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An Institutional Analysis of Consumer Law

A. B. Overby

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An Institutional Analysis of Consumer Law

*A. Brooke Overby**

ABSTRACT

This Article explores the revival of interest in consumer protection in the United States, and the impact of this revival on the consumer movement. The Author examines the influence that political organizations and institutions have upon the final shape and content of consumer law in the United States and European Union. The Article begins with a general introduction to institutional theory across academic disciplines and to the institutional environment and arrangements in which consumer lawmaking proceeds in the United States and Europe. Next, the Article assesses consumer initiatives in the United States and the European Union, focusing on deceptive advertising, unfair contract terms, consumer credit, and consumer access to justice problems. The Author's assessment illuminates the institutional factors that shape consumer protection initiatives. Finally, the Article discusses the limits of traditional United States perspectives on consumer law. The Article concludes that an institutional approach provides a better and more accurate framework for analyzing consumer issues.

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I. INTRODUCTION

The growth in the consumer economy, globalization, innovations in technology and communications, and efforts to modernize U.S. uniform commercial laws all have contributed to renewed concerns over legal regulation of consumer transactions. In the United States, this revival of interest in consumer protection seeks to build upon and perhaps to reinterpret issues raised and initially resolved decades earlier, a time during which consumer issues were at the forefront of legal attention domestically.¹ It was during the 1960s

1. See generally Ralph J. Rohner, *Multiple Sources of Consumer Law and Enforcement (Or: "Still in Search of a Uniform Policy")*, 9 GA. ST. U. L. REV. 881, 882-89 (1993) (discussing growth of consumer movement in the 1960s and consumer legislation that emerged from movement). Nonetheless, consumer protection issues and legal protection of consumers have been a source of concern throughout history. See, e.g., Paul B. Rasor, *Biblical Roots of Modern Consumer Credit Law*, 10 J. L. &

and 1970s that many of the principal consumer protection statutes were enacted.² The renewed attention to consumer protection issues suggests that the consumer movement may be undergoing a new transformation.

Many areas of legal doctrine and social policy are beginning to converge in recent debates. For U.S. lawyers and scholars, perhaps the most important development involves the Uniform Commercial Code (the UCC or the Code), which is in the final stages of a substantial revision project.³ Throughout this lengthy project, the revisions have served as the central stage on which a battle has been taking place over consumer protection issues in the areas covered by the UCC. The revisions have provoked critical analysis not only of the substance of revisions to the Code but also of its sponsors, the National Conference of Commissioners on Uniform State Laws (the NCCUSL) and the American Law Institute (the ALI).⁴ Consumer issues also have had a significant impact on the NCCUSL and ALI approval process and on the consideration of approved Official Drafts by state legislatures.⁵ Related to this development, a growing body of

RELIGION 157 (1993-94) (delineating biblical regulations affecting consumer credit); Richard J. Barber, *Government and the Consumer*, 64 MICH. L. REV. 1203, 1205-06 (1966) (presenting medieval consumer protection measures).

2. Rohner, *supra* note 1, at 884-85.

3. Over the past decade nearly every article of the UCC has undergone revision, although the status of the revisions within NCCUSL and with state legislatures differs with the article. To find the status of current NCCUSL revision projects see NCCUSL, *Introductions & Adoptions of Uniform Acts*, at <http://www.nccusl.org/uniformacts.asp>. Articles 2 and 2A, the last major articles to be revised, are currently in the midst of a lengthy and politically controversial drafting process. See *infra* note 5.

4. For sustained critiques, from a consumerist perspective, of the NCCUSL revisions to Articles 3 and 4 of the UCC see Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993) (discussing how uniform laws process can be affected by interest groups, and applying this thesis to UCC revisions); Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993) (presenting an account of political biases of drafting processes by participant in process). For more general discussions of consumer issues raised in the Code revision project see Jean Braucher, *Foreward: Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L.Q. 1 (1997) (providing current articles on Code revisions and consumer issues); Kerry Lynn Macintosh, *Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based on Business Practices?*, 38 WM. & MARY L. REV. 1465 (1997) (developing framework for determining extent of UCC involvement in consumer issues); Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707 (1998) (presenting an account of revision efforts); A. Brooke Overby, *Modeling UCC Drafting*, 29 LOY. L.A. L. REV. 645, 650-68 (1996) (discussing current perspectives on relationship between consumer protection and Code revision process).

5. Notable events in the revision process included the refusal of the NCCUSL and ALI to approve the draft revisions of Article 2 (Sales) presented at the July 1999 meeting, allegedly due to business pressures, which resulted in the resignation of the

literature employs positive political theory or economic analysis to evaluate the role of private lawmaking entities such as the NCCUSL and the ALI to assess their susceptibility to special interest group influences and to analyze the impact that such influences might have on NCCUSL and ALI products.⁶ Thus, significant questions of institutional design and legislative methodology⁷ have arisen out of the UCC experience.

The uniform laws debate raises a much broader structural issue regarding the proper allocation of governmental authority in regulating consumer transactions. While other parts of the world, such as the European Union, are moving more toward more centralized forms of government, the United States has experienced a movement away from federal regulation toward state and local government regulation.⁸ This trend is antithetical to the strongly

Reporters to the project. See generally William J. Woodward, Jr., *Private Legislation in the United States—How the Uniform Commercial Code Becomes Law*, 72 TEMP. L. REV. 451, 460 n.39 (1999) (describing events of Summer 1999 relating to Article 2 revisions). A new drafting committee thereupon was formed. Press Release, NCCUSL, ALI and NCCUSL Announce New Drafting Committee for UCC Articles 2 and 2A (Aug. 18, 1999), available at <http://www.nccusl.org/pressrel/pr-18-99.asp>. After objections to proposed Article 2B governing intangibles were raised, the ALI and NCCUSL ultimately abandoned the effort to include the Article in the UCC and the NCCUSL alone sponsored what is now the Uniform Computer Information Transactions Act (UCITA) as a separate uniform act. Bruce Kobayashi & Larry E. Ribstein, *Uniformity, Choice of Law and Software Sales*, 8 GEO. MASON L. REV. 261, 265-66 (2000) (detailing history of UCITA). To examine a web site detailing the progress of UCITA in the state legislatures see UCITA, *UCITA Online*, at <http://www.ucitaonline.com>. In the case of the 1990 revisions to Articles 3 and 4, consumer rights advocates were able to secure non-uniform amendments and, in some cases, delay enactment of revised Articles 3 and 4 after a concerted political lobbying campaign against the revisions. Overby, *supra* note 4, at 646, 646 n.8.

6. See, e.g., Edward J. Janger, *Predicting When the Uniform Laws Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998) (discussing regulatory capture theory applied to private legislatures); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996) (presenting economic analysis of NCCUSL products); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (theoretical analysis of private legislatures); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994) (discussing political influences in Article 9 revision process).

7. Cf. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* (1994) (comprehensive account of institutional choice); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394 (1996) (overview of institutional theory in law).

8. See, e.g., William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 203 (1997); Peter H. Schuck, *Introduction: Some Reflections on the Federalism Debate*, 14 YALE J. ON REG. 1 (1996). The term "devolutionary" usually refers to "federal withdrawal from a regulatory field in favor of exclusive occupation by state and local governments." Bratton & McCahery, *supra*, at 203 n.1. Devolution is not necessarily synonymous with "deregulation," although devolution does lead to deregulation at the federal level. *Id.* "Devolution" of federal power also conceivably

federalized ideology that supported much of the earlier consumer law initiatives. Moreover, somewhat paradoxically, the experience with the UCC suggests the possibility that more vigorous federal involvement in the area of consumer transactions may be warranted, if not necessary.⁹ The new consumer debate therefore will not only involve issues of private legislatures and consumer values, but will raise federalism concerns as well. Federalism concerns are not isolated solely to the UCC and its treatment of consumer issues. Even foundational issues such as the validity of electronic signatures—which recently was addressed by Congress through The Electronic Signatures in Global and National Commerce Act¹⁰—now invoke substantial questions concerning the proper roles of international, federal, and state bodies in regulating commercial transactions.¹¹

Finally, the view that consumer law is a domestic and internal matter is being called into question.¹² Consumer law has acquired an increasing transnational and international dimension as a result of economic integration and technological developments such as e-commerce. This suggests that the traditional roles played by legal organizations in consumer lawmaking perhaps ought to be questioned in light of increasing globalization. The impact of globalization on domestic U.S. contract law is often overlooked or de-emphasized. U.S. law reform efforts all too frequently proceed without serious reflection on the manner in which other jurisdictions have addressed and resolved similar issues. The new consumer debate, at least in the United States, often seems to continue the

could occur when public power is moved to private actors, through, for example, privatization. See Schuck, *supra*, at 2.

9. To the extent substantial lack of uniformity exists in areas critical to interstate commerce, the potential for federal intervention in the area increases, due to the benefits created by a uniform, or harmonized, law. Cf. Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 744-51 (1999) (identifying benefits of unification projects). Some authors have suggested that federal intervention is also warranted when a uniform laws process does not satisfactorily advance held policy goals. Edward L. Rubin, *Types of Contracts, Interventions of Law*, 45 WAYNE L. REV. 1903, 1925 (2000) (suggesting federal action when state law fails to attain an efficient result).

10. The Electronic Signatures in Global and National Commercial Act, Pub. L. No. 106-229, 114 Stat. 464 (2000).

11. Compare S. 761, 106th Cong., § 6(c) (1999) (evidencing intent not to preempt significantly consistent state law on digital signatures and validating enactment of NCCUSL uniform acts) with H.R. 1714, 106th Cong. § 102(B) (1999) (proposing alternative preemptive effect of federal digital signature law). For the final act's preemption provision, see § 102, 114 Stat. 464, *supra* note 10.

12. See, e.g., David Harland, *The United Nations Guidelines for Consumer Protection: Their Impact in the First Decade*, in CONSUMER LAW IN THE GLOBAL ECONOMY: NATIONAL AND INTERNATIONAL DIMENSIONS 1, 2-3 (Iain Ramsay ed., 1997) (discussing differing perspectives on consumer protection as internal state matter and on when international involvement is justified).

disturbing practice of avoidance, although the parochialism of the NCCUSL and ALI in the drafting of the UCC is a long-observed phenomenon.¹³ Whether consumer protection issues ultimately will become global, rather than local, matters is, of course, a debatable question. Nonetheless, the shift in emphasis from the local to the global generally in the last decade merits consideration when evaluating U.S. perspectives on consumer law.

Consumer law in the future most likely will play out on a field vastly different from that which showcased the liberal, rights-oriented consumer debate decades ago. The reassessment of the NCCUSL and the ALI, the reordering of federal and state priorities in the United States, increasing internationalization, and the potential transformation of consumer issues from matters of local concern to matters of some global import all indicate that a radical reinterpretation of consumer law may eventually emerge. In the United States, this reinterpretation will raise broad issues regarding the state uniform laws process, consumer rights, and economic justice—which provide the source for much of the argument to date—but also much more subtle questions of institutional design, organizational competence, federalism, law and technology, and the global economy.

This Article addresses these issues by examining the influence that political organizations and institutions apart from consumer values and ideology potentially have on the final shape and content of consumer law in the United States and European Union. The Article advances and employs a comparative and institutional approach toward analysis rather than a more traditional “consumer values” approach. To evaluate the impact that organizational and institutional constraints play in the creation of consumer law, the Article contrasts consumer protection issues being addressed in the emerging dual system of the European Union with similar initiatives in the United States. While the European Union’s characterization as a federal state, in a comprehensive and unitary sense, is in and of itself a provocative and much debated question beyond the scope of

13. See Peter Winship, *As the World Turns: Revisiting Rudolf Schlesinger's Study of the Uniform Commercial Code "In Light of Comparative Law"*, 29 LOY. L.A. L. REV. 1143, 1144-46, 1158-62 (1996) (discussing comparative perspectives on commercial law and raising issue of need for comparative studies of consumer legislation). To examine some recent exceptions to the general dearth of comparative approaches to domestic U.S. consumer and transactional law see Symposium, *Teaching Sales Law in a Global Context: The Reciprocal Influence of Domestic Sales Law (Article 2) on Private International Law (CISG and UNIDROIT) and Private International Law on Revised Article 2*, 72 TUL. L. REV. 1925 (1998) (presenting essays on reciprocal influences of domestic and international law); Andreas P. Reindl, *Consumer Contracts and European Community Law*, 75 WASH. U. L.Q. 627 (1997) (providing a comparative assessment).

this Article,¹⁴ the structures of the EU establish a layer of centralizing legal bodies¹⁵ that makes an analogy to the United States federal system useful. These contrasting parallel developments suggest that institutional, organizational, and social constraints apart from consumer ideology play a significant role in shaping consumer law. Thus, the traditional focus on consumer values not only inaccurately describes legislative action, but is also inadequate for guiding the future development of consumer law.

The Article begins with a general introduction to institutional theory across academic disciplines, including legal theory, and to the institutional environment and arrangements¹⁶ in which consumer lawmaking proceeds in the United States and Europe.¹⁷ The Article continues with an assessment of consumer initiatives in the United States and the European Union in the areas of deceptive advertising, unfair contract terms, consumer credit, and consumer access to justice problems.¹⁸ Such an assessment illuminates the institutional factors that act to shape consumer protection initiatives. The Article then discusses the limits of traditional U.S. perspectives on consumer law and concludes that an institutional approach provides a better and more accurate framework for analyzing consumer issues.¹⁹

14. Compare Koen Lenaerts, *Federalism: Essential Concepts in Evolution—The Case of the European Union*, 21 *FORDHAM INT'L L.J.* 746, 746-52 (1998) (describing attributes of federal state and assessing EU in that light) with Manfred Zuleeg, *What Holds a Nation Together? Cohesion and Democracy in the United States and in the European Union*, 45 *AM. J. COMP. L.* 505, 526 (1997) (rejecting conception of EU as a federal state). See generally J.H.H. WEILER, *THE CONSTITUTION OF EUROPE* (1999) (numerous essays exploring European integration and evolving visions of EC constitutional principles).

15. See *infra* text accompanying notes 69-93.

16. Because institutional theory is less well-developed in legal theory than in other scholarly areas, see *infra* text accompanying notes 43-44, use of accepted institutional terminology in legal analysis is necessarily imprecise. The term "Institutional Environment" as it would apply to legal—as opposed to economic—analysis might refer generally to "political, social, and legal ground rules" that define the context in which consumer lawmaking proceeds and that establish the basis for consumer lawmaking. Cf. OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 378 (1996) (defining "institutional environment" in New Institutional Economics as "[t]he rules of the game that define the context in which economic activity takes place. The political, social, and legal ground rules [that] establish the basis for production, exchange, and distribution."). "Institutional Arrangements," by contrast, might refer to governance structures. Cf. *id.* (defining "institutional arrangements" as "[t]he contractual relation or governance structures between economic entities that defines the way in which they cooperate and/or compete."); see also *id.* at 325-28 (distinguishing institutional environment and arrangements).

17. See *infra* Part II.

18. See *infra* Part III.

19. See *infra* Part IV.

II. INSTITUTIONS, ORGANIZATIONS, AND VALUES IN CONSUMER PROTECTION

The issue concerning why consumer transactions ought to be regulated at all, or at least treated differently from other types of contracts, provides the customary departure point for an inquiry into consumer protection issues. Under a traditional framework for analysis of consumer protection law, particular legal provisions or acts—for example, court opinions or statutes—are assessed in the context of how effectively they advance the values or goals that justified intervention in the first place. Alternative approaches can be compared or contrasted by critical evaluation of their efficacy in furthering established or held goals of consumer policy. From the prescriptive side, the traditional framework seeks to guide law reform efforts by advancing specific proposals for reform that would further such held goals. When competing or contradictory goals exist, the focus shifts to the normative and descriptive power of each goal.²⁰

This traditional framework nonetheless provides a picture of consumer law and lawmaking that is, at best, incomplete. It has two weaknesses, each of which feeds off the other. First, the predominance of consumer law values and policies as the foundation for the traditional framework often acts to exclude political processes and organizations as immaterial, or at least operates on the assumption that all lawmaking bodies are roughly equivalent. In other words, it all too frequently assumes that the source of the law is insignificant—that, for example, whether a rule originated with the courts or agencies, with state or federal legislatures, with non-legal customs, or with private legislatures is irrelevant or tangential to the inquiry. Second, the power of any traditional value-based analysis increases or decreases in direct relation to the acceptance of the evaluative theory by the community. That is, when a strong consensus exists within the legal community as to the particular goals supporting regulation, the strength of the evaluation obviously increases. For example, if substantial agreement exists that accommodating informational imbalances between consumers and businesses ought to be the goal of legal intervention, a provision's failure or success in furthering that goal becomes much more authoritative than in cases in which divergent views on proper social policy uncomfortably coexist. Where such divergences exist, coupled with the disjunction that often exists between values and institutional processes and organizations, the traditional perspective's weaknesses become enhanced because it provides

20. See KOMESAR, *supra* note 7, at 4.

limited guidance for accommodating deeply divergent views across a multiplicity of organizations and their underlying environments.

