on connecting research and evidence with regulatory policy and lawmaking could assist in bridging the gap between what is currently known about consumer credit behavior and where future research and policymaking is heading.

The CFPB is modeled on the FDA,[299] partly because the FDA's market-signaling function allows the general public to develop relatively low levels of sophistication for product choice—assuming such products are safe. Should the public now make similar assessments with respect to consumer financial instruments? But unlike the prescription drug market, consumer demand for credit does not have a helpful intermediary, like a doctor, who can filter information and who carries his or her own product- and market-expertise. Despite proposing a path-breaking solution, those implementing the CFPB model relied on the insights of those who study administrative law and regulatory frameworks moreso than human

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Protection Bureau: Savior or Menace?, 81 GEO. WASH. L. REV. 856 (2013) (domestic law reviews); Luke Nottage and Souichirou Kozuka, Lessons from Product Safety Regulation for Reforming Consumer Credit Markets in Japan and Beyond, 34 SYDNEY L. REV. 129 (2012) (international law review).

295. *See* Bar-Gill & Warren, *supra* note 293.

296. *Id.* at 98, proposing the core functions of what would become the CFPB.

297. *See also* Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV.199, 283 (2008). In contrast to Bar-Gill and Warren, Willis considers the role of consumers in more depth throughout her critique of a proposed solution to consumer credit problems. However, she similarly dismisses a solution that focuses entirely on the consumer, instead concluding that negative outcomes are a result of the interaction between the consumers and the market, which Congress must regulate in combination to be effective.

298. For example, the CFPB's first annual report did not offer substantial insight into the research team's long-term projects and implied that the team was not yet substantively staffed. See CONSUMER FIN. PROT. BUREAU, BUILDING THE CFPB: A PROGRESS REPORT 28 (2011), available at http://files.consumerfinance.gov/f/2011/07/Report_BuildingTheCfpb1.pdf.

299. Bar-Gill & Warren, *supra* note 293, at 99.

behavior.[300] However, to engage with changing consumers' responses to reform, scholars would re-engage the larger question of how to best influence consumer choices from a cognitively optimal vantage point. To do that, as described in Section III *supra*, educators and issuers should utilize socio-demographic data and insights when examining evidence on consumer card use and attempting to optimize disclosure, which federal law forbids. Presently, the CFPB's existing enforcement regime does not encourage acquisition of and policy experimentation with customers' socio-demographic information.

When the CARD Act was passed, the connection between the efficacy of disclosures and the increasing reliance on such disclosures was uncertain. In other words, those advocates who still preferred a disclosure-based regime were optimistic in the face of little direct evidence of its efficacy. For example, Bar-Gill and Warren's disclosure reforms acknowledged that assumptions about consumer reality were "untested" and that both theory and evidence suggested that regimes built upon consumer rationality would prove unrealistic or be contradicted by existing data.[301]

The remainder of this Article suggests a demand-focused legislative intervention and points toward further research and evaluation of its efficacy. Though the CARD Act does not rely entirely on disclosure and directly regulates certain credit card practices, some of its provisions rely on a disclosure strategy. Those disclosures still reflect the one-size-fits-all strategy of prior statutes. Yet more focus is needed on consumers as definable, diverse groups.[302] Given the diversity of consumers and the existing exploitation of their lack of information, policymakers should consider consumers' unique characteristics as individual members of identifiable groups and use these distinctions to inform elements of education in the regulatory solution to improve credit card safety.[303] In particular, Schumer's

300. *Id.* at 101, inviting those "schooled in administrative law" to help flesh out the proposal.

301. *Id.* at 7.

302. *See* David Adam Friedman, *Reinventing Consumer Protection*, 57 DePaul L. Rev. 45, 46–47 (2007) (arguing that the consumer protection approach which focuses on a definable consumer group, either an externally identifiable group or a carefully constructed one, is most successful because it provides a kind of "hyper-protection," which policymakers may provide according to various criteria, it incorporates elements of a direct enforcement approach by signaling to perpetrators that the definable group is protected in this heightened manner, and it uses empowerment and education of the consumer group members as individuals).