As will be addressed in this section, legal processes and organizations matter profoundly and in a manner that the traditional perspective frequently fails to recognize. It also will be argued that the assumption of wide acceptance of the social goals of consumer protection is tenuous. The section begins with a discussion of an emerging institutional approach toward evaluating law and lawmakers, an approach that connects values with institutions and organizations and that provides an alternative to traditional methodologies.²¹ The section continues with a detailed discussion of the formal political organizations²² involved in consumer lawmaking and constraining principles²³ under which those organizations act.

A. *An Institutional Perspective on Consumer Law*

As with most areas of law, there is no widely held consensus on the underlying basis for regulating consumer transactions or on the goals of consumer law. The primary theoretical rationales usually advanced for consumer protection legislation might fall into three general categories: (1) policing for market failures or, in a related vein, creating efficient markets for consumer goods and services; (2) advancing ethical goals; or (3) paternalist protection of the consumer.²⁴ A market failure rationale for consumer protection relies upon the belief that government should only intervene in otherwise private transactions when a market failure exists and when the benefits of legal intervention exceed the costs.²⁵ Efficiency itself might be viewed as the goal of consumer law.²⁶ Ethical

21. See *infra* Part II.A.

22. See *infra* Part II.B.

23. See *infra* Part II.C.

24. IAIN RAMSAY, CONSUMER PROTECTION 34 (1989).

25. See, e.g., GERAINT HOWELLS & THOMAS WILHELMSSON, EC CONSUMER LAW (1997) (describing market failure as principal aim of EC consumer protection law). Market failures, however, must be "curable" from a cost perspective to justify interventionist legislation. As Iain Ramsay states:

A potential market failure occurs when there is a failure of one of the conditions for the optimal operation of a competitive market. This provides a necessary but not sufficient reason for government intervention. It is not sufficient because it is necessary to estimate the effect of the failure on the price, quality and quantity of the goods or services provided in the market and to identify the costs of remedying the failure. Government intervention is not costless and an estimate must be made of the costs and benefits of intervention and the potential impact of a remedy on the market and the behaviour of those affected.

RAMSAY, *supra* note 24, at 36.

26. Cf. Robert E. Scott, *The Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies*, in THE

rationales for consumer protection law look to theories of justice to support intervening into consumer transactions.²⁷ In this vein, a reason for intervening on ethical grounds might be one of distributive justice, a desire to transfer wealth from wealthy corporate sellers to less wealthy consumer buyers. Distributive justice goals most frequently are invoked when transactions involving poorer consumers are at issue.²⁸ Shared community values also might provide an ethical justification for regulating consumer contracts,²⁹ as might, alternatively, norms such as preserving individual autonomy, dignity, or respect.³⁰ Norms such as individual liberty and autonomy underlie rules couched in terms of “freedom of contract” and are raised to support non-intervention in consumer contracts. Finally, a paternalist basis for intervention suggests that a consumer’s individual preferences to some degree ought to be overruled by government judgment on the matter.³¹ For many, this rationale has strongly negative connotations that make paternalist justifications for intervention unacceptable within the dominant Western liberal tradition.³² This is most particularly so because, in overruling a

JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 149, 150 (Jody S. Kraus & Steven D. Walt eds., 2000) (making claim that primary role of the state in “uniformly enforcing commercial contracts is to regulate incomplete contracts efficiently”); *cf. also* Introduction, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 1 (asserting that “[e]fficiency is the dominant theoretical paradigm in contemporary corporate and commercial law scholarship”).

27. See, e.g., Thomas Wilhelmsson, *Consumer Law and Social Justice*, in CONSUMER LAW IN THE GLOBAL ECONOMY, *supra* note 12, at 217, 218-19 (discussing relationship between consumer law and theories of corrective and distributive justice).

28. See *id.* at 225-28 (discussing redistributive impact of consumer law on disadvantaged consumers).

29. See, e.g., Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463 (1994) (advancing communitarian theory for interpretation and enforcement of Community Reinvestment Act).

30. See generally RAMSAY, *supra* note 24, at 47-54.

31. *Id.* at 54. The proper definition of the term “paternalism,” and determining the scope of legally acceptable paternalist intervention, is the matter of great debate. See, e.g., Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) (discussing paternalist intervention); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983) (discussing types of paternalist regulation and their philosophical derivation). Professor Anthony Kronman, for example, suggests that paternalist rules are those “that prohibit[] an action on the ground that it would be contrary to the actor’s own welfare. . . .” *Id.* at 763.

32. See, e.g., Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349, 381-94 (1988) (exploring “extreme discomfort” felt by others with paternalist intervention and with Professor Kronman and Kennedy’s perspectives on paternalism); Richard W. Garnett, *Why Informed Consent? Human Experimentation and the Ethics of Autonomy*, 36 CATH. LAW. 455, 491 (1996) (discussing history of hostility to paternalist intervention).

consumer's personal appraisal of a desired course of action, paternalism poses a threat to individual liberty.³³

Given these differing, and sometimes conflicting, justifications for consumer protection law, lawmaking bodies might demonstrate widely disparate approaches toward particular substantive consumer issues based solely upon the held ideology. For example, one legislative body might view intervention in consumer contracts as justifiable only where an identified and effectively curable market failure exists. A government with a more communitarian agenda might, by contrast, lean toward advancing communitarian goals through intervention. Even if some agreement on the underlying basis for intervention is present, that fact alone would not eliminate the possibility of non-uniform legal approaches to any specific consumer matter. Broad standards and values such as "efficiency," "equality," or "community" might in themselves suggest more than one legislative or judicial approach to the same issue. Consumer law's imperfection, therefore, stems first from the broad array of ideological premises on which it is based. The existence of a great number of formal and informal legal organizations involved in regulating consumer transactions heightens uncertainty.

Such uncertainties suggest that an institutional framework for analysis of consumer protection issues might provide a viable and much more concise alternative to the traditional values-based approach. Institutional theory is most developed in the area of economics, in which two schools, New Institutional Economics (NIE) and Old Institutional Economics (OIE), have generated extensive scholarship in the area.³⁴ One of its most prominent articulations can be found in the work of NIE theorist Douglass North, whose work on the evolution of institutions serves as an offshoot of neoclassical economic theory.³⁵ Although NIE perhaps lacks a well-defined or

33. See, e.g., Kronman, *supra* note 31, at 764-65 (discussing moral concerns arising from paternalist laws); Braucher, *supra* note 32, at 392 (raising liberal fears of "ad hoc" paternalism); Garnett, *supra* note 32, at 491 (raising "our culture's dedication to the force of consent. . ."). Professor Eyal Zamir recently has argued that paternalistic legislation is not necessarily incompatible with efficiency goals, and thus the two are not in some cases inconsistent bases for evaluating legislation. Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 230 (1998). Zamir suggests that paternalistic rules that overrule individual consent in some cases may also be efficient. *Id.* at 284-85.

34. See generally MALCOLM RUTHERFORD, INSTITUTIONS IN ECONOMICS: THE OLD AND NEW INSTITUTIONALISM (1994) (comparing NIE and OIE).

35. See, e.g., DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) (developing theory of institutional change); WILLIAMSON, *supra* note 16 (NIE analysis of economic organization); see also OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 1-14 (1985) (tracing development of institutional approach in economics scholarship). Even within NIE, substantial differences and distinctions exist among NIE theorists. See generally

unified agenda and is comprised of many sub-disciplines,³⁶ the basic focus of an institutional approach is on institutions—the rules of the game, in that they are “humanly devised constraints that shape human interaction.”³⁷ As developed by North in the context of the evolution and development of institutions, a spectrum of political, economic, social, and educational organizations exists in any society that may, among other roles, influence the evolution of formal and informal institutions.³⁸ North begins by recognizing the reality that “[e]conomic (and political) models are specific to particular constellations of institutional constraints that vary radically both through time and cross sectionally in different economies.”³⁹ In addition, an institutional perspective in transaction cost economics attempts to explore the impact that bounded rationality and imperfect information have on human behavior,⁴⁰ recognizing also that ideas and ideology may impact human behavior.⁴¹ Finally, any modeling of the political or economic process must incorporate the institutions—or, from above, the rules of the game—invoked by that process in a way frequently absent from mainstream economic modeling.⁴² According to NIE proponents, acceptance of these tenets acts to invigorate otherwise static neoclassical economic theory by incorporating incomplete information and social and human realities into economic modeling and analysis.

While institutional analysis has made substantial inroads in other academic disciplines in addition to economics,⁴³ the full

RUTHERFORD, *supra* note 34 (detailing NIE perspectives in areas such as formalism, individualism, rationality, evolution, and efficiency).

36. RUTHERFORD, *supra* note 34, at 2-3 (placing public choice, game theory, transaction cost economics, and numerous other areas in NIE).

37. NORTH, *supra* note 35, at 3.

38. *Id.* at 4-5 (distinguishing institutions—rules—and organizations—players).

39. *Id.* at 110.

40. *Id.* at 111; *see also* WILLIAMSON, *THE MECHANISMS OF GOVERNMENT*, *supra* note 16, at 4-10 (outlining basic analytic assumptions of transaction cost economics and distinguishing those assumptions from tenets of orthodox analysis).

41. NORTH, *supra* note 35, at 111. North’s views regarding ideology are not universally held across NIE. RUTHERFORD, *supra* note 34, at 45-46 (presenting both North’s perspective on role of ideology in institutional development and contrary views).

42. NORTH, *supra* note 35, at 112.

43. Rubin, *supra* note 7, at 1413-38 (tracing in detail the development of institutional analysis in economics and continental social theory and advancing methodology for legal analysis); *see also* Robert E. Goodin, *Institutions and Their Design*, in *THE THEORY OF INSTITUTIONAL DESIGN* 1, 2-19 (Robert E. Goodin ed., 1996) (discussing current literature regarding institutional design in history, sociology, economics, political science, and social theory). Professor Goodin advances several complementary propositions that, he argues, apply to the new institutionalism across academic disciplines, although the application occurs in varying degrees. *Id.* at 19-20. For example, institutional theory commonly holds that individuals and groups pursue projects within a collectively constrained context. *Id.* at 19. “Those constraints take

parameters of a mature and highly developed institutional methodology for law are still largely unexplored.⁴⁴ Two major themes on institutional legal analysis have emerged from the legal literature to date. As an innovative perspective on legal analysis, institutional legal theory might start with the proposition that it is often impossible to separate the goals of law from the critical evaluation of the institutions that are selected to accomplish those goals.⁴⁵ This also suggests, however, as an initial matter, that the substance and form of law cannot be viewed apart from the political or economic organizations or actors that generate the law in question, whether courts, legislatures, agencies, or markets. In legal analysis, "[e]mbedded in every law and public policy analysis that ostensibly depends solely on goal choice is the judgment, often unarticulated, that the goal in question is best carried out by a particular institution."⁴⁶ The decision of who, or what, decides is an institutional choice, which "reflects the reality that the decision of who decides is really a decision of *what* decides."⁴⁷ It is therefore impossible, posits institutional legal theory, to separate goal choice from institutional—rule—choice or organizational—lawmaker—choice in the rigid manner that the traditional normative framework so often presupposes.⁴⁸ Given that the institution or organization chosen to advance a goal will impact the manner in which the goal ultimately might shape public policy, institutional and organizational choices must be evaluated against the goal to be attained and are essential, rather than tangential, components of legal analysis.⁴⁹

An institutional approach toward legal analysis recognizes, first, that the issue of whether any specific legal provision or act

the form of institutions—organized patterns of socially constructed norms and roles. . .," which impact both institutional actors and social life as well. *Id.* at 19-20.

44. Developed articulations of an institutional methodology for legal analysis, which vary significantly as to focus and underlying approaches, include KOMESAR, *supra* note 7; PETER MORTON, *AN INSTITUTIONAL THEORY OF LAW* (1998); Rubin, *supra* note 7; *cf. also* Kenneth W. Abbott, Commentaries on Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus in Retrospect and Prospect*, 25 *YALE J. INT'L LAW* 273, 273-76 (2000) (collecting articles and discussing impact of institutional and regime theory in international law and international relations).

45. KOMESAR, *supra* note 7, at 5.

46. *Id.*

47. *Id.* at 3.

48. *Id.* at 5.

49. *Id.*

Goal choice and institutional choice are both essential for law and public policy. They are inextricably related. On the one hand, institutional performance and, therefore, institutional choice can not be assessed except against the benchmark of some social goal or set of goals. On the other, because in the abstract any goal can be consistent with a wide range of public policies, the decision as to who decides determines how a goal shapes public policy.

Id.

successfully accomplishes a particular held policy goal or value is actually a radically incomplete picture of a much deeper question. Rather, goals and values are advanced through legal rules and, perhaps more importantly, by way of the actions of formal and informal organizations that operate within their own peculiar constraints and within the background rules that establish their institutional environments.⁵⁰ Any truly comprehensive analysis of law requires consideration of the underlying institutional arrangements and environment in a way that traditional legal perspectives frequently overlook, if not completely ignore.

From a prescriptive, law reform perspective, under an institutional framework, the social policy aims of consumer law must be balanced with the question of institutional and organizational choice—for example, by considering whether a goal is better accomplished through a particular type of rule and through a particular mechanism, such as markets, state legislatures, federal legislatures, and so forth. An institutional perspective in this way moves beyond the sole emphasis on consumer values towards a much richer framework that addresses the question of the interrelationship between values, the structure, design, or use of existing or new legal institutions—rules—that advance the underlying values, and the formal and informal organizations through which those institutions emerge. By making this transition, institutional legal theory shifts attention from policy norms or ethical values alone to a focus on the complex relations between legal rules, the players involved, the institutional environment, and norms and values.

Institutional theory's second theme provides important limits to the descriptive power of traditional norm-based legal analysis. Somewhat akin to the relation between neoclassical economics and NIE, an institutional model of legal analysis reflects a move away from a formally rational legal system that creates and applies universal rules.⁵¹ While social policy, ethical norms, or consumer ideology certainly continue to be relevant factors in evaluating consumer law, other factors such as the governance structure in which legal decisions are made must also be taken into account. Thus, normative values are somewhat reduced in weight and recognized as necessarily an incomplete representation of law.⁵² An

50. For rough working definitions of "Institutional Environment" and "Institutional Arrangement" as used in this Article, see *supra* note 16.

51. Cf. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 240 (1983). As defined by Teubner, "[a] formal rational legal system creates and applies a body of universal rules, and formal rational law relies on a body of legal professionals who employ peculiarly legal reasoning to resolve specific conflicts." *Id.*

52. Cf. 3 THIERRY BOURGOIGNIE & DAVID TRUBEK, *CONSUMER LAW, COMMON MARKETS AND FEDERALISM IN EUROPE AND THE UNITED STATES* vii (1987) (indicating "an analysis of the normative content of legal rules and policies—while still central—

institutional perspective on the lawmaking process begins from no fixed position.⁵³ The perspective would not choose between efficiency and social justice, for example, but might use, as one institutional theorist has suggested, "the methodologies derived from both approaches to explore the development of a common metric by which efficiency and social justice could be compared, balanced, and traded off in real institutional settings."⁵⁴

By moving away from modern views of law based on formal rationality and static universal norms into a post-modern regime for evaluating law and legal acts based on particulars and concepts of fit, an institutional legal perspective brings with it two consequences. With respect to law reform proposals, it demands that political and legal organizations and structures receive consideration along with the traditional legal emphasis on social policy goals or ethical norms, as discussed above.⁵⁵ As a by-product of this stance, in evaluating products of legal organizations, institutional theory de-emphasizes formal evaluative criteria in favor of a much more open-ended and flexible inquiry into the relations and fit among institutions, organizations, and values.⁵⁶ This approach to evaluation of legal systems and their products presents a more completely post-modern theory of law, with an "emphasis on the particular and [a] . . . corresponding distrust of generalizations."⁵⁷ General theories are not necessarily to be avoided, but "rather, the point is that discourses based on different normative premises are most likely to converge when they address specific issues. Within a given culture, the empirical grounding that specificity provides will tend to generate areas of common understanding and communication, if not complete substantive agreement."⁵⁸

The area of consumer law—with its disputed ideological bases and broad array of lawmaking bodies—provides a rich area for application of institutional theory. Addressing any consumer protection issue under an institutional framework, however, becomes a much more complex task. Even the very basic question of whether a person ought to qualify as a "consumer" to be protected by a statute could conceivably invoke subtle, but in fact enormously complex, balancing issues. For example, under the U.K.'s Fair Trading Act 1973, "consumers" protected by the statute are persons who are supplied or seek to supply goods or services in the course of business

can give only a partial picture of the function and shortcomings of law in its societal context.").

53. Rubin, *supra* note 7, at 1429.

54. *Id.* at 1430.

55. *Id.* at 1429-33.

56. *Id.* at 1430.

57. *Id.* at 1425.