303. *See generally id.* at 47 n.11 (2007) (suggesting that policymakers should use identifiable or constructed characteristics of consumers to offer heightened protection from fraud, and noting that one characteristic, a group's educational deficiencies, may explain why they

box could better serve a wider range of consumers if it were diversified like consumers. In this context, personalization would not require tailoring a statement's disclosure of information to more precise quantification of a consumer's debt level or how to reduce it as it does in other reform initiatives. Instead, personalized offerings should be tailored to a consumer's socio-demographic background, which could mimic generic personalized offerings but more effectively. But to do so, we must revisit the Equal Credit Opportunity Act ("ECOA"), which currently prevents such an approach.

ECOA was passed as a response to concerns that the newly expanding credit market in the 1970s did not prevent issuers and lenders from using discriminatory criteria in their decision to grant or deny credit.[304] In addition to prohibiting the use of various socio-demographic information in granting credit, ECOA required lenders to explain the specific reasons for denying credit, which placed an additional check on using prohibited criteria when making lending determinations.[305]

ECOA's goals and structure, much like the Disclosure Act, were rooted in good intentions. But, as access to credit has become easier in the decades since its enactment and as many forms of discrimination have declined, Congress has not weighed ECOA's present-day value against its informational costs. As with the Disclosure Act and its subsequent amendments, much of the original evidence for ECOA focused on individual tales of discrimination and then projected that such discrimination was widespread, harmful, and stifling groups' economic mobility.[306] Further, though ECOA's initial prohibitions were tied to concerns about gender equity in access to credit,[307] Congress soon added prohibitions against discrimination based on race, color, religion, national origin, and age.[308] The extension of a one-size-fits-all approach across a variety of socio-demographic groups, uncontroversial at the time, assumed that the credit-access barriers initially cited as a reason to focus on women applied equally to a variety of other groups and that the same solution was therefore appropriate.[309]

are targeted in the first place). Although not all problematic consumer credit experiences will be fraud, the suggestion may still be a valid way to approach general reforms.

304. S. Rep. No. 278, 93d Cong., 1st Sess. 3 (1973).

305. 15 U.S.C. § 1691 (2006).

306. S. Rep. No. 278, 93d Cong., 1st Sess. 3 (1973).

307. *Id.*

308. 15 U.S.C. § 1691 (2006).

309. S. 1927, 94th Cong., 1st Sess. (1975).

But ECOA's well-intentioned prohibition on socio-demographic data-gathering solves a problem that has substantially diminished and creates barriers for consumers who intend to rely on its provisions. First, ECOA's focus was on access to credit, not discrimination in its use, and so it still assumes a world where denial of credit is common and takes place in face-to-face transactions fraught with reliance on stereotypes and individual judgments—not computer scoring and automated replies. Second, ECOA mandated that issuers cannot collect certain socio-demographic information, which limits its power as an anti-discrimination tool. ECOA claims are difficult to prove because the burden of proof shifts to the plaintiff unless the plaintiff can provide direct evidence of discrimination, which is rare and difficult to establish. In order to prove credit-discrimination under ECOA, the plaintiff must show (1) membership in an ECOA protected class, (2) that he or she applied for and was qualified for credit, (3) that the credit application was rejected despite his or her qualifications, and (4) that the lending institution or card-issuer continued to approve credit for applicants with similar qualifications absent the group membership.[310] Because card issuers do not collect the socio-demographic information of those seeking credit (and do not consummate these transactions face-to-face), it becomes virtually impossible for those who are denied credit to gather evidence that discrimination occurred.[311] Given the changes in the credit marketplace over forty years, an absence of evidence that access to credit remains a problem across all of ECOA's protected groups, the inability of group members to sustain litigation due to data-collection restrictions, and evidence that heterogeneity of consumers exists both between and among socio-demographic groups, it is appropriate to question the ECOA's prohibitions as applied to credit card issuers. As explained below, removing those restrictions would allow issuers and regulators to experiment, data-gather, and analyze behavior—all of which would enhance market efficiency.