58. *Id.*

of the supplier, but who do not receive goods or services in the course of a business.⁵⁹ Attention to inequality of bargaining power, a concern evoking ethical and market failure issues, is reflected in such a definition by contrasting the experience of the enterprise seller with the inexperience of the individual person buyer. Yet, by way of contrast, other legislative approaches expand the definition of "consumer" to encompass persons engaged in transactions of a personal nature, without regard for the status of the supplier.⁶⁰ This approach reflects less of a concern for the unequal status of the parties and focuses more on the inexperience of the buyer, perhaps incorporating more paternalist notions into the concept of the legally protected "consumer."

Thus, even with regard to this very primary definitional issue of what in fact a legally protected "consumer" is, ambiguity may arise from disparate views on the underlying theoretical goals of consumer law. The issue can be framed in terms of regulating an unequal relationship between business enterprises and individuals in an era of mass-market consumption or as one of protecting persons involved in personal transactions. A traditional perspective would leave it at that. While acknowledging that widely varying policy goals and values are an important component of any legal inquiry, an institutional legal framework also moves on to demand that institutional choice, organizational dynamics, and structural and cultural values that provide an equally important part of the institutional environment of law be considered along with social policy goals and values. Under an institutional perspective, in the

59. Fair Trading Act, 1973, c. 41, § 137(2) (U.K.). The Fair Trading Act defines a 'consumer' as: any person who is either—

(a) a person to whom goods are or are sought to be supplied (whether by way of sale or otherwise) in the course of a business carried on by the person supplying or seeking to supply them, or

(b) a person for whom services are or are sought to be supplied in the course of a business carried on by the person supplying or seeking to supply them,

and who does not receive or seek to receive the goods or services in the course of a business carried on by him.

Id.

60. See, e.g., UNIF. CONSUMER SALES PRACTICES ACT § 2(1), 7A U.L.A. 210 (1970), which provides as follows:

"[C]onsumer transaction" means a sale, lease, assignment, award by chance, or other disposition of an item of goods, a service, or an intangible [except securities] to an individual for purposes that are primarily personal, family, or household, or that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged, or a solicitation by a supplier with respect to any of these dispositions.

Id.

examples given above, it would not be considered inconsequential that the former definition emerged from a national legislature now part of a broader economic union or that the latter was proposed by a private legislature involved in U.S. state law reform efforts. Consideration of these actual lawmaking bodies and the institutional constraints that guide their deliberations and actions, along with consumer values, provides a complex subtext to the analysis.

Traditional legal approaches and institutional legal approaches in this way provide competing frameworks for evaluating consumer protection law. As suggested above, an institutional framework requires a deeper analysis of the actual political organizations involved in lawmaking than the traditional perspective. The focus of this Article is on the factors apart from values in the United States and European Union that may act to impact consumer protection issues and the final form of consumer protection law. Thus, to provide a more comprehensive foundation for an institutional analysis of consumer law in those jurisdictions, the remainder of this section first outlines briefly the formal organizations involved in consumer lawmaking.⁶¹ A discussion of the institutions that constrain and guide the activities of those organizations follows.⁶²

B. *Political Organizations*

Consumer law emerges from a variety of lawmaking bodies. In the United States, for example, legislation is the task of either the federal government or state and local governments. Federal legislation has the obvious benefits of national uniformity, while state law, by contrast, can vary widely from state to state. To reduce interstate lack of uniformity, private legislatures such as the NCCUSL may propose uniform laws and model acts to state legislatures. The ALI Restatements of Law also seek to synthesize and modernize state law. The most successful NCCUSL and ALI project is perhaps the Uniform Commercial Code (UCC). The UCC's success in the state legislatures, however, is quite unique among NCCUSL products—many other NCCUSL uniform laws, particularly those in the consumer law area, have not been widely accepted by the states.⁶³

The bodies responsible for enforcing U.S. consumer law change depending on the law being enforced. Courts can enforce statutory rights created by state or federal legislatures. Agencies also are key players in enforcing consumer rights. For example, the FTC plays a

61. See *infra* text accompanying notes 63-93.

62. See *infra* text accompanying notes 94-105.

63. See Ribstein & Kobayashi, *supra* note 6, at 134-35, 135 fig. 1 (adoption history of NCCUSL uniform laws).

substantial role in enforcing federal laws that proscribe unfair and deceptive acts and practices, an issue discussed later in this Article in the context of deceptive advertising.⁶⁴ State agencies enforce state laws that also prohibit unfair or deceptive trade practices.⁶⁵ A more recent legislative technique has been the encouragement of parallel federal and state enforcement of federal consumer law.⁶⁶ Regulation of consumer transactions at the judicial level may begin with application of the common law. For example, Article 2 of the UCC does not apply to services contracts.⁶⁷ Via the UCC or common law, courts enforce the obligation of good faith and fair dealing and the doctrine of unconscionability, both of which frequently act to protect consumers.⁶⁸ Common law actions such as those based on deception or misrepresentation are within the ambit of judge-made law. Alternatively, areas may be covered by state legislation such as the UCC or state consumer statutes that give rise to statutory claims. As interpreters of consumer and commercial statutes, courts can play a simple, but significant, role.

Similarly diverse organizations and institutions exist in the European Union (EU). Consumer law in the EU stems generally from two sources, the first, and primary, being Member State law.⁶⁹ Reference to the governmental structures of the individual Member State will determine what constitutes Member State law.⁷⁰ Thus, in a common law jurisdiction such as the United Kingdom, the Member State law is comprised of both the common law and statutory law of the United Kingdom and emerges from the unique lawmaking organizations of that state.⁷¹ Because the European Union is also

64. See *infra* text accompanying notes 121-35.

65. See, e.g., UCSPA §§ 5-9 (procedure for state agency investigation powers and enforcement of deceptive practice statute); see also *infra* notes 130-35 and accompanying text (discussion of state anti-deception legislation).

66. E.g., Credit Repair Organizations Act § 410, 15 U.S.C. § 1679h (2000); Telemarketing and Consumer Fraud and Abuse Prevention Act § 4, 15 U.S.C. § 6103 (2000).

67. UCC § 2-102 (1995) (scope of application).

68. See *infra* text accompanying notes 163-67.

69. See Reindl, *supra* note 13, at 628-35 (describing Member State involvement in consumer protection).

70. An index of current Member States, with brief descriptions of those states' political systems, can be found at http://www.europa.eu.int/abc/eu_members/index_en.htm.

71. As the following quotation sets out in greater detail,

Under the Common Law, the principles of contract and the tort of negligence have been applied to protect consumers, particularly in respect of the sale of goods and the supply of services. Effective protection under the law of contract, however, is considerably limited by the rules of privity, under which a person must be a party to a contract to acquire rights or obligations under it . . .

There are considerable difficulties in establishing negligence and a claim for damages is limited in that damages for pure economic loss may not be recoverable at all. Common Law remedies have gradually been overtaken by

comprised of a significant number of civil law jurisdictions, from a national perspective Member State law differs not only as to substance, but also with respect to fundamental epistemological and ontological issues devolving from the civil versus common law traditions.⁷²

Community law is the second source for legal protection of consumers in the EU and has the potential for becoming the key means by which a comprehensive consumer policy will be established throughout Europe.⁷³ The emerging importance of Community law brings with it significant political and jurisprudential issues as the focus of European Union consumer policy moves away from the individual Member States to the European Community at large.⁷⁴ Such a shift in perspective not only brings with it the issues of transnational—Member State—relations and supranational—local versus central—concerns, but also introduces a new set of institutions and actors into the framework.⁷⁵ The first general area of consumer

increasing consumer protection legislation, including the Misrepresentation Act 1967, the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982, and the Consumer Protection Act 1987.

European Community law has had an increasing influence on United Kingdom law. The European Communities Act 1972 applied existing directly applicable or effective Union law to the United Kingdom and provides for Community Regulations and Directives to be incorporated into United Kingdom law. Regulations are directly applicable in Member States and, therefore, they do not need national legislation to give them effect. Directives are not directly applicable, and they do require a Member State to alter its law. Directives are the most important source of Community law in the United Kingdom, and these are incorporated into the domestic law by statute or statutory instrument.

Lynn West & Norton Rose, *United Kingdom*, in 2 INTERNATIONAL CONSUMER PROTECTION UK-I-1 (Dennis Campbell ed., 1995).

72. See, e.g., HOWELLS & WILHELMSSON, *supra* note 25, at 19-25. For example, the connection between law and legal culture results in national perspectives that are inextricably linked to local culture. See *id.* at 20-21. Arguably, the differing perspectives that the common and civil lawyer bring to bear concerning law, interpretation, legal systems and legal institutions, and organizations render superficial comparisons between Member States more difficult, if not perhaps impossible. Cf. *id.* at 22-24.

73. Reindl, *supra* note 13, at 635-36 (advocating need for Community involvement).

74. See *infra* text accompanying notes 99-116 (discussing dynamics of centralization).

75. The principal political bodies in the European Union are the Court of Justice, the European Parliament, the Council, and the Commission. To examine a full description of EU Institutions and their role see *Institutions of the European Union*, at <http://www.europa.eu.int/inst-en.htm>; see also Lenaerts, *supra* note 14, at 752-75 (discussing comprehensively the composition of and decision-making procedures for EU bodies). The 1992 Treaty on European Union (TEU), which amended the 1957 EEC Treaty (the Treaty of Rome) establishing the former European Economic Community (EEC), was the most significant step toward a unified Europe and renamed the EEC the European Community (EC). The Treaty of Amsterdam, effective as of May 1, 1999, amended the TEU, among other things, and represents the most recent articulation of

protection law in the EU falls into the classification of “negative consumer law.”⁷⁶ Negative law devolves from Community action under what is now Article 28 of the Treaty of Amsterdam,⁷⁷ which provides that “[q]uantitative restrictions on imports and all measures having equivalent effect shall[, without prejudice to the following provisions,] be prohibited between Member States.”⁷⁸ Article 29 contains a similar provision for exports.⁷⁹ The provisions in Articles 28 and 29, however, do not prevent Member States from implementing prohibitions or restrictions that are justified on a number of non-market public policy grounds.⁸⁰ In a series of cases over the years, the European Court of Justice has found Member State consumer-related law impacting imports and exports across the EU to be either compatible or incompatible with these treaty provisions—or their predecessors.⁸¹ By means of this still developing jurisprudence on the free movement of goods, the ECJ has emerged as a principal player in consumer protection across the EU.

principles of Community integration. To read discussions of the numerous treaties, and the treaties themselves, see *European Treaties*, at http://www.europa.eu.int/abc/treaties_en.htm.

76. GERAINT G. HOWELLS & STEPHEN WEATHERILL, CONSUMER PROTECTION LAW 85 (1995) (using phrases “negative” and “positive” law in consumer protection area); Reindl, *supra* note 13, at 635 (same).

77. “Treaty of Amsterdam” refers to the recently effective amended TEU, with the latter modifying the EEC Treaty. See TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES and CERTIFIED RELATED ACTS, Oct. 2, 1997, O.J. (340) 1 (1977) [hereinafter TREATY OF AMSTERDAM]; see also *supra* note 75.

78. TREATY OF AMSTERDAM art. 28.

79. *Id.* art. 29.

80. *Id.* art. 30. Article 30 provides that:

[t]he provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protections of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Id. Although consumer protection measures do not fall within the scope of Article 30, the ECJ has found that they constitute a “mandatory requirement” under the *Cassis de Dijon* formula, thus allowing such measures when justified, necessary, and proportional. See Reindl, *supra* note 13, at 630-32 (discussing the *Cassis de Dijon* test and related case law).

81. See Reindl, *supra* note 13, at 629-32 (collecting ECJ rulings on free movement provisions); see also Laurence W. Gormley, *Two Years After Keck*, 19 FORDHAM INT’L L.J. 866 (1996) (discussing application of, and changing ECJ attitudes toward, what is presently Article 28 of the Treaty of Amsterdam). A watershed ECJ decision in 1993 interpreting present Article 28 significantly limited earlier case law when it concluded that neutral Member State regulation of marketing or selling arrangements fell outside of Article 28’s proscriptions. See *Keck & Mithouard*, [1993] ECR I-6097 (Joined Cases C-267/91 & C-268/91) (interpreting prior Article 30).

Until Maastricht and the Treaty on European Union (TEU),⁸² however, no direct treaty language expressly allowed the creation of a Community-wide consumer policy,⁸³ although the lack of any express authorization did not by any means prevent a proactive Community stance toward consumer protection issues. Under Article 100 of the Treaty of Rome,⁸⁴ the Council had authority to pursue harmonization legislation in consumer transactions by providing as follows:

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.⁸⁵

Article 100a, added in 1987, gave similar power for the functioning of the internal market and allowed qualified majority voting in areas of Council competence.⁸⁶ Many of the Directives⁸⁷ discussed later in this Article were issued through the Council's Article 100 and Article 100a power.

In spite of the limited express authority initially given to EU bodies to regulate affirmatively in the area of consumer protection at the supranational level, consumer protection matters as a general policy concern have been a focus of EU-wide attention for many years. To a great extent the position taken is one that, at least by the rhetoric, consistently favors the consumer. Beyond harmonization legislation authorized by Articles 100 and 100a, the agenda for an aggressive stance favoring the consumer was set by a 1975 Council Resolution concerning the rights of consumers.⁸⁸ The resolution articulated five basic consumer rights: (1) the right to protection of health and safety; (2) the right to protection of economic interests; (3)

82. See *supra* note 75.

83. HOWELLS & WEATHERILL, *supra* note 76, at 95; HOWELLS & WILHELMSSON, *supra* note 25, at 6-7.

84. See *supra* note 75.

85. EEC Treaty art. 100.

86. EEC Treaty art. 100a; see also HOWELLS & WEATHERILL, *supra* note 76, at 83, 97.

87. Directives, in and of themselves, have no immediate legal force in Member States. See TREATY OF AMSTERDAM art. 249 (stating effect of regulations, directives, decisions, recommendations, and opinions). Rather, Member States are obligated by treaty to implement the published directive into their national law. *Id.*; see also Reindl, *supra* note 13, at 646-51 (discussing Directives and supporting ECJ case law). Unimplemented directives—those not transposed into national law—have no effect in suits between individuals, but may result in Member State liability for damages to an individual for the state's failure to act. *Id.* at 647-48; see also Faccini Dori v. Recreb Srl [1995] All ER (EC) 1 (1994) (Case C-91/92) (discussing effect of unimplemented directives).

88. Council Resolution of 14 April 1975, OJ 1975 C92/1; see also Reindl, *supra* note 13, at 637 (describing agenda set by 1975 resolution and subsequent action plans).

the right of redress; (4) the right of information and education; and (5) the right of representation—the right to be heard.⁸⁹ Programs of Community-wide activities building from these basic consumer rights followed in subsequent years.⁹⁰ Thus, prior to 1992, actions at the Community-wide level were largely directed toward internal market concerns, but within the larger context of a maturing conversation concerning consumer rights and protection in the Community at large.

In 1992, the TEU seemed to expand the express authority of EU political bodies to create Community-wide consumer protection measures that were not based upon Article 100 and 100a harmonization authority.⁹¹ Community institutions' powers to regulate in consumer areas were, arguably, expanded even further in 1999 under the Treaty of Amsterdam.⁹² These provisions have left an

89. See Council Resolution of 14 April 1975, OJ 1975 C92/1, ¶ 3.

90. See HOWELLS & WILHELMSSON, *supra* note 25, at 9-13 (discussing initiatives following 1975 Resolution); see also Jules Stuyck, *European Consumer Law After the Treaty of Amsterdam: Consumer Policy In or Beyond the Internal Market*, 37 COMMON MKT. L. REV. 367, 377-79 (2000).

91. Article 129a of the TEU provided:

1. The Community shall contribute to the attainment of a high level of consumer protection through:

(a) measures adopted pursuant to Article 100a in the context of the completion of the internal market;

(b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.

2. The Council, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, shall adopt the specific action referred to in paragraph 1(b).

3. Action adopted pursuant to paragraph 2 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

TEU art. 129a. In addition, the TEU contained a new chapter on consumer protection—Chapter XI of the EC Treaty—and expressly mentioned strengthening consumer protection as a Community activity in Article 3, arguably expanding Community powers. Stuyck, *supra* note 90, at 379-82; see also Reindl, *supra* note 13, at 641 (discussing debate concerning legal significance of TEU Art. 129a).

92. See Economic and Social Committee, Opinion on the 'Consumer policy action plan 1999-2001', 1999 O.J. (C 209) 1, 2.2 ("[t]he Amsterdam Treaty expanded the scope for an effective consumer policy.") (citing TREATY OF AMSTERDAM art. 153); Stuyck, *supra* note 90, at 382-88 (discussing possible impact of Treaty of Amsterdam on EU consumer issues). Much of the controversy revolves around Article 153 of the Treaty of Amsterdam, revising Article 129a of the TEU. For example, Article 153 provides in part:

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the

open and provocative question regarding the appropriate boundaries between, on the one hand, Member State institutions and local policies toward consumer protection and, on the other hand, EU institutions and Community policy. The progression from the 1975 Council Resolution to the Treaty of Amsterdam evidences an increasing centralization of consumer policymaking at the Community level, if only in theory. The TEU's shifting of Community priorities in consumer protection from regulation of the internal market alone to the establishment of an independent Community consumer policy and subsequent developments in the Treaty of Amsterdam provide a textual basis for the exercise of such powers.⁹³ The growing strength of Community political bodies suggests that a reorientation of issues from the national to the supranational arenas may be occurring, although increasing centralization should not be viewed as a surprising by-product of the emergence of centralizing organizations and institutions.

Whether in the United States or in the European Union, the relations between formal organizations and those organizations' respective spheres of jurisdiction and competence add another dimension to legal action. Moderating principles exist that will constrain and delimit formal activity in consumer areas. The next section addresses those principles.

C. Constraining Principles

In the United States, constitutional and political constraints act to balance consumer legislation among the domestic institutions mentioned in the previous section. For example, with respect to commercial legislation where uniformity is desirable, the NCCUSL and the federal government each are possible lawmaking bodies by

health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.

TREATY OF AMSTERDAM art. 153(1)-(2). Most significantly, the entirely new reference to consumer "rights" to information, education, and organization, and the placement of consumer "interests" into a separate paragraph suggest the potential for Community-wide and centralized actions under the Treaty of Amsterdam than otherwise were authorized by the TEU. *Id.* art. 153(1). See Stuyck, *supra* note 90, at 385.

93. See, e.g., HOWELLS & WILHELMSSON, *supra* note 25, at 7-9 (describing pre-Maastricht consumer protection policy as largely directed toward common, and then internal, markets, and raising possibility that, post-Maastricht, development of autonomous, non-market based Community consumer policy may emerge); Stuyck, *supra* note 90, at 389-400 (discussing relationship between pre-Maastricht policies and post-Treaty of Amsterdam possibilities).

which such legislation might be accomplished.⁹⁴ Concerns such as federalism,⁹⁵ efficiency or equity,⁹⁶ consumer justice,⁹⁷ or uniformity⁹⁸ are frequently raised as important considerations that not only ought to influence the substantive legal products of these legislatures, but also the basic decision of whether to intervene at all into the matter. For example, state versus federal action and federal versus agency action are regulated by the constitution, considerations of political comity, and—in the case of agencies—enabling legislation. Judicial deference towards legislative acts provides another example of a domestic political constraint in the United States.

While in the United States the constraints that act to delimit and define the boundaries between the formal political bodies discussed in this section are accepted—albeit fluid and at times hotly disputed—in the European Union, the boundaries of power are still unsettled and ambiguous after the TEU and Treaty of Amsterdam. Views on the allocation of power might fairly be said as falling anywhere along a broad spectrum of enhancing local diversity, on the one hand, to complete Community centralization, on the other. For example, the following excerpt advances a structural approach to the relationship among Member State autonomy, Community-wide consumer policy, and consumer markets:

Europe's greatest strength is its diversity. It is essential to both the aims and the methods of consumer policy: essential to its aims, because a proper response to individual needs implies diversification of production; essential to its methods, because the policy must be sufficiently flexible to allow particular responses to particular circumstances. Community policy should not seek to impose uniform solutions for problems, but to establish the structures within which solutions can be implemented at the appropriate level, be it Community-wide, national, regional or local. Experience has taught the Community that the right level of government at which to execute a

94. The United States Congress has constitutional authority to regulate in matters of interstate commerce. U.S. CONST. art. I, § 8, cl. 3. Uniform laws of the NCCUSL are not binding in any respect, but rather proposed for formal enactment by state legislatures. Although there is no prohibition that prevents the NCCUSL from proposing a law to the federal government, and indeed some have suggested the NCCUSL consider this possibility, the NCCUSL traditionally has acted as, and indeed was constituted to be, representative of state governments. *See, e.g.,* Patchel, *supra* note 4, at 160-62.

95. *See, e.g.,* Overby, *supra* note 4, at 684-87 (discussing importance of federalism in drafting uniform state laws).

96. *See, e.g.,* Edward Rubin, *Efficiency, Equity, and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991) (critiquing UCC revisions in terms of equity and efficiency).

97. *See, e.g.,* Yvonne W. Rosmarin, *Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process*, 35 WM. & MARY L. REV. 1593 (1994) (providing a consumer activist perspective on Article 2 revisions).

98. *See, e.g.,* Raymond T. Nimmer, *Uniform Codification of Commercial Contract Law*, 18 RUTGERS COMPUTER & TECH. L.J. 465 (1992) (discussing advantages of uniformity in contract law codification efforts).

particular function is the lowest level at which the job can be efficiently done.⁹⁹

By contrast to a "diversity" approach that rejects a strongly centralized conception of Community-wide involvement, an independent Community-based approach is also possible.¹⁰⁰

Principles of subsidiarity and proportionality most likely will be the regulatory devices that ultimately will balance the proper spheres of authority between EC bodies and Member States. Subsidiarity, or the principle that "the right level of government to execute a particular function is the lowest level at which the job can be done," is expressly incorporated into the Treaty of Amsterdam.¹⁰¹ Facially, subsidiarity appears to be a relatively straightforward concept. For U.S. lawyers, the principle of subsidiarity can be roughly analogized as incorporating many of the issues couched domestically in terms of federalism.¹⁰² In spite of the similarity, the operation and parameters of the principle of subsidiarity as a justiciable principle in moderating the roles and respective powers of national and EU bodies has received limited attention.¹⁰³ The TEU and Treaty of

99. EAMONN LAWLOR, *INDIVIDUAL CHOICE AND HIGHER GROWTH: THE AIM OF CONSUMER POLICY IN THE SINGLE MARKET* 14 (2d ed. 1988) (citation omitted).

100. See, e.g., HOWELLS & WILHELMSSON, *supra* note 25, at 320-23 (discussing potential for Community-wide consumer policy oriented around "legitimate expectation" and raising possible conflicts among that approach, diversity, and harmonization goals).

101. TREATY OF AMSTERDAM art. 5. Article 5 provides:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Id. Article 5 of the Treaty of Amsterdam is a renumbered iteration of Article 3b of the TEU. See *supra* note 75 (discussing amendment of the TEU). The TEU was the first to introduce subsidiarity in the text. See Stuyck, *supra* note 90, at 382.

102. See Edward T. Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT'L L.J. 1, 1-7 (2000) (discussing American and European interpretations of term "federalism" and its relation to Community principle of subsidiarity); see also Lenaerts, *supra* note 14, at 746-49 (incorporating variants of American federalism into EU analysis); see also W. Gary Vause, *The Subsidiarity Principle in European Union Law American Federalism Compared*, 27 CASE W. RES. J. INT'L L. 61, 62 (1995) (drawing analogy between subsidiarity and American federalism, but suggesting also that "subsidiarity does not have an exact counterpart in the American system of federalism.").

103. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 362-64, 379-83, 403-07 (1994); see also Christian Kirchner, *The Principle of Subsidiarity in the Treaty*

Amsterdam fail to make explicit in their texts the goals that subsidiarity would advance, a silence that allows further ambiguity.¹⁰⁴ The boundaries that subsidiarity ultimately might place between Member State and Community bodies is therefore still an open question.¹⁰⁵ In the face of such ambiguity, subsidiarity could be interpreted between the broad extremes of diversity and centralization suggested earlier. It could be interpreted as a principle intended to advance expansive local power and discretion or, at the other extreme, as a principle containing a centralizing concept that has precisely the opposite effect of totalism.¹⁰⁶ In a similar vein, subsidiarity may advance diversity and pluralism

on *European Union: A Critique from a Perspective of Constitutional Economics*, 6 TUL. J. INT'L & COMP. L. 291, 299-300 (1998) ("subsidiarity principle has been praised as an instrument to stop further erosion of Member States' sovereignty, and it has been criticized because of its impracticability for judicial review.").

104. In 1992, a Protocol regarding application of the principles of subsidiarity and proportionality was annexed to the EC Treaty. See PROTOCOL ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY, available at http://www.europa.eu.int/eur-lex/en/treaties/dat/ams_treaty_en.pdf, 105 (last modified Dec. 14, 2000) (incorporated by reference in the Treaty of Amsterdam). In examining whether an action is consistent with subsidiarity, the following guidelines are considered: (1) whether the issue under consideration has transnational aspects which cannot be satisfactorily regulated by Member State action; (2) whether Member State action alone or lack of Community action would conflict with Treaty requirements or otherwise significantly damage Member States' interest; and (3) whether Community action would produce clear benefits, whether by reason of scale or effects, when compared to action at the Member State level. *Id.* ¶ (5). In spite of existing ambiguities, subsidiarity has had practical effect in the area of consumer law. For example, concerns over subsidiarity have led to withdrawal or amendment of several Commission consumer proposals. See Stuyck, *supra* note 90, at 382.

105. Kirchner, *supra* note 103, at 300-02. The principle does not in itself allocate power between the EC and Member States but rather acts to distribute power in mixed fields of competencies. *Id.* at 300.

106. Ian Ward, *Identity and Difference: The European Union and Postmodernism*, in NEW LEGAL DYNAMICS OF EUROPEAN UNION 15, 24 (J. Shaw & G. More eds., 1995); Vause, *supra* note 102, at 66 (subsidiarity preserves local self-determination and local government accountability). The indeterminacy of subsidiarity, for some writers, reflects its postmodern nature:

It [subsidiarity] is a 'constitutional' term which is not supposed to be determinable, at least not objectively. A conceptual text whose ambition is to sow confusion of meanings is a peculiar technology, or so it seems to those of us brought up in a jurisprudential tradition of analytic rigour. Moreover, subsidiarity is particularly important because the establishment of its identity, either as a mechanism for totalization or for respecting the particular, will determine the nature of the European legal and constitutional order. It may be a postmodern incarnation of difference as justice, or alternatively, it may turn out to be the technology which will 'silence' the particular.

Ward, *supra*, at 24. Ward sees the EU as "best understood as a postmodern text, and perhaps as a postmodern polity," and views a central goal of post-modernism as one of "radically decentraliz[ing] power from the nation-state and relocat[ing] it at its most basic societal level." *Id.* at 15, 24.

within the European Union¹⁰⁷ or act contrary to diversity through harmonization, and therefore homogenization, actions by Community institutions. It also simply could be argued that the principle's extreme vagueness renders it an ineffective regulatory principle incapable of practical and certain application, albeit a pleasant enough catchword.

Even if understood as integral to accomplishing the goals of democratic legitimization¹⁰⁸ and for enhancing accountability in the decision-making processes of the Community,¹⁰⁹ subsidiarity's operation in the area of consumer transactions—most often considered matters of local concern¹¹⁰—is even more problematic in light of its ambiguity. The extremes mentioned above suggest widely different approaches toward consumer protection issues. Viewed as a diversity-enhancing preference toward the local, the final goal might be for the Community to emphasize structures that ultimately “delegate responsibility to the most effective agents in the process: the consumers themselves.”¹¹¹ Under this interpretation, subsidiarity would be a regulative principle that weighs against

107. According to Ward:

The ready acceptance of subsidiarity as a decentralizing and anti-federalist concept which can better facilitate a pluralist, and thus more participatory democratic Europe is, of course, immanently critical in a strictly jurisprudential sense. Nicholas Emiliou has championed subsidiarity as a mechanism for legal and political ‘diversification’, albeit as presented in a more identifiably ‘co-operative’ federal legal structure.

Id. at 26.

108. Kirchner, *supra* note 103, at 302.

109. Imelda Maher, *Legislative Review by the EC Commission: Revision without Radicalism*, in *NEW LEGAL DYNAMICS OF EUROPEAN UNION*, *supra* note 106, at 237.

110. See *supra* note 12 and accompanying text. Because subsidiarity deals with exercise of power within the EU, the subnational level is not part of the debate. Rather, the focus is on the decision-making processes of the Community. Maher, *supra* note 109, at 237.

111. LAWLOR, *supra* note 99, at 14. Lawlor suggests that subsidiarity mandates an anti-legislative and structurally-oriented attitude of the Community toward consumer issues, an approach that implicitly rejects an active, interventionist centralized legislative attitude:

There will always be a need for a certain minimum of Community legislation to define and guarantee basic consumer rights such as physical and economic safety. More detailed regulations may be needed at other levels, to adapt these Community-wide requirements to national and local circumstances, but the policy will achieve its real purpose only when consumers, equipped with a basic recognition by the law of their proper role in the economy, are enabled to exert their right of choice to maximum effect. That demands not legislation, but structures to allow and encourage a flow of information between producer and consumer, so that the market behaviour of each is based on a full understanding of the other's needs or capabilities.

Id.

creation of an autonomous consumer policy at the EC level.¹¹² At the other extreme, if subsidiarity is interpreted as establishing a centralizing and federalizing role for EU institutions, an active autonomous Community-wide policy addressing consumer issues could be possible,¹¹³ consistent with the enhanced powers granted to EC institutions under Article 153 of the Treaty of Amsterdam.¹¹⁴

Another doctrine, also addressed in Article 5 of the Treaty of Amsterdam,¹¹⁵ that restrains Community action vis-à-vis the Member States is "proportionality." As with subsidiarity, the impact that proportionality might have as an operative principle is still largely speculative:

The doctrine of proportionality, which the Court of Justice largely derived from continental principles of constitutional and administrative law, is said to require that every Community measure satisfy three related criteria. First, the measure must bear a reasonable relationship to the objective – presumably a legitimate one – that the measure is intended to serve. This may be regarded as the doctrine's "rationality" component. Second, the costs of the measure must not manifestly outweigh its benefits. This may in turn be regarded as the doctrine's "utility" component. Finally, the measure chosen must represent the solution, among the various alternatives that were available for achieving the prescribed objective, that is least burdensome. This requirement to use the "least restrictive" or "least drastic" means is one that the Court of Justice has typically justified in terms of minimizing the burdens imposed by the Community on the private sector, but it can readily be used to minimize the Community's intrusions on the Member States and their subcommunities as well. Each of the three elements of proportionality has at least some resonance among levels of judicial scrutiny recognized in U.S. constitutional review.¹¹⁶

In the more precise area of consumer law in the European Union, proportionality suggests that Community-wide measures be based on a cost-benefit analysis and on developments in the internal market.¹¹⁷

In sum, whether subsidiarity and proportionality will be interpreted as centralizing or localizing principles remains an open question. Legislation at the Member State level might have advantages such as preserving cultural and legal diversity, which

112. See HOWELLS & WILHELMSSON, *supra* note 25, at 302-03 (addressing arguments against Community involvement based on application of principle of subsidiarity).

113. See *id.* at 303-06 (advancing arguments for future direction of Community policy and suggesting that principle of subsidiarity will not hinder creation of that policy).

114. See *supra* note 92 (discussing Article 153).

115. See *supra* note 101. Along with subsidiarity, proportionality is addressed by the 1992 PROTOCOL, discussed *supra* note 104.

116. Bermann, *supra* note 103, at 386-87.

117. See Stuyck, *supra* note 90, at 398-99 (advancing an approach toward analyzing proportionality and impact on Community consumer issues).

could be lost through Community-wide legislation. Community-wide consumer legislative initiatives, on the other hand, advance with them important values such as uniformity and certainty. The precise balance that ultimately will be struck between Member State autonomy, Community bodies, and the consumer remains an unfolding issue in the European Union.

D. Conclusion

As the discussion in this section suggests, the questions of whether and how legally to protect consumers in the market raise a myriad of complex political and ethical issues. Dissension begins with the underlying theoretical basis for policing consumer transactions. That basis may be focused on supporting markets or, at the other extreme, on intervening into markets based on economic, ethical, or paternalist rationales. Basic institutional design and organizational capacity issues may further act to complicate the initial question concerning values. A traditional framework for legal analysis seeks merely to evaluate legal products using shared values. Yet, an institutional framework of analysis provides an alternative to the traditional approach. Under this framework, imperfect information, behavioral realities, and the political and institutional constraints on legal organizations may influence those organizations in formulating a legislative response to any consumer protection issue. Such influences ultimately may act to impact the rules that emerge from political activity. Under an institutional approach for analyzing consumer law, background institutional and organizational factors such as those discussed in this section receive consideration along with consumer values.

III. INSTITUTIONAL INFLUENCES ON CONSUMER LAW

To examine more deeply the impact that values, organizations, social context, and constraining principles on political actors and organizations ultimately may have on the final form of substantive consumer law, Part III compares and contrasts consumer protection initiatives in the United States and in the European Union. As mentioned in the previous section, each regime is similar in economic development, although they have different legal, organizational, and political histories. Nonetheless, the legal systems also have similar—albeit not identical—federalized structures that work under analogous constraints allocating power between the local, national, and supranational levels. In light of such similarities, the traditional framework would suggest that the two regimes should address similar issues in a similar manner in areas in which consensus on consumer ideology exists.