Socio-demographic variables substantially influence everything from a person's political psychology and cultural norms to his or her spending habits and family structure. For example, card issuers could gather language information as part of the issuing process. They could then deploy statements and disclosures in the primary

310. Rowe v. Union Planters Bank, 289 F.3d 533, 535 (8th Cir. 2003).

311. Latimore v. Citibank Fed. Savings Bank, 151 F.3d 712 (7th Cir. 2008) (where a racial discrimination in loan-making claim against Citibank failed, in part, because of the inability of the plaintiff to gather the non-existent racial-classifications of other similiarly situated applicants).

cardholder's first language, which would allow for a better understanding of the card's terms.[312] Or, if the card-issuer knew that members of certain cultural groups were more likely to engage in sub-optimal spending/payment patterns, issuers could frame disclosures with cultural references or examples to help guide the consumer to a more optimal choice. In short, they could couple any number of personalized offerings with social-science predictive data to better educate and inform consumers and increase rational decision-making—which is, after all, the primary goal of disclosure advocates.

However, the ECOA prohibits gathering and utilizing this information. As a result, it is unclear whether the "failure" of financial literacy and disclosure is rooted in their generic-man norming or other factors. To allow for policy-experimentation consistent with existing evidence, Congress should amend the ECOA to allow issuers to gather customers' socio-demographic information. Thus, researchers, regulators, and (with some caveats) issuers could use that information to produce better disclosure, better education, and better market outcomes.

D. Revisiting Financial Education And Literacy

Scholarship has proven that "consumers make systematic mistakes in their choice of credit products and in their use of these products."[313] As Bar-Gill and Warren frame it, "[t]hese observed mistakes indicate the existence of deficits in either information or rationality—or both."[314] Evaluating existing research, Bar-Gill and Warren show that consumers pick sub-optimal credit offers.[315] A renewed focus on group-based financial literacy could help right this ship. For example, scholars assessing evidence and the trajectory of scholarship since the Disclosure Act have shown that subsequent changes in disclosure regimes should both acknowledge irrationality and consider the role of information campaigns or financial education as a more substantive evidence-informed intervention.[316]

Nonetheless, financial literacy as a solution to the credit card crisis has its critics. Willis believes that "the prospects for financial education as an effective policy tool are bleak" considering "the

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312. TILA contemplates such a regime only with respect to statements and disclosures sent to Puerto Rico.

313. Bar-Gill & Warren, *supra* note 293, at 26.

314. *Id.* at 26–27.

315. *Id.* at 33.

316. *See, e.g.*, Consumer Bankruptcy in Global Perspective, *supra* note 344, at 33.

skills and biases with which most consumers currently operate."[317] The consumer financial "products available in today's marketplace are bountiful, manifold, and dynamic."[318] Further, "[e]fforts to teach consumers the meaning of APR . . . have failed spectacularly."[319] Willis critiques the proposed "solution" to consumer credit problems through disclosure, and others have since suggested that this critique is merited.[320]

In response to this critique, it may be reasonable to initially assume generic-man financial literacy models do not work. The same empirical weaknesses of the Disclosure Act's approach—namely that the education models are one-size-fits-all when a more nuanced and socio-demographically attuned approach might yield better results—could cause this failure. If it is possible, indeed likely, that a consumer-differentiated approach would yield greater efficacy, definitive proof of financial literacy's failure is unclear.

Even if broadly addressing consumer financial literacy is too costly and inefficient, taking into account the unique financial-literacy failings of distinct consumer groups is possibly a more efficient way to optimize regulatory reforms.[321] This optimization is especially true given the level of sophistication of the market and the depth and breadth of knowledge credit issuers possess about consumers based solely on their use of the credit products. Bar-Gill and Warren describe how such information "can then be categorized by demographic or geographic groups" to create "powerful prediction models for others in similar groups."[322] If ECOA permitted issuers to gather socio-demographic information, policymakers and regulators such as the CFPB could require that issuers also share that information. With this new information, issuers and regulators could analyze consumer outcome data to better tailor reforms for credit product consumers or to create innovative products unique to certain consumer credit markets.

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317. *See* Willis, *supra* note 297, at 211.

318. *Id.* at 212.

319. *Id.* at 219.

320. *See* Daniel Fernandes et al, *Financial Literacy, Financial Education and Downstream Financial Behaviors* 9–10 (2014) (forthcoming in Management Science) (reviewing prior studies through meta-analysis, conducting original studies, and concluding that there is virtually no link between financial literacy/education and consumer financial behavior).

321. *See* Willis, *supra* note 297, at 260 ("[T]hus far. . .financial-literacy education is not demonstrably effective and probably never will be an effective solution to consumer finance problems."); Bar-Gill & Warren, *supra* note 293, at 13 ("Consumers are uninformed because information is costly to acquire.").

322. Bar-Gill & Warren, *supra* note 293, at 23–24.

Bar-Gill and Warren recognize the harm that "unsafe" credit products cause consumers.[323] They conclude that substantial negative effects, including financial distress to the individual consumer as well as widespread market distortions, are not distributed evenly among consumer demographics.[324] But the causes of these distortions or how existing law and regulations exacerbate this problem are unknown because of the generic-man approach. Consumer advocates and policy makers who care about such disparate impact, with the proper data available, could build upon the research of Bar-Gill, Warren, and others using consumer-level data and analysis focusing on sub-group differences and supplemented by the careful lessons about the overall efficacy of existing disclosure models.

E. Revisiting Generic-Man Disclosures

Aside from revisiting the efficacy of directly educating consumers through targeted financial literacy, policymakers can also use existing behavioral and survey evidence to reconsider using the generic one-size-fits-all financial disclosure models. Professors Ben-Shahar and Schneider focus explicitly on the shortcomings of this approach as applied to the acquisition of credit.[325] When deciding to acquire a credit card, consumers do not receive information, read, understand, or apply it correctly to their decisions.[326] As Ben-Shahar and Schneider concluded, there is a "great paradox of the Disclosure Empire [as it] grows, so also grows the evidence that mandated disclosure repeatedly fails to accomplish its ends."[327]

Ben-Shahar and Schneider's work provides a nexus between evidence and disclosure policy and focuses on how disclosure works generally, as opposed to how it works with respect to consumer finance. As they describe, disclosure works effectively only when the mandates are clear, the problem is identified, the appropriate disclosure is used, and the disclosure is written at the appropriate level.[328] Each step is problematic.[329] The primary purpose of mandated disclosure is "to supply the information people need to make better decisions."[330] However, if "a mandated-disclosure regulation

323. *Id.* at 56–69.
324. *Id.*
325. Ben-Shahar & Schneider, *supra* note 30, at 665.
326. *Id.* at 717.
327. *Id.* at 665.
328. *Id.* at 679.
329. *Id.*
330. Ben-Shahar & Schneider, *supra* note 300, at 730.

fails to accomplish its purpose, it cannot be justified even if its cost is small."[331] One unintended cost, for example, occurs when mandated disclosures "crowd out useful information . . . . [and] reduce the attention" that consumers will give to pertinent information.[332]

Thus, if scholars and policymakers insist upon the contextual efficacy of existing credit card disclosure regimes, they should reexamine this neutral generic-man disclosure model. Applied evidence is required to fundamentally improve the modern disclosure regime, as behavioral science makes the limitations of existing disclosures clear. Ben-Shahar and Schneider argue "mandated disclosure cannot reliably improve people's decisions and thus cannot be a dependable regulatory mechanism."[333] Failing to truly understand the demand-side variable (the consumer and her behavioral psychology), "mandated disclosure not only fails to achieve its stated goal but also leads to unintended consequences that often harm the very people it intends to serve."[334] These unintended consequences suggest that a rigorous focus on specialized disclosures, unique to various sub-groups, might prove successful.[335] While such targeted solutions on their own may not implement dramatic safety reform across the credit market, the underlying goals of such specialized regulations are worth pursuing and might otherwise remain unaddressed.[336] If a large part of the inequality in this "species of contract" is consumers' lack of sophistication, Congress should try to not only enhance the sophistication of consumers but also, perhaps more importantly, the sophistication of the regulations that protect them.[337] Evidence-based policymaking can

331. *Id.*

332. *Id.* at 737.

333. *Id.* at 705.

334. *Id.*at 647.