Yet, the legal treatment of consumer issues such as deceptive advertising, unfair contract terms, consumer credit issues, and dispute resolution often differs materially in the two systems, in spite of these similarities and in spite of shared values. It will be argued that such differences often do not emerge from serious differences over consumer values or ideology, but rather from institutional constraints—including political, social, and cultural constraints—particular to the systems. For example, the regimes for deceptive advertising and unfair contract terms reflect more deeply divergent attitudes toward centralization than toward substantive consumer social policy.¹¹⁸ In other words, the differences may emerge if only in part from institutional or political constraints apart from consumer ideology. The treatment of consumer credit issues provides an example of how cultural integration may act to impact the final form, and ultimate success, of a consumer law.¹¹⁹ Finally, differing values toward consumer access to justice issues reflect the effect that different systems and underlying views toward dispute resolution may have on final legal provisions.¹²⁰

A. *Federalization and Federalism*

As discussed in Part II, principles of federalism and subsidiarity may act to constrain and guide lawmakers' activity. In this section, two areas of consumer protection law will be discussed: regulating deceptive advertising and policing unfair contract terms. The approaches taken by the United States and the European Union in these areas evidence the impact that federalism values may have on consumer protection law.

1. Deceptive Advertising

a. United States

Regulation of advertising in the United States begins at the federal level, which in spite of state and local responses retains the limelight in the area. Section 5(a)(1) of the Federal Trade Commission Act (FTC Act) provides that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”¹²¹

118. See generally *infra* Part III.A.

119. See generally *infra* Part III.B.

120. See generally *infra* Part III.C.

121. 15 U.S.C. § 45(a)(1) (1994).

Dissemination of "any false advertisement" likely to induce the purchase of food, drugs, devices, or cosmetics is defined under the FTC Act as an "unfair or deceptive act or practice."¹²² False advertising, as defined by the FTC Act, is an advertisement that is misleading in a material respect.¹²³

The proper standard for assessing the meaning of "deceptive" and "unfair" has been the subject of the most significant debate in the area, a debate that focuses principally on a 1983 FTC Policy Statement.¹²⁴ This Policy Statement articulated in detail the Commission's current views on the proper standard for deception and arguably established a more lenient, pro-business standard than that previously applied.¹²⁵ The proper interpretation of when an act or

122. 15 U.S.C. § 52.

123. 15 U.S.C. § 55(a)(1).

124. To read a comprehensive analyses of the pre-1983 and post-1983 situations regarding the FTC deception standard, and the underlying context and possible impact of the shift, see Mark E. Budnitz, *The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371, 396-409 (1997); Jack E. Karns & Alan C. Roline, *The Federal Trade Commission's Deception Policy in the Next Millenium: Evaluating the Subjective Impact of Cliffdale Associates*, 74 N.D. L. REV. 441 (1998).

125. A case before the Commission after the 1983 FTC Policy Statement presented the standard in the following manner, suggesting that it was solely restating existing FTC jurisprudence:

[T]he Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material. These elements articulate the factors actually used in most earlier Commission cases identifying whether or not an act or practice was deceptive, even though the language used in those cases was often couched in such terms as "a tendency and capacity to deceive."

In the Matter of Cliffdale Associates, 103 F.T.C. 110, 164-65 (1984) (quoting *Sears Roebuck & Co.*, 95 F.T.C. 406 (1980), *aff'd*, 676 F.2d 385 (9th Cir. 1982)). A concurring and dissenting opinion in *Cliffdale Associates*, however, accused the majority in the case of covertly raising the standard for a finding of deception from that previously applied:

The majority opinion acknowledges that the Commission need not find actual deception to conclude that Section 5 [of the FTC Act] has been violated. Furthermore, it admits that the courts have traditionally and recently recognized this fact by requiring the Commission to find only that an act or practice has the "tendency or capacity" to mislead consumers. So far, so good. However, three commissioners have found it necessary to improve on language long understood by the courts and previous commissioners, by substituting the word "likely" for "tendency or capacity." "Likely to mislead," they insist, expresses more clearly the notion that actual deception need *not* be found!

The avowed intentions of the majority are admirable, but the *results* of their effort to "fix" an unbroken legal standard are not. Their choice of language is unfortunate, because the word "likely" suggests that some particular degree of likelihood of actual deception must be found. Therefore, it may create the

practice is "unfair" under the FTC Act is handled by a standard different from that set forth above for deception and has, along with deception, been a source of controversy. The vagueness of the standard made the FTC's unfairness jurisdiction another subject of maneuvering in the 1980s as the FTC arguably began to adopt a more pro-industry stance toward advertising regulation.¹²⁶ As a result of this shift in policy, when assessing the "unfairness" of an act or practice the focus is on actual economic or physical harm caused by the act.¹²⁷ The Commission has now expressly rejected the view that "unfairness" can be assessed by a standard of "immoral, unethical, oppressive, or unscrupulous" conduct.¹²⁸

Underlying these shifting interpretations of unfairness and deception under the FTC Act lies a complex and interesting debate on

impression, intentionally or not, that the burden of proof is higher than it has always been under the traditional "tendency or capacity" standard.

The new deception analysis has a more serious effect that is clearly not unintentional. That is to withdraw the protection of Section 5 from consumers who do not act "reasonably."

Id. at 184-85 (Pertschuk, Comm'r, concurring in part and dissenting in part).

126. See Budnitz, *supra* note 124, at 409-11 (detailing Congressional efforts to limit FTC unfairness jurisdiction).

127. In re Int'l Harvester Co., 104 F.T.C. 949 (1984). The test for unfairness was presented as follows in *International Harvester*:

The first element . . . is that the injury must be substantial. Unlike deception, which focuses on "likely" injury, unfairness cases usually involve actual and completed harm. While in most cases the harm involved is monetary, the policy statement expressly noted the "unwarranted health and safety risks may also support a finding of unfairness."

The second element is that the conduct must be harmful in its net effects. This is simply a recognition of the fact that most conduct creates a mixture of both beneficial and adverse consequences. In analyzing an omission this part of the unfairness analysis requires us to balance [a]gainst [sic] the risks of injury the costs of notification and the costs of determining what the prevailing consumer misconceptions actually are. This inquiry must be made in a level of detail that deception analysis does not contemplate.

Finally, the third element is that the injury must be one that consumers could not reasonably have avoided through the exercise of consumer choice. This restriction is necessary in order to keep the FTC Act focused on the economic issues that are its proper concern. The Commission does not ordinarily seek to mandate specific conduct or specific social outcomes, but rather seeks to ensure simply that markets operate freely, so that consumers can make their own decisions.

Id. at 1061. For a discussion of *International Harvester*, which involved a manufacturer's failure to warn customers about a dangerous defect in the manufacturer's product, its relation to earlier FTC unfairness cases, and its significance in FTC deception cases, see Karns & Roline, *supra* note 124, at 451-55.

128. *Int'l Harvester*, 104 F.T.C. at 1060 & n.42; see also 15 U.S.C. § 45(n) (1999) (1994 amendments tracking FTC Policy Statement and constraining FTC authority in unfairness cases).

the proper roles of the federal government versus the states in regulating deceptive advertising. Over the years, these roles have shifted from a strongly federal enforcement mechanism under the FTC Act to a state-dominated one under state law. If only by perception, prior to the 1980s, when the Reagan era brought "deregulation" to the fore, the FTC was viewed as adopting a much more heavy-handed and interventionist approach to consumer protection issues such as deceptive advertising, a position strongly opposed by industry.¹²⁹ The 1983 Policy Statement thus represented a move toward federal deregulation. The changes to the federal standards for deception and unfairness and the development of a hands-off, pro-industry federal regulatory attitude toward policing advertising also arguably had the effect of increased state enforcement of state laws.¹³⁰ In spite of the historically strong federal involvement in regulating deceptive advertising, states themselves nonetheless are active in the area. Every state also regulates deceptive advertising under what are generally called unfair and deceptive acts and practices statutes (UDAPS). Many of these statutes are modeled after the FTC Act itself and, ironically, were enacted at the urging of a then-activist FTC to facilitate a joint federal and state effort toward policing deception and unfairness in consumer transactions.¹³¹ The substance of these statutes varies widely depending upon the state,¹³² and state attorney general

129. See Budnitz, *supra* note 124, at 371 ("The conventional wisdom is that the [FTC] under President Carter's Chairman, Michael Pertschuk, turned the FTC into a renegade agency which engaged in runaway consumer protection, hamstringing business with excessive regulation to such an extent it became known as the 'national nanny.'").

130. *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 71-77 (1989) (discussing increase in state policing of advertising due to "the perceived slackening of FTC enforcement" during Reagan years and approving of increased state involvement); Ross D. Petty, *FTC Advertising Regulation: Survivor or Casualty of the Reagan Revolution?*, 30 AM. BUS. L.J. 1, 33-34 (1992) ("In addition to causing increased competitor litigation over advertising, the Reagan FTC's perceived advertising enforcement gap led state attorneys general to begin bringing advertising cases."). The active and, to a great extent, pro-consumer involvement of the states has not universally been applauded. See, e.g., Terry Calvani, *Advertising Regulation: The States v. FTC*, 58 ANTITRUST L.J. 253, 258-66 (1989) (critiquing perceptions of a hands-off agenda of the FTC and criticizing state enforcement efforts).

131. J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 356-57 (1992) (discussing the rise of the FTC in the 1960s and enactment of state UDAPS). Unlike the FTC Act, the state statutes usually provide for a private right of action and sometimes allow recovery of up to treble damages and of attorney's fees. *Id.* at 357. This mechanism allows the consumer to act as a private "attorney general" through use of the private right of action, thereby enhancing the enforcement effort. *Id.*

132. JOHN A. SPANOGLE ET AL., *CONSUMER LAW* 69-70 (2d ed. 1991); Franke & Ballam, *supra* note 131, at 358-60 & nn.71-77 (categorizing general models of state UDAPS).

enforcement efforts vary in their positions from either pro-industry to pro-consumer.¹³³ It is, however, fair to assert that in response to the changes in the federal standards in the 1980s, many states have taken a much more aggressive attitude that favors the consumer, to the chagrin of some pro-industry, pro-deregulation commentators.¹³⁴ Deregulation at the federal level therefore had the effect of stepped-up enforcement, if not, in the view of some analysts, over-regulation, at the state level.

The shifting dialectic between federal and state enforcement efforts evidences the strongly federalized system for policing deceptive advertising that has evolved, with the predominant role being played by the FTC through federal agency action. Subsidiary to that role, states complement the FTC involvement through their own analogous statutes that regulate deception.¹³⁵ Coordinating and conflicting efforts will emerge depending on prevalent attitudes regarding federalism, deregulation, and consumer interests. The

133. See Calvani, *supra* note 130, at 266.

134. See generally *id.* (critiquing state enforcement efforts); Petty, *supra* note 130, at 34 (arguing that effect of Reagan era deregulation and heightened state enforcement efforts caused advertisers "to bear the burden of state regulation and private litigation costs that are more onerous than prior FTC regulation.").

135. State UDAPS, while powerful tools for regulating deception, are not the sole state law mechanism for policing deception. Common law causes of action are available based upon fraud or misrepresentation, although success using this action will vary because state attitudes toward actionable fraud differ widely. If the buyer can prove that the seller made an untrue, fraudulent, or material statement, and that the buyer reasonably relied upon the statement, an action for misrepresentation certainly will be successful. E. ALAN FARNSWORTH, *CONTRACTS* 249-72 (2d ed. 1990). Beyond liability for intentional misrepresentation, states differ widely as to the buyer's right to recover using a fraud theory. For example, Montana broadly defines constructive fraud as "any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under him by misleading another to his prejudice. . . ." MONT. CODE ANN. § 28-2-406 (1999). Jurisdictions' approaches to finding liability for non-disclosure, as opposed to intentional or negligent disclosure, are even more widely disparate. *Cf.* Ollerman v. O'Rourke Co., 288 N.W.2d 95 (Wis. 1980) (rejecting doctrine of caveat emptor and finding liability for non-disclosure) with Stambovsky v. Ackley, 572 N.Y.S.2d 672 (1991) (limited encroachment on doctrine of caveat emptor).

The NCCUSL, producers of the Uniform Commercial Code, has attempted to provide interstate uniformity to the issue by drafting the Uniform Consumer Sales Practices Act (UCSPA), although this uniform laws effort has been largely unsuccessful, having been enacted by only two states. The UCSPA provides that "[a] deceptive act or practice" in connection with a consumer transaction will violate the UCSPA. See UNIF. CONSUMER SALES PRACTICES ACT § 3, 7A U.L.A. 212 (1999). It also prohibits "unconscionable" consumer sales practices. *Id.*, § 4(a). When the seller knew or had reason to know "that he made a misleading statement of opinion on which the consumer was likely to rely to his detriment," the court should consider that fact as a circumstance evidencing an unconscionable practice. *Id.* § 4(c)(6). Finally, liability for breach of express warranty under the UCC may exist as a means of policing deceptive advertising. See U.C.C. § 2-313, 1A U.L.A. 109 (1999) (providing that when sellers of goods make an "affirmation of fact" concerning goods that becomes part of the basis of the bargain, good must conform to that affirmation).

experience post-1983 suggests that efforts at decreased enforcement at the federal level may in fact result in heightened enforcement efforts at the state level. Thus, the current regime for policing deception in the United States operates on a system of dual-tiered formal enforcement efforts, with a tension arising between federal and state involvement when differences over values and the proper scope of intervention occurs.

b. European Union

Some control of advertising occurs through the European Court of Justice's decisions regarding Member State measures that impact the functioning of the internal market.¹³⁶ Most significantly, however, the Misleading Advertising Directive (Directive),¹³⁷ published in 1984 and amended in 1997, establishes general principles for advertising regulation in the EU. The Directive begins by recognizing that "the laws against misleading advertising now in force in the Member States differ widely" and that "since advertising reaches beyond the frontiers of individual Member States, it has a direct effect on the establishment and the functioning of the common market."¹³⁸ Under the Directive, Member States are required to "ensure that adequate and effective means exist for the control of misleading advertising"¹³⁹ in the interests of consumers as well as

136. See, e.g., *Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC & Estee Lauder Cosmetics GmbH* (Case C-315/92), 1994 E.C.R. I-317 (interpreting EEC Treaty as precluding national prohibition on products bearing name "Clinique"); *Criminal Proceedings Against Oosthoek's Uitgeversmaatschappij BV* (Case 286/81), 1982 E.C.R. 4575 (upholding national prohibition on free gift promotional scheme); see also *supra* notes 77-81 and accompanying text (regarding the Treaty of Amsterdam free movement rules and ECJ interpretations thereof).

137. Council Directive 84/450/EEC of 10 September 1984 Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising (84/450/EEC), 1984 O.J. (L250) 17 (amended by 1997 O.J. (L290) 18, European Parliament and Council Directive 97/55/EC of 6 October 1997 amending Directive 84/450/EEC Concerning Misleading Advertising so as to include Comparative Advertising). While the Directive prohibits misleading advertising, it merely regulates comparative advertising. *Id.* art. 3(a) (setting forth permissible uses of comparative advertising).

138. *Id.* at 17.

139. The Directive defines "advertising" and "misleading advertising" in the following manner:

1. 'advertising' means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations;
2. 'misleading advertising' means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature,

competitors and the general public.”¹⁴⁰

is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.

Id. art. 2.

140. *Id.* art. 4(1). A Television Directive was issued five years after the Misleading Advertising Directive. Council Directive 89/552/EEC of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation, or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L298) 23. The Television Directive governs numerous aspects of television advertising, including placement and timing of television advertising, subliminal advertising, surreptitious advertising, cigarette advertising, alcohol advertising, and children’s advertising. *See generally id.* For example, the Directive provides that “[t]elevision advertising shall not: (a) prejudice respect for human dignity; (b) include any discrimination on grounds of race, sex, or nationality; (c) be offensive to religious or political beliefs; (d) encourage behaviour prejudicial to health or to safety; [or] (e) encourage behaviour prejudicial to the protection of the environment.” *Id.* art. 12. Moreover, the Television Directive continues that

[t]elevision advertising shall not cause moral or physical detriment to minors, and shall therefore comply with the following criteria for their protection:

- (a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;
- (b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;
- (c) it shall not exploit the special trust minors place in parents, teachers or other persons;
- (d) it shall not unreasonably show minors in dangerous situations.

Id. art. 16. Thus, the approach differs from the FTC interpretation of “unfairness” in significant respects, by suggesting that moral conduct, rather than physical or economic injury, does constitute a basis for legal intervention.

The problem of comparative advertising in the European Union resulted in the 1997 amendments to the Misleading Advertising Directive to encompass regulation of comparative advertising. *See* 1997 Amendments, *supra* note 137. The amendments begin by acknowledging that consumer choice is impacted by comparative advertising. *Id.* at 18. Comparative advertising is permitted when

- (a) it is not misleading. . . . (b) it compares goods or services meeting the same needs or intended for the same purpose; (c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price; (d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser’s trade marks, trade names, other distinguishing marks, goods or services and those of a competitor; (e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor; (f) for products with designation of origin, it relates in each case to products with the same designation; and (g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products. . . .

Id. art. 3a.