335. This intervention also generally builds on arguments by Rachlinski and Mitchell, among others, whose focus on the intersection of policy reforms, cognitive differences, and socio-demographic variance substantially inform my approach. *See, e.g.*, Jeffrey J. Rachlinski, *Cognitive Errors, Individual Differences, and Paternalism*, 73 U. Chi. L. Rev. 207 (2006); Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 Wm. & Mary L. Rev. 1907 (2002).

336. *But see* Friedman, *supra* note 302 at 60–61 (2007) (suggesting the related but opposite conclusion with respect to consumer fraud that such targeted "group protection enhances the perpetrator's risk in targeting that group and shifts fraud activity toward the total pool of less vulnerable individuals" and concluding that "hyper-protection can enhance deterrence in the general population.").

337. Bar-Gill & Warren, supra note 293, at 7 (2008). See, also, Friedman, supra note 302 for the proposition that hyper-protecting one defined group could result in enhanced protection across the general consumer population, which a concerted effort to educate that group might achieve and make them into the "informed minority" that Bar-Gill and Warren dismiss.

successfully interact with disclosure-scholarship to help refine existing policy. As Bar-Gill and Warren explain, "the data show[s] substantial error rates for the simplest credit decisions. In the credit card area, more complex credit decisions remain untested."[338]

The solution is not merely more disclosure, nor should it be simply more information for the end-user so that he can have third parties or competing issuers analyze it. Instead, the solution can and should reexamine the role a consumer's socio-demographics can play in shaping disclosure to achieve a more optimal result—educating consumers and helping them make better choices and achieve more optimal results. If issuers can micro-target consumers with tailored disclosures that explicitly rely on and learn from both an individual's group memberships and individual habits, that disclosure is likely to produce better outcomes.

CONCLUSION: TOWARD EVIDENCE-BASED POLICY AND FUTURE REFORM

Credit card policy reform is situated in an anecdotal or empirically shaky approach to legislation. Congress could focus on consumers rather than legislating by anecdote.[339] Legislation by anecdote works when empirics are lacking because their absence creates a vacuum in which any reform seems better than none. The opposite is also true: when empirical data are available, those working towards reform can avoid legislating by anecdote given the evidence upon which to base scientific conclusions.[340] This form of evidence-based policy making has worked elsewhere, and Congress should deploy it in this context as well.

The CARD Act successfully forced issuers to change how credit cards actually work. Now Congress, regulators, or the CFPB must focus on consumers and how to more optimally educate them and change sub-optimal behavior. Revisiting the history of consumer credit card regulation leads to a few key conclusions about how to do this. First, Congress should use quantitative and qualitative research to determine the precise information to include in

338. *Id.* at 37.

339. *See* Credit Card Practices: Fees, Interest Charges, and Grace Periods: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Security and Governmental Affairs, 110th Cong. 14 (2007) (statement of Wesley Wannemacher, Consumer, Lima, Ohio).

340. *See, e.g.,* FIN. SERV. AUTH, CONSUMER RESEARCH 42, *supra* note 22; FIN. SERV. AUTH, CONSUMER RESEARCH 34, *supra* note 22; FIN. SERV. AUTH, CONSUMER RESEARCH 44, *supra* note 22; FIN. SERV. AUTH., CONSUMER RESEARCH 35, *supra* note 207.

disclosure regimes. Second, both disclosure regulation and financial education could be more effective if the needs and desires of particular populations and sub-groups are differentiated. Third, Congress should revisit ECOA's restrictions and prohibitions on the acquisition and use of customer socio-demographic information to accomplish these goals.

If more research focuses on how cardholders acquire and use cards and the way that financial literacy interacts with varied disclosure regimes, evidence can more effectively inform future credit card policy-making. Though the CFPB has gathered much empirical data and produced an array of studies in this area, the research has not yet had the policy impact many of its advocates had hoped. Some of the CFPB's evidence questions the efficacy of the CARD Act's key disclosure-centered provisions and finds that the total amount consumers pay for their credit cards is no higher, on average, than it was before the CARD Act took effect."[341] In the meantime, card issuers continue their evidence-based market reforms, as they've focused their research efforts and billion-dollar budgets on "drawing psychological and behavioral lessons from the enormous amounts of data" they collect every day.[342] They "study cardholders from every angle."[343] Card issuers run "tens of thousands of experiments each year, testing emotions elicited by various card colors and the appeal of different envelope sizes."[344] The federal government, despite the vast array of resources at its disposal, has failed to even hint at similar testing strategies, explicitly using socio-demographic data. For example, the CFPB could create a research laboratory similar to a card issuer, where it would deploy a variety of methodologies to learn how sub-groups of consumers think and for which groups certain reforms are most effective. However, the CFPB has instead focused on heightening its