These provisions suggest that the Directive is premised on many¹⁴¹ of the same substantive policies and values that justify intervention in the United States. In contrast to the United States regime, however, the Directive gives to Member States broad latitude in determining the means by which to police misleading advertising. Voluntary control of misleading advertising through industry self-regulation, for example, is permitted, a phenomenon rarely seen in the United States.¹⁴² Member States must ensure that legal or administrative proceedings are available to check misleading advertising.¹⁴³ The Directive serves to set a regulatory floor for misleading advertising because Member States are not precluded "from retaining or adopting provisions with a view to ensuring more extensive protection . . . for consumers, persons carrying on a trade, business, craft or profession, and the general public."¹⁴⁴

In spite of their reliance upon many shared values regarding the impact of deception on markets, important structural differences exist between the U.S. and EU legal regimes. As stated above, the U.S. enforcement scheme has proceeded within the tensions of state

141. The EC approach, however, currently places much greater value on morality in advertising regulation, as reflected most vividly in The Television Directive discussed *supra* note 140. This approach contrasts with the FTC views expressed in *International Harvester* that "unfairness" under the FTC Act does not encompass immoral or unethical conduct. See *supra* note 127 and accompanying text.

142. 1984 O.J. (L250) 17, art. 5. Such voluntary proceedings must be in addition to the court or administrative proceedings otherwise required by the Misleading Advertising Directive. *Id.* Self regulation of advertising is not entirely unknown in the United States. See, e.g., Ross D. Petty, *Advertising Law and Social Issues: The Global Perspective*, 17 SUFFOLK TRANSNAT'L L. REV. 309, 316 (1994) (discussing U.S. industry self regulation). The American emphasis on placing legal issues within a framework of regulation versus deregulation, or vice versa, however, allows intermediate steps such as self regulation to be overlooked as a viable alternative to either complete regulation or wholesale deregulation. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 101-32 (1992) (discussing advantages and disadvantages of self-regulation).

143. The Directive provides:

Such means shall include legal provisions under which persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising or regulating comparative advertising may:

- (a) take legal action against such advertising; and/or
- (b) bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Article 5.

1984 O.J. (L250) 17, art. 4(1) (as amended by 1997 O.J (L290) 18).

144. *Id.* art. 7(1). The language of Article 7(1), however, does not apply to comparative advertising "as far as the comparison is concerned." *Id.* art. 7(2).

and federal authority and structural values of federalism, and of regulation versus deregulation. Decreased federal involvement may act to heighten state efforts as result of these tensions. It is also a regime that largely downplays self-regulation as a legislative response to the problem of misleading advertising. In the EU, by contrast, Member States retain greater power in regulating the issue, and sometimes radically different state enforcement schemes are preserved.¹⁴⁵ For example, the U.K. counterparts of the U.S. FTC Act and the FTC are the Fair Trading Act of 1973 (FTA) and the Director of Fair Trading.¹⁴⁶ The FTA gives the Director of Fair Trading authority over "consumer trade practices."¹⁴⁷ In the case of misleading practices, the Director may use an informal method of dispute resolution to attempt to remedy the procedure.¹⁴⁸ Most

145. In Germany for example, competitors and associations have the right to sue in cases of deceptive advertising, and competitors who unfairly compete must reimburse claimants for attorneys fees. See Georg Jennes, *Germany*, in *ADVERTISING LAW IN EUROPE AND NORTH AMERICA* 151 (James Maxeiner & Peter Schotthöfer eds., 1992). Contrast such a scheme with the self-regulatory scheme in place in Britain discussed in the text.

146. See Fair Trading Act, 1973 (U.K.).

147. Section 13 of the FTA defines "consumer trade practice" as "any practice which is for the time being carried on in conjunction with the supply of goods (whether by way of sale or otherwise) to consumers or in connection with the supply of services for consumers and which relates:

(a) to the terms or conditions (whether as to price or otherwise) on or subject to which goods or services are or are sought to be supplied, or

(b) to the manner in which those terms or conditions are communicated to persons to whom goods are or are sought to be supplied or for whom services are or are sought to be supplied, or

(c) to the promotion (by advertising, labelling or marking of goods, canvassing, or otherwise) of the supply of goods or of the supply of services, or

(d) to methods of salesmanship employed in dealing with consumers, or

(e) to the way in which goods are packed or otherwise got up for the purpose of being supplied, or

(f) to methods of demanding or securing payment for goods or services supplied.

Fair Trading Act 1973, § 13.

148. The Director's authority stems from the following provisions:

14. — (1) [Subject to the exclusion of certain goods and services, such as legal and medical services], the Secretary of State or any other Minister or the Director may refer to the Advisory Committee the question whether a consumer trade practice specified in the reference adversely affects the economic interests of consumers in the United Kingdom.

17. — (1) This section applies to any reference made to the Advisory Committee by the Director under section 14 of this Act which includes proposals with the following provisions of this section.

advertising regulation largely occurs at the informal level, however, because the United Kingdom has significant voluntary controls on advertising. In 1962, the advertising industry created the

(2) Where it appears to the Director that a consumer trade practice has the effect, or is likely to have the effect,—

(a) of misleading consumers as to, or withholding from them adequate information as to, or an adequate record of, their rights and obligations under relevant consumer transactions, or

(b) of otherwise misleading or confusing consumers with respect to any matter in connection with relevant consumer transactions, or

(c) of subjecting consumers to undue pressure to enter into relevant consumer transactions, or

(d) of causing the terms or conditions, on or subject to which consumers enter into relevant consumer transactions, to be so adverse to them as to be inequitable.

any reference made by the Director under section 14 of this Act with respect to that consumer trade practice may, if the Director thinks fit, include proposals for recommending to the Secretary of State that he should exercise his powers under the following provisions of this Part of this Act with respect to that consumer trade practice.

34. — (1) Where it appears to the Director that the person carrying on a business has in the course of that business persisted in a course of conduct which—

(a) is detrimental to the interests of consumers in the United Kingdom, whether those interests are economic interests or interests in respect of health, safety or other matters, and

(b) in accordance with the following provisions of this section is to be regarded as unfair to consumers,

the Director shall use his best efforts by communication with that person or otherwise, to obtain from him a satisfactory written assurance that he will refrain from continuing that course of conduct and from carrying on any similar course of conduct in the course of that business.

35. If, in the circumstances specified in subsection (1) of section 34 of this Act,—

(a) the Director is unable to obtain from the person in question such an assurance as is mentioned in that subsection, or

(b) that person has given such an assurance and it appears to the Director that he has failed to observe it,

the Director may bring proceedings against him before the Restrictive Practices Court.

....

[41.—Allows the Director to bring actions in alternative courts if certain conditions are met]

Advertising Standards Authority (ASA), an independent body with the task of supervising advertising standards—other than on radio and TV.¹⁴⁹ The Committee of Advertising Practice (CAP) administers the system along with the ASA and is the body responsible for producing the British Codes of Advertising and Sales Promotion (BCASP).¹⁵⁰ In 1999, the United Kingdom adopted a tripartite system of self-regulation: The independent ASA supervises the system and applies the BCASP; the advertising industry establishes the standards in light of all pertinent laws and regulations and writes the BCASP through the CAP; and the Advertising Standards Board of Finance (ASBF) provides the framework and funding for the self-regulatory program.¹⁵¹

The English case of *Director General of Fair Trading v. Tobyward*¹⁵² provides a good illustration of the intersection between

149. See Darren Fitzgerald, *Self-Regulation of Advertising in the United Kingdom*, ENT. L. REV. No. 8(7), at 250-52 (Sweet & Maxwell Ltd. 1997).

150. See British Codes of Adver. and Sales Promotion §§ 68.12-22 (10th ed. 1999), available at http://www.asa.org.uk/the_codes. The CAP currently is comprised of 21 trade and professional groups and associations. *Id.* § 1 (listing CAP members). Although the BCASP are quite extensive and deal with standards for many industries, they also include general principles governing a broad array of issues such as Honesty, Decency, Truthfulness, Substantiation, Legality, Fear and Distress, Safety, Violence and anti-social behavior. The following provisions of the BCASP give a sense of the approach taken by the general principles:

- 2.1. All advertisements should be legal, decent, honest and truthful.
- 2.2. All advertisements should be prepared with a sense of responsibility to consumers and to society.
- 2.3. All advertisements should respect the principles of fair competition generally accepted in business.
- 2.4. No advertisement should bring advertising into disrepute.
-
- 5.1. Advertisements should contain nothing that is likely to cause serious or widespread offence....
- 5.2. Advertisements may be distasteful without necessarily conflicting with 5.1 above. Advertisers are urged to consider public sensitivities before using potentially offensive material.
- 5.3. The fact that a particular product is offensive to some people is not sufficient grounds for objecting to an advertisement for it.
- 6.1. Advertisers should not exploit the credulity, lack of knowledge or inexperience of consumers.
- 7.1. No advertisement should mislead by inaccuracy, ambiguity, exaggeration, omission or otherwise.

Id.

151. *Id.* §§ 68.1-68.49.

152. See *Dir. Gen. of Fair Trading v. Tobyward Ltd.*, 1 W.L.R. 517 (Ch. 1989).

Community and Member State law and of the impact the British system of self-regulation has upon deceptive advertising within those legal frameworks. In *Tobyward*, the manufacturer of a diet product¹⁵³ published allegedly misleading advertisements¹⁵⁴ concerning the product in several newspapers. After receiving a number of complaints about the advertisements, the ASA contacted the manufacturer. The council of the ASA upheld the complaints, and, when the manufacturer continued to publish the advertisements, the ASA finally referred the matter to the Director of Fair Trading.¹⁵⁵ After subsequent meetings with the manufacturer, the Director sought to enjoin the advertisements under the regulations that implemented the Misleading Advertising Directive in the United Kingdom.¹⁵⁶

The court granted the injunction, finding the advertisements to be prima facie misleading.¹⁵⁷ The court gave broad deference to the principle of self-regulation embodied in the ASA Code and the British system of self-regulation. Finding the Director's position on the advertisement to be "reasonable," the court found that:

[A]dvertisers would be more inclined to accept the rulings of their self-regulatory bodies if it were generally known that in cases in which their procedures had been exhausted and the advertiser was still publishing an advertisement which appeared to the court to be prima facie misleading, an injunction would ordinarily be granted.¹⁵⁸

In addition to viewing the court's predominant role as one of providing force to the system of self-regulation, the court believed the issuance of the injunction would not interfere with any legitimate interests of the manufacturer and would protect the consumer interest as well.¹⁵⁹

Tobyward illustrates the very limited intrusion of the Misleading Advertising Directive into Member State systems, in spite of the differences existing among the states. The Directive gives

153. The product was a substance called guar gum, which slowed down elimination of waste, thus making the consumer feel less hungry, and thus arguably causing the consumer to eat less and lose weight. *Id.* at 520.

154. The manufacturer claimed that use of the product could result in permanent weight loss, that there was a "guarantee of success," that the product was a "new medical breakthrough," that was "100% safe," and that users of the product could lose specified amounts of weight over a specific time period. *Id.* at 520-22. Testimony at trial indicated that these claims were false. *Id.* at 519-21.

155. *Id.* at 520.

156. See Control of Misleading Advertising Regulations 1988, SI 1988/915.

157. The court found that the manufacturer's claims in the advertisements, discussed *supra* note 154, were false, and that the advertisements were likely to affect economic behavior of the persons to whom it was addressed, by making it likely that they would buy the product. Thus, the ads were "misleading" under the definition provided by the Directive. *Id.* at 521-22; see *supra* note 139 (Directive definition).

158. *Tobyward*, 1 W.L.R. at 522.

159. *Id.*

much deference to the principle of self-regulation at the very local level, permitting in the case of the United Kingdom, formal legal intervention that only arises when all attempts at self-regulation have failed. This is the case even in the face of claims that self-regulation is anti-consumer. Consumer advocates in the United Kingdom, for example, have argued against the British method of self-regulation and the slow enforcement mechanism at the Director of Fair Trading level.¹⁶⁰ With respect to advertising complaints, informal resolution through the ASA mechanism makes legal intervention only a “last resort” and only viable in a small percentage of cases.¹⁶¹

When comparing the U.S. and EU regimes for policing deceptive advertising, one can discern principles of federalism and subsidiarity at work that in themselves create significant differences between the jurisdictions. In the United States, regulation is focused at the federal level through enforcement of the FTC Act, with state UDAPS mirroring, and even supplementing, federal efforts. Federalism principles and market regulation concerns act to allocate power between these bodies. Yet, by framing the debate as “state versus federal” and “regulation versus deregulation” questions, these principles and concerns also act to de-emphasize procedures such as self-regulation as a possible response to the problem. By contrast, the regime for misleading advertising established in the EU through the Misleading Advertising Directive is much more sophisticated, with broad supranational standards that nonetheless leave great enforcement discretion to Member States and their traditional systems. Obviously, each system is acting under constraints that are peculiar to their organizations and legal cultures. The First Amendment provides a significant barrier to heavy-handed

160. See HOWELLS & WEATHERILL, *supra* note 76, at 511-16 (discussing complaints against the long processes established under the Fair Trading Act). A 1983 study of 273 merchant assurances obtained pursuant to the Fair Trading Act's assurances mechanism revealed the following:

- in the case of 100 assurances, the traders subsequently traded satisfactorily;
- in the case of 145 assurances, the traders ceased to trade;
- in the case of 28 assurances, further action was required.

Id. at 512. It could be argued that this data impressionistically suggests that the self-regulation system and the assurances procedures at DFT in the United Kingdom effectively have acted to check errant traders, either by forcing compliance or by ejecting marginal traders who engage in deception from the market.

161. The ASA claims that few advertising cases even require legal intervention beyond the ASA resolution mechanism. See ADVERTISING STANDARDS AUTHORITY, ANN. REP. 1999, available at <http://www.asa.org.uk>, at 8-11 (Complaint and resolution figures for 1999). For a recent judicial decision that upholds an ASA adjudication, see *SmithKline Beecham PLC v. Advertising Standards Auth.*, No. CO/2291/200, [2000] EWCA Admin. 6, 2001 WL 14905 (Q.B. 2001).

regulation of advertising in the United States.¹⁶² Federalization and federalism are long-established principles in U.S. law, thus making probable the framing of the debate in terms of federalism. The still emerging role of EU institutions and concerns over subsidiarity and proportionality dictate a deferential attitude toward existing Member State systems by EU bodies.

The situation of a highly federalized, and at times federally dominated, scheme in the United States and a contrasting decentralized scheme in the EU is not universal in all areas of consumer protection. As the next section will show, the federalized U.S. and decentralized EU models reverse in the area of unfair contract terms.

2. Unfair Contract Terms

Another predominant concern of consumer protection policy focuses on policing the terms of the consumer contract. Values used in support of such intervention include fairness issues, market or information regulation, or concerns over the validity of an agreement entered into in situations of unequal bargaining power. Under each view, some sort of legal intervention may be warranted, although in different degrees depending upon the espoused view. As discussed in this section, similar to deceptive advertising, federalizing and decentralizing constraints on lawmakers may affect the ultimate legal response.

a. United States

In the United States, regulation of terms in the consumer contract largely occurs at the state level. Two very basic doctrines affecting use of terms are the obligation of good faith and fair dealing and the doctrine of unconscionability. The Uniform Commercial Code provides that "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."¹⁶³ Good faith can mean "honesty in fact in the conduct or transaction concerned,"¹⁶⁴ but more importantly, in the case of a merchant, means "honesty in fact and the observance of reasonable commercial

162. See, e.g., *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (finding federal restrictions on "broadcast indecency" constitutionally permissible); *Ass'n of Nat'l Advertisers v. Lungren*, 44 F.3d 726 (9th Cir. 1994), cert. denied, 516 U.S. 812 (1995) (upholding California restrictions on environmental claims in advertising).

163. U.C.C. § 1-203, 1 U.L.A. 109 (1999).

164. *Id.* § 1-201(19).

standards of fair dealing in the trade.”¹⁶⁵ Good faith, most particularly under the latter definition that incorporates notions of “fair” conduct, can check the use of perceived unfair terms in consumer contracts.¹⁶⁶ The doctrine of unconscionability acts to regulate terms by giving judges broad latitude to strike out “unconscionable” terms or to refuse to enforce “unconscionable” contracts.¹⁶⁷ Also at the state law level, specific types of contract terms may be heavily regulated.¹⁶⁸ State UDAPS may impact use of terms in consumer contracts.¹⁶⁹ Finally, individual states may prohibit particular types of terms—state law usury statutes limiting maximum interest rates, for example, are a type of legislative regulation of terms.

As can be seen from these provisions, much of the substantive regulation of terms in consumer contracts in the United States occurs at the state law level, often through open-textured standards such as “good faith,” with relatively nominal involvement of the federal government. While comprehensive federal statutes governing disclosure of terms exist—such as the Truth in Lending Act¹⁷⁰—their focus usually is upon disclosure of information and terms rather than substantive regulation of those terms.¹⁷¹ Albeit somewhat of a

165. *Id.* § 2-103(1)(b); *see also id.* § 3-103(a)(4) (good faith includes not only honesty but also observance of reasonable commercial standards of fair dealing). Article 5 of the U.C.C. (Letters of Credit) incorporates the subjective state of mind standard. *See* U.C.C. § 5-102(a)(7), 2B U.L.A. 554 (1999).

166. *See, e.g. id.* § 4-401 cmt. 3 (recognizing that good faith may act to limit bank’s discretion in setting fees under bank-depositor contracts).

167. Section 2-302 of the U.C.C. provides:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

U.C.C. § 2-302, 1B U.L.A. 15 (1999).

168. *See, e.g., id.* § 2-316 (regulating warranty disclaimers); *id.* § 2-719(2)-(3) (restricting limitations of remedies and exclusions of consequential damages).

169. *See supra* notes 131-35 and accompanying text.

170. *See infra* text accompanying notes 213-19.

171. This is not to suggest that the federal government is not involved at all in regulation of terms in consumer contracts. For example, the federal Magnuson-Moss Warranty Act (MMWA), regulates to a limited degree disclaimers of warranties and limitations of warranties in written warranties of consumer products. 15 U.S.C. § 2301-12 (1994). Under the MMWA, a designated “Full” warranty may not disclaim or limit the duration of state law implied warranties. *Id.* § 104(a). Warranties designated by the Seller as “Limited” may not disclaim state law implied warranties, but may limit the duration of such state law warranties if the limitation is conscionable and set forth

generalization, the area of term regulation in consumer contracts largely has been the prerogative of the states and the NCCUSL. Thus, with respect to regulation of contract terms, the situation in the United States is somewhat a reversal of that seen in the area of policing deceptive advertising. In the latter area, strong federal authority historically was exercised through the FTC Act, within an overarching regime of cooperation and conflict between federal and state bodies. In the case of contract terms, only limited federal intervention has occurred to date, with the primary regulatory authority retained at the local state level.¹⁷²

b. European Union

As with the United States, the balance of Community versus Member State authority also shifts in the European Union in the area of unfair contract terms. One of the EC's more recent Directives addressed specifically the propriety of including in consumer contracts many types of unfair contract terms.¹⁷³ The Unfair Terms in Consumer Contracts Directive (UTCC Directive) begins by recognizing that the disparity among Member State law treatment of unfair terms may result in distortions of competition between suppliers¹⁷⁴ and the consumer interests involved in such

in clear and unmistakable language and prominently displayed on the face of the warranty. *Id.* § 108. The MMWA thus to some degree preempts state laws that otherwise would allow disclaimers of warranties in the consumer context. *See also* 15 U.S.C. § 1639 (1994) (TILA preclusion of types of terms in certain high interest mortgages).

172. The sensitivity of federal authorities to the historic role of the states in contract regulation can be seen most recently in the debates concerning federal regulation of electronic signatures and the crafting of federal bills around possible state and NCCUSL actions in the area. *See supra* note 11.

173. Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L95) 29. Some types of terms related to quality of consumer goods, which have a fairness dimension, are not addressed by the UTCC Directive. Recently EC bodies promulgated a Directive that addresses the issue of legal and commercial guarantees in consumer contracts for the sale of goods, analogous to U.C.C. Article 2 warranty provisions in the United States. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, 1999 O.J. (L171) 12. The Guarantees Directive provides significant remedies to the consumer when goods do not conform to express or implied guarantees made by the seller or producer and provides further that attempts to restrict consumer rights provided by the Directive are not binding on the consumer. *See id.* arts. 2, 3, 6 & 7.1. The Directive must be transposed into Member State law by January 2002. *Id.* art. 11. As a substantial consumer protection measure, the Directive has raised significant questions on whether it contravenes the principle of subsidiarity. *See, e.g.,* Frances E. Zollers, Sandra N. Hurd & Peter Shears, *Consumer Protection in the European Union: An Analysis of the Directive on the Sale of Goods and Associated Guarantees*, 20 U. PA. J. INT'L ECON. L. 97, 122-24 (1999) (setting out parameters of subsidiarity debate).

174. The preamble to the UTCC Directive provides:

disparities.¹⁷⁵ Under the UTCC Directive, Member States must provide that “unfair terms” used in a contract concluded with a consumer¹⁷⁶ by a seller or supplier¹⁷⁷ not be binding on the consumer

Whereas the laws of Member States relating to the terms of contract between the seller of goods or supplier of services, on the one hand, and the consumer of them, on the other hand, show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers and suppliers, notably when they sell and supply in other Member States;

....

Whereas sellers of goods and suppliers of services will thereby be helped in their task of selling goods and supplying services, both at home and throughout the internal market; whereas competition will thus be stimulated, so contributing to increased choice for Community citizens as consumers;

1993 O.J. (L95) 29. See also Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, COM (2000) 248 final, at 13 (noting that competition is distorted by the cost-externalizing effects of unfair terms, and that unfair terms lead to distortions in competition and lower quality prices and services) [hereinafter UTCC Report].

175. The preamble continues in part:

Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services; whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State;

Whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own, it is essential to remove unfair terms from those contracts;

....

Whereas the two Community programmes for a consumer protection and information policy underlined the importance of safeguarding consumers in the matter of unfair terms of contract; whereas this protection ought to be provided by laws and regulations which are either harmonized at Community level or adopted directly at that level;

....

Whereas more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; whereas those rules should apply to all contracts concluded between sellers or suppliers and consumers; whereas as a result *inter alia* contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements must be excluded from this Directive;

1993 O.J. (L95) 29.

176. A “consumer” is defined as “any natural person who . . . is acting for purposes which are outside his trade, business or profession.” *Id.* art. 2(b).

177. A “seller or supplier” is defined as “any natural or legal person who . . . is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.” *Id.* art. 2(c).

and that the contract continue to bind the parties, if it is capable of continuing in existence without the unfair terms.¹⁷⁸ Member States also must ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.¹⁷⁹ Terms are “regarded as unfair if, contrary to the requirement of good faith, [they] cause[] a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”¹⁸⁰

Terms that have been “individually negotiated” are excepted or excluded from the general proscription on unfairness.¹⁸¹ However, a term is deemed not to have been individually negotiated “where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.”¹⁸² Even if particular aspects of a term or one specific term have been individually negotiated, that fact alone does not exclude the application of the UTCC Directive “if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.”¹⁸³ The Annex contains an indicative and non-exhaustive list of the terms that typically might be regarded as unfair.¹⁸⁴ In addition, all terms

178. *Id.* art. 6.

179. *Id.* art. 7(1). The means are to

include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

Id. art. 7(2). These remedies “may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.” *Id.* art. 7(3).

180. *Id.* art. 3(1). The unfairness of a term is to be assessed “taking into account the nature of the goods or services for which the contract was concluded” and reference is to be made “to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.” *Id.* art. 4(1). Unfairness does not relate either to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration. *Id.* art. 4(2).

181. *Id.* art. 3(1).

182. *Id.* art. 3(2). In showing that a standard term has been individually negotiated, the burden of proof is on the seller or supplier. *Id.*

183. *See id.* The European Commission noted in April 2000 that formal attempts to invoke the “individually negotiated” term exception are non-existent, but that the use of boilerplate clauses in computer-generated consumer contracts which assert that the consumer has individually negotiated the contract is rising, although such clauses are, in its view, not only null and void, but highly prejudicial to consumers. UTCC Report, *supra* note 174, at 14.

184. These terms include those that have the object or effect of:

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
- (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
- (f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;

in written contracts must always be drafted in plain, intelligible language.¹⁸⁵ When there is doubt about the meaning of a term, the interpretation most favorable to the consumer is to prevail.¹⁸⁶ Member States are permitted to adopt or retain the most stringent provisions compatible with the EC Treaty in the area covered by the UTCC Directive to ensure a maximum level of protection for the consumer.¹⁸⁷ Although the UTCC Directive does not take the extreme measure of adopting a black-list of "unfair" terms,¹⁸⁸ even its gray-list approach evidenced by the Annex stands to intervene significantly into Member State law. While the Misleading Advertising Directive can be construed as attempting in at least some degree to preserve Member State regulation and existing systems, the UTCC Directive might have the opposite effect.

The intersection of British contract law and the Directive provides a good example of the way in which the UTCC Directive might fundamentally impact, if not change, the national law of a Member State within a very short period. The United Kingdom first implemented the UTCC Directive in 1994.¹⁸⁹ The first set of implementing regulations became effective as of July 1, 1995 and gave the Director of Fair Trading authority to consider complaints

(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

UTCC Directive, annex. Member States are obligated to transpose the entire text of the list in the Annex into their respective transposition instrument (the national law that implements the Directive). See UTCC Report, *supra* note 174, at 16. The Commission recently observed two problems stemming from this requirement. First, Nordic countries have refused to transpose the Annex out of concern that national courts would use the list instead of applying criterion that under national law offer more protection for the consumer. See *id.*; see also Thomas Wilhelmsson, *The Unfair Contract Terms Directive and the Nordic Contract Model*, in THE INTEGRATION OF DIRECTIVE 93/13 INTO THE NATIONAL LEGAL SYSTEMS (Conference Papers 1-3 July 1999) (copy on file with the author) (discussing impact of UTCC Directive on Nordic countries) [hereinafter 1999 CONFERENCE PAPERS]. Second, the vague wording of subparts to the annex has "weakened its practical impact" in national court opinions. UTCC Report, *supra* note 174, at 16.

185. UTCC Directive, art. 5.

186. *Id.*

187. *Id.* art. 8.

188. See UTCC Report, *supra* note 174, at 16-19 (account of black-list versus gray-list question in UTCC Directive debate). Many Member States nonetheless have opted for a black-list approach to the Annex. See *id.* at 17.

189. See SI 1994, No. 3159.

under the regulations.¹⁹⁰ This was replaced by another transposing instrument five years later.¹⁹¹

Under U.K. domestic law in effect prior to the UTCC Directive, consumers received substantially less protection than provided under the Directive. For example, under the Unfair Contract Terms Act 1977, only a limited number of terms were covered as "unfair."¹⁹² A seller could not exclude or restrict his liability for death or personal injury resulting from negligence.¹⁹³ In the case of other loss or damage, exclusions or restrictions of liability for negligence were to satisfy a reasonableness requirement.¹⁹⁴ Thus, a greater number of terms may now be considered perhaps unfair in the United Kingdom after implementation of the UTCC Directive.

The Directive's incorporation of the obligation of good faith into consumer contracts also might fundamentally alter U.K. consumer contract law. The United Kingdom, at least prior to implementation of the Directive, often took a case-by-case approach to many types of unfair contract terms, an approach similar to U.S. state contract law.¹⁹⁵ Often the results were inconsistent. In the 1974 case of *Lloyd's Bank Ltd. v. Bundy*,¹⁹⁶ the court adopted a very liberal approach to policing the consumer contract. *Lloyd's Bank* involved an elderly farmer who had mortgaged the family farm to help his son.¹⁹⁷ The banks initiated foreclosure, and the trial court ruled in favor of the banks, feeling that there was nothing "which takes this out of the vast range of commercial transactions."¹⁹⁸ The trial court ordered the farmer, Herbert Bundy, to give up possession of the farm to the bank.¹⁹⁹ Bundy appealed on the ground that the circumstances surrounding the transaction were so exceptional that he should not be held bound.²⁰⁰

190. UTCC Report, *supra* note 174, at 7 n.12; Robert Bradgate, *Experience in the United Kingdom*, in 1999 CONFERENCE PAPERS, *supra* note 184, at 36-37 (laying out enforcement mechanism established in 1994 Regulations).

191. Unfair Terms in Consumer Contracts Regulations, SI 1999, No. 2083 § 2 (revoking SI 1994, No. 3159). The 1994 Regulations were revoked due to their failure to "fully implement" Article 7(2) by only giving the Director General of Fair Trading the power to seek injunctions against use of unfair terms. See UTCC Report, *supra* note 174, at 7. The 1999 Regulations permit several "qualifying bodies," including consumer associations, also to seek injunctive relief in a representative capacity. See 1999 UTCC Regulations, § 12, sch. 1.

192. Unfair Contract Terms Act 1977 § 2(1).

193. *Id.*

194. *Id.* § 2(2).

195. See *supra* text accompanying notes 163-72.

196. *Lloyd's Bank Ltd. v. Bundy*, 3 W.L.R. 501 (Ct. App. Civ. Div. 1974).

197. *Id.* at 504.

198. *Id.*

199. *Id.*

200. *Id.*

The appellate court reversed. While noting that "in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it,"²⁰¹ the court then articulated several exceptions to this rule, all of which were derived from a unifying principle of inequality of bargaining power.²⁰² Yet, the expansive approach of *Lloyd's Bank* has not been widely incorporated into English case law. For example, in *Hart v. O'Connor*,²⁰³ the eighty-three year old trustee of an estate contracted to sell the land to the defendant, a neighbouring farmer. Unknown to the defendant, the vendor-trustee was of unsound mind.²⁰⁴ A brother and his two sons instituted proceedings in the High Court of New Zealand against the defendant and the vendor, asserting that the contract should be rescinded for lack of mental capacity, unfairness, and unconscionability.²⁰⁵ While the plaintiffs won at the lower court level, the appeal was allowed, and the court found that the plaintiff did not engage in unconscionable conduct.²⁰⁶ The court found "no equitable fraud, no victimisation, no taking advantage, no overreaching or other description of unconscionable doings" that might justify a finding of unconscionability.²⁰⁷ Some English commentators also have noted that English courts generally adopt an extremely conservative approach to the issues of good faith and unconscionability and question the implementation of good faith by the UTCC Directive:

The use by [the UTCC] Directive of the notion of good faith raises the question of whether English Law requires that a party to a contract exercise his rights in good faith, whether the right in question concerns the creation of a contract or its performance. Such a question may be expressed in a variety of ways: put negatively, it may be asked whether a party's *bad faith* should affect his exercise of rights or whether his "unconscionable conduct" in the creation of a contract should affect its validity and put at its most general, whether this exercise should be

201. *Id.* at 506. In the court's view:

No bargain will be upset which is the result of the ordinary interplay of forces. There are many hard cases which are caught by this rule. Take the case of a poor man who is homeless. He agrees to pay a high rent to a landlord just to get a roof over his head. The common law will not interfere. It is left to Parliament. Next take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and it is guaranteed by a friend. The guarantor gives his bond and gets nothing in return. The common law will not interfere. Parliament has intervened to prevent moneylenders charging excessive interest. But it has never interfered with banks.

Id.

202. *Id.* at 506-08. The doctrinal categories were delineated "duress of goods", "unconscionability," "undue influence," "undue pressure," and "salvage agreements." *Id.* at 507-08.

203. *Hart v. O'Connor*, 3 W.L.R. 214 (Privy Council 1985).

204. *Id.* at 215.

205. *Id.*

206. *See id.* at 233.

207. *Id.*

recognised only if this is reasonable or fair. In 1766, in the context of recognising the duty of disclosure in contract of insurance, Lord Mansfield C.J. stated that “[t]he governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon.” Nevertheless, the modern view is that, in keeping with the doctrines of freedom of contract and the binding force of contracts, in English contract law good faith is in principle irrelevant.²⁰⁸

This suggests that the UTCC Directive may significantly impact, or in fact has already impacted, English law and, most importantly, aspects of what might be considered very basic contract law policy. Nor is the impact limited to the United Kingdom, which arguably had a doctrine of unfairness that acted against the consumer interest that might justify activist intervention by EU bodies. For example, contract law in Nordic countries, which emphasizes strongly and integrally a fairness principle above that established by the UTCC Directive, also may be impacted adversely by the Directive.²⁰⁹

Such an impact on existing legal traditions among the Member States suggests an increasingly federalizing and centralizing approach toward regulating unfair contract terms. Under the Directive’s approach, existing Member State contract law and attitudes ultimately may be altered—a position arguably much different from that suggested by the Misleading Advertising Directive. Moreover, the conflict between supranational standards

208. 1 CHITTY ON CONTRACTS 1-010, 12-13 (28th ed. 1999); see also MICHAEL H. WHINCUP, CONTRACT LAW AND PRACTICE 3.25, 56-57 (2d rev. ed. 1992).

[I]nsofar as English law finds nothing objectionable in contracting to give very little in order to obtain a great deal, on principle it is not concerned with the *fairness* or otherwise of bargains. Its basic attitude is still that of nineteenth century *laissez-faire* philosophy. It is a law for merchants and businessmen, supposedly bargaining on equal terms, each free to get the better of the other if he can. Once made, the bargain is binding, for better or worse. The law will not rewrite people’s contracts for them in the interests of abstract ideals of fairness or justice. English law is thus unique in having no general rule against unconscionable contracts, or in refusing to imply obligations of good faith between contracting parties.

Id.; Simon Whittaker & Reinhard Zimmermann, *Good Faith in European contract law: surveying the legal landscape*, in GOOD FAITH IN EUROPEAN CONTRACT LAW 39-48 (Zimmermann & Whittaker eds., 2000) (discussing absence of duty of good faith in English contract law but noting where good faith principles have been assimilated in other doctrinal areas). *But see* Bradgate, *supra* note 190 (arguing that innovations to English good faith doctrine following the UTCC Directive are overstated by some authors).