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341. Leonard J. Kennedy et. al., The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century, 97 Cornell L. Rev. 1141, 1158 (2012).

342. Charles Duhigg, *What Does Your Credit-Card Company Know About You?*, N. Y. Times Mag. (May 12, 2009), at MM40, *available at* http://www.nytimes.com/2009/05/17/magazine/17credit-t.html?pagewanted=all.

343. *Id.*; Duncan A. MacDonald, *Viewpoint: Card Industry Questions Congress Needs to Ask*, American Banker at 2 (Mar. 23, 2007), https://www.americanbanker.com/issues/172_58/-306775-1.html?zkPrintable=true ("No other industry in the world knows consumers and their transaction behavior better than the bank card industry. It has turned the analysis of consumers into a science rivaling the studies of DNA or the launching of the Discovery spaceship into orbit. The mathematics of virtually everything consumers do is stored, updated, categorized, churned, scored, tested, valued, and compared from every possible angle in hundreds of the most powerful computers and by among the most creative minds anywhere. In the past 10 years alone, the transactions of 200 million Americans have been reviewed in trillions of different ways to minimize bank card risks.").

344. *Id.*

enforcement of ECOA and attempting to eliminate issuers' and lenders' use of socio-demographic information.[345]

The issuers' science-centered approach is exactly what one would expect from a consumer-smart savvy business operation seeking to maximize revenues in a changing regulatory environment. Yet Congress, throughout decades of tinkering with such laws, has taken a virtually a-scientific approach. Not only could Congress respond appropriately to the innovations of credit card issuers with more informed legislation based on rigorous empirical data, but it could also use the same types of strategies that the card companies use to maximize consumer responses.[346] Legislative efforts, including the provision of financial-literacy information, could target consumers based on their age, race, gender, income level, and other relevant variables.[347] While recognizing that consumers have different financial literacy levels, informational messages could be delivered in various formats across distinct media with content as diverse as the consumers. Card issuers clearly recognize all of these distinctions in their marketing practices, and Congress could certainly follow their lead to address the issues such practices raise.[348]

While CFPB researchers have turned initial attention toward a robust science-driven approach to analyzing and revising much of the mortgage disclosure and acquisition market, less has been done regarding credit card markets. Meanwhile, card issuers still lead the way in understanding consumer credit card psychology.[349] For example, Capital One's Card Lab is an interactive "internet site that lets customers design their own cards."[350] What most people don't realize is that "Capital One can watch as [you] navigate the site, learning more and more" about what level of value you place on different credit card agreement terms and conducting an enormous real-time, ongoing experiment."[351] This research is exactly the type of real-time evidence-informed experiment that can benefit consumers, but that the federal government has never tried to understand or replicate to improve or optimize regulatory solutions. Regardless of how many laws Congress passes or how many tweets the CFPB gets, until legislators and regulators inform their

345. *See, e.g.,* CFPB Bulletin 2013–02: Indirect Auto Lending and Compliance with Equal Credit Opportunity Act, *http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf* (last visited February 20, 2014).

346. *See* Charles Duhigg, *supra* note 342.

347. Friedman, *supra* note 302.

348. *See* Duhigg, *supra* note 342.

349. *Id.*

350. *Id.*

351. *Id.*

views with a more robust and thoughtful empirical approach, efforts to meaningfully regulate the credit card market will continue to fail.[352] It is time to think both more empirically and more theoretically about the contents of Schumer's box.

352. *The Card Game*, PBS Frontline (2010) (Statement of Shailesh Mehta, Former CEO, Providian Bank) http://www.pbs.org/wgbh/pages/frontline/creditcards/etc/synopsis.html.