209. Wilhelmsson, *supra* note 184, at 20 (discussing potential adverse effect that UTCC Directive may have on Nordic contract law and theory). For a comprehensive, comparative treatment of good faith across the Member States in a myriad of areas, see generally GOOD FAITH IN EUROPEAN CONTRACT LAW, *supra* note 208.

that strongly favor the consumer interest and local contract policy is as much a conflict between appropriate views on local versus central powers as it is one of competing social policy goals or values. For example, it is hard to reconcile the position taken by the UTCC Directive with an interpretation of the principle of subsidiarity that would enhance diversity.²¹⁰ The UTCC Directive, in sum, stands as an example of what may eventually be the "Europeanization" of Member State private law.²¹¹ While in the European Union an increasing centralizing trend in regulating consumer contract terms appears to be occurring, the United States to date has resisted this trend by leaving most of the authority in regulating the terms of the consumer contract to the individual states and the NCCUSL.

B. *Integration: Consumer Credit*

As the preceding section suggests, deceptive advertising and unfair contract terms provide examples of how federalism values may work into the final form of consumer law. The area of consumer credit disclosure suggests that cultural, linguistic, and economic integration also may impact involvement of political organizations in consumer lawmaking. Compulsory disclosure of information is a common tool for regulating consumer contracts, implicitly resting on the rationale that such disclosure may correct informational imbalances frequently present in consumer contracts.²¹² As will be discussed in this section, the experience in the European Union

210. See *supra* text accompanying notes 99-114. In a recent article Gunther Teubner argues that the interjection of good faith into British law by the UTCC Directive should be interpreted as an "irritant" that will provoke a uniquely British reconstruction of the doctrine rather than as a "transplant" of foreign legal doctrine into the domestic British system. See generally Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998). Positing that national legal systems operating within different production regimes inevitably will devise different doctrinal solutions to the same problems, Teubner argues against a unifying interpretation of EU harmonization in favor of a diversification approach. See *id.* at 31-32.

211. See Stuyck, *supra* note 90, at 396-97 (discussing current perspectives on "creeping Europeanization" and its impact on private law); see also Editorial, *Europeanization of private law—Part 2*, 35 COMMON MKT. L. REV. 1013 (1998) (quoted in *id.* and raising concern over centralization reflected in consumer-related areas). Whether a "European consumer law" exists or should exist perhaps depends on what that term is intended to define. See Thomas Wilhelmsson, *Is There a European Consumer Law - and Should There Be One?*, 41 SAGGI, CONFERENZE E SEMINARI 1-3 (Centro di Studi e Recerche Di Diritto Comparato 2001) (distinguishing different meanings attributed to "European consumer law" and arguing against development of such a law that connotes changes at the deeper level of legal culture); see also Teubner, *supra* note 210, at 12-13, 31-32 (suggesting that Europeanization, interpreted as unification through law, inevitably produces new divergences and supporting interpretation that favors devolution and diversification).

212. See generally William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400.

suggests that a disclosure initiative requires a sufficient degree of common community values and integration of legal and economic cultures as a condition to successful implementation. Although mandated disclosure has been a successful federal legislative technique in the United States, where the individual states have relatively homogenous cultural and economic values, and a common language as well, similar disclosure initiatives in the European Union have been less successful.

1. United States

The archetype of all modern consumer disclosure statutes is perhaps the United States federal Truth in Lending Act (TILA),²¹³ which among other things requires creditors to disclose clearly and conspicuously the “annual percentage rate” and “finance charge” in consumer credit transactions.²¹⁴ Regulation Z,²¹⁵ promulgated by the Board of Governors of the Federal Reserve, implements TILA. From a technical standpoint, perhaps the most significant problem with consumer credit disclosure is developing a common working definition of “finance charge” and “annual percentage rate.” In the United States, the issue of whether the cost of credit—the finance charge—includes points, loan fees, credit, or other insurance is an issue that results in significant TILA questions. Similarly, quoted rates of interest may vary widely depending on the method used to calculate annual percentage rate (APR). Detailed regulations promulgated under TILA attempt to resolve these problems.²¹⁶

While it is a target of criticism for its underlying rationales or for its failed methodology²¹⁷ and is widely excoriated by the financial community,²¹⁸ TILA nonetheless can be considered a successful

213. 15 U.S.C. §§ 1601-1667f (1995).

214. *Id.*

215. 12 C.F.R. pt. 226 (2001).

216. *See id.* §§ 226.4, 226.14; *see also* Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 277-80 (discussing original debates regarding computation of cost of credit and APR).

217. *See generally* Rubin, *supra* note 216 (critiquing TILA and arguing that TILA represents a failure of legislative methodology). As Professor Rubin points out, the efforts of the Federal Reserve in implementing TILA through Reg Z played a significant role throughout the history of TILA. *See id.* at 289-95.

218. TILA is a perennial contender for financial institutions' least favored statute, on the grounds that it creates costly paperwork and exposes them to unjustified lawsuits. *See, e.g.*, Dean Anason, *Lender Groups Call For Overhaul of Respa, Truth-in-Lending Act*, AM. BANKER, Feb. 21, 1997, at 2. According to one industry representative, the TILA requirements are “excessive, confusing, and difficult to comply with.” *Id.* Research by government regulators suggests that TILA is one of the most commonly violated consumer protection laws, although most violations are not of an egregious nature. *See* Dean Anason, *In Focus: FDIC: Most Banks Break Consumer Laws, And Mostly by Mistake*, AM. BANKER, Sept. 15, 1997, at 3. In 1996, for

disclosure act when measured by its staying power alone. Differences, often harsh, most often arise concerning the proper interpretation of the statute and also its underlying effectiveness.²¹⁹ It is difficult, however, to argue in favor of repealing "truth." While to its critics inadvisable or ineffectual, consumer credit disclosure not only was possible legislatively in the United States, but has proven to be a consumer protection device of lasting duration.

2. European Union

Some attempts to regulate disclosure of the cost of consumer credit have occurred at the EC level. Unlike in the United States, however, these attempts have been modest and, to date, successful only in incremental degrees and with nominal actual impact. In 1987, a Council Directive first addressed consumer credit disclosure issues.²²⁰ Similar to TILA, this Directive, to a limited extent, attempted to impose mandatory disclosure to consumers of interest rates. The Directive required that all credit agreements be in writing and that the consumer receive a copy of the written agreement.²²¹ The written agreement was to include a statement of the annual percentage rate of charge,²²² a statement of the conditions under which the annual percentage rate of charge may be amended, and the other essential terms of the contract.²²³

example, the FDIC forced 148 banks to compensate 6272 customers \$1.4 million for TILA violations. *Id.*

219. *See, e.g.,* Rubin, *supra* note 216, at 236 & nn.14-15 (results of leading empirical studies of TILA); 298-99 (discussing alternatives to disclosure as a means of policing abusive credit).

220. Consumer Credit Directive 87/102/EEC (Dec. 22, 1986) (amended by Council Directive 90/68/EEC, 1990 O.J. (L 061) 14-18 and by European Parliament and Council Directive 98/7/EEC, 1998 O.J. (L 101) 17-23).

221. *Id.* art. 4(1). A "credit agreement" meant "an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation." *Id.* art. 1(2)(c).

222. Prior to the 1998 amendments, "Annual percentage rate of charge" meant "the total cost of the credit to the consumer" expressed as an annual percentage of the amount of the credit granted and calculated according to existing methods of the Member States. *Id.* art. 1(2)(e). "Total cost of the credit to the consumer," used to calculate the annual percentage rate of charge was defined as "all the costs of the credit including interest and other charges directly connected with the credit agreement," again to be determined in accordance with the provisions or practices of the Member States. *Id.* art. 1(2)(d). In cases where it was not possible to state the annual percentage rate of charge, the consumer was to have been provided with "adequate information" in the written agreement. *Id.* art. 4(2).

223. *Id.* art. 4(2). In the case of agreements for financing goods or services contracts, "essential terms" could include the following:

- (i) a description of the goods or services covered by the agreement; (ii) the cash price and the price payable under the credit agreement; (iii) the amount of the deposit, if any, the number and amount of instalments and the dates on which they fall due, or the method of ascertaining any of the same if unknown at the

Yet, due to the lack of a shared Community method for calculating annual percentage rate, an issue long resolved in the United States through TILA and through federal regulatory involvement, the 1987 Directive could only defer to Member State methods for calculating APR.²²⁴ Significant amendments attempting to address these problems related to lack of a common method for calculating APR followed later.²²⁵ In 1990, the Consumer Credit Directive was amended to provide a uniform method for calculating consumer credit costs and APR throughout the European Union, to be phased over a three-year period.²²⁶ Yet, this amended Directive has had only limited success, with delays occurring in implementation.²²⁷ Another amendment to the Consumer Credit Directive, this time to modify the uniform method and thus to establish a common Community APR and to create an EU symbol to indicate that APR, followed in 1998.²²⁸ Well into the second decade of initiatives to harmonize consumer credit disclosure rules in the European Union, progress on the matter has been limited.

Raw interest group politics and Member State interests²²⁹ admittedly may play a role in the slow development of a Community-wide APR standard. In addition to those factors, the limited success and frequent delays in implementation of a common method of interest rate disclosure suggests also that limited integration of credit markets among the Member States of the European Union may impact the development of consumer law.²³⁰ Significant discrepancies in business practices, Member State legislation, and tax issues provide additional hurdles along with credit market

time the agreement is concluded; (iv) an indication that the consumer will be entitled . . . to a reduction if he repays early; (v) who owns the goods (if ownership does not pass immediately to the consumer) and the terms on which the consumer becomes the owner of them; (vi) a description of the security required, if any; (vii) the cooling-off period, if any; (viii) an indication of the insurance (s) required, if any, and, when the choice of insurer is not left to the consumer, an indication of the cost thereof.

Id. annex.

224. See *supra* text accompanying notes 214-16; see also HOWELLS & WILHELMSSON, *supra* note 25, at 204.

225. See HOWELLS & WILHELMSSON, *supra* note 25, at 194-95 (discussing development of EC proposals on consumer credit).

226. Council Directive 90/88/EEC, 22 February 1990 amending Directive 87/102/EEC for the Approximation of the Law, Regulations, and Administrative Provisions of the Member States Concerning Consumer Credit, 1990 O.J. (L 061) 14-18.

227. See HOWELLS & WILHELMSSON, *supra* note 25, at 205-06; 1997 O.J. C 155 (Mar. 11, 1997) ¶ 1.

228. European Parliament and Council Directive 98/7/EC, preamble, 1998 O.J. (L 101) 17-23 (mandating use of Community-wide APR standard).

229. For example, a common formula would result in the changing of practices in France and Germany. See HOWELLS & WILHELMSSON, *supra* note 25, at 205.

230. See 1997 O.J. C 115 (Mar. 11, 1997) ¶ 2.

development.²³¹ The limited volume of cross-border transactions to date, in which a common method of computing interest rates would prove most useful, also has weighed against success.²³² Coupled with slow market integration are political considerations weighing against success. EC imposition of a Community-wide disclosure method might act to test the boundaries of subsidiarity and proportionality.²³³ Finally, because disclosure of information invokes with it language issues, cultural concerns related to language preservation may also be related to the slow progress of consumer credit disclosure in the European Union.²³⁴

Factors such as these, which are acting to check successful EU level disclosure initiatives, illuminate some crucial antecedents for successful harmonization. The history of consumer credit disclosure initiatives provides an example of how legal, business, and social culture can impact the form and success of consumer law at the national or transnational level. As the EU experience demonstrates, a sufficient amount of legal, cultural, and economic integration must exist prior to creation of largely uniform, and successful, disclosure standards across borders.

The limited success of credit disclosure in the European Union also, through implication, demonstrates some factors that advanced TILA's success in the United States. Returning again to the United States experience with TILA, and contrasting the success of TILA with the EU experience, it is likely that many factors apart from consumer politics and consumer ideology contributed to the success of TILA. TILA was enacted at a time when the states had attained a sufficient amount of economic and legal integration to make TILA a political possibility at the federal level. The preference for federal over state action during the time of enactment made congressional action politically palatable, if not self-evidently proper, under then-prevalent views on appropriate federal action. Most critically, the existence of an established regulatory body such as the Federal

231. See *id.* ¶ 2.3.

232. See *id.* ¶ 2.4.

[C]onsumer credit is still largely provided by the financial institutions of a country for the residents of the same country, and for obvious reasons: the need to know the client, different legislation, difficulty in reclaiming sums lent abroad. It is only in certain border areas that cross-border credit is of any significance.

Id.

233. See *id.* ("The Commission has accepted that it is not possible, while complying with the proportionality rule and subsidiarity, to harmonize these definitions.")

234. Cf. Michele Belluzzi, *Cultural Protection as a Rationale For Legislation: The French Language Law of 1994 and the European Trend Toward Integration in the Face of Increasing U.S. Influence*, 14 DICK. J. INT'L L. 127 (1995) (discussing cultural dimension of language restrictions at Member State level).

Reserve that had both the expertise and desire to enforce TILA after its enactment ensured the "success" of the law. Focusing the debate exclusively on whether federal action through TILA was wise or improper, as traditional legal analysis might suggest, thus would overlook the political, organizational, cultural, and economic factors—such as economic and legal integration, developed political bodies, common language, and federalism values—that were present at the time of enactment so as to permit legislative action. And, the experience of credit disclosure comparatively indicates that these factors are not insignificant aspects in the development of disclosure laws.

C. Systems: Consumer Arbitration

The question of creating just and accessible systems for resolving consumer disputes plays an important role in consumer protection. To paraphrase the old saying, rights must have remedies. A great number of consumer dispute mechanisms exist, which vary from jurisdiction to jurisdiction. For example, both the United States and Europe rely significantly on consumer complaint mechanisms as an informal means of enforcing consumer disputes. The Better Business Bureau in the United States is an example of this method of dispute resolution. Member States of the European Union have similar entities to assist consumers, such as, in the United Kingdom, organizations including Consumer Advice Centres, Citizens' Advice Bureaus, and trade associations.²³⁵ The EC has begun to work on the transnational level to provide methods of informal dispute resolution by establishing a pilot project that has opened "frontier centres" in European cities to provide information on consumer issues and consumer law.²³⁶ The centers are run by private or public sector agencies experienced in consumer affairs and are assisted by the Commission.²³⁷

Beyond the purely informal methods of dispute resolution exists a myriad of enforcement schemes that fall short of traditional judicial dispute resolution. The British Code of Advertising Practice provides a good example of industry self-regulation, an approach less favored in the United States, which usually emphasizes dispute resolution within more formal legal structures.²³⁸ The U.S. FTC Act²³⁹ and the U.K. Fair Trading Act²⁴⁰ are examples of employing agencies to

235. See RAMSAY, *supra* note 24, at 126.

236. COMMISSION OF THE EUROPEAN COMMUNITIES, CONSUMER POLICY: SECOND COMMISSION THREE-YEAR ACTION PLAN 19 (1993).

237. *Id.*

238. See *supra* notes 149-62 and accompanying text.

239. See *supra* text accompanying notes 121-28.

240. See *supra* notes 146-48 and accompanying text.

enforce consumer rights, with the primary agency remedy being the injunction or cease and desist order.²⁴¹ In the arena of formal judicial dispute resolution, many procedural devices are used to secure consumer access to justice. In the United States, the predominant scheme is to allow private rights of action. For example, many state deceptive practices statutes employ consumers as private attorneys general by allowing consumers to bring a private action under the statute.²⁴² Burdens of proof, provisions for statutory damages and for punitive damages, authorization for class actions, and awarding of attorneys fees are all additional devices that are intended to provide consumers with greater access to the courts in the United States. Class actions, nonetheless, are a U.S. phenomenon and an approach rarely available in the European Union, although the 1998 Directive on injunctions in the consumer context has brought a somewhat similar device by allowing specified national bodies to bring actions for injunctions in other Member States to protect the "collective interest of consumers" in the enjoining jurisdiction.²⁴³ Punitive damages rarely are recoverable in the European Union unless expressly authorized by statute, and no statutes presently in force provide for such damages.²⁴⁴

Such wide variety of types of informal and formal devices for dispute resolution and differing attitudes toward implementation of those devices to enhance consumer access to justice will act to cause significant variations in legislation among states or countries. The question of enforceability of arbitration clauses in consumer contracts, perhaps one of the most important issues concerning access to justice today, provides a good example of the serious differences that can emerge due to differing attitudes and values toward dispute resolution systems. The legal response to the enforceability of such clauses diverges between the United States and European Union.

Each jurisdiction begins at the same factual point—arbitration increasingly is becoming a key mechanism for consumer dispute resolution in both the United States and the European Union and contractual waivers of a judicial forum in consumer transactions are frequent. Yet, beyond that, significant differences arise when

241. See, e.g., 15 U.S.C. § 57(b) (FTC Act cease and desist order); see also *supra* note 148 (Director of Fair Trading powers).

242. See *supra* note 131.

243. Council Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, art. 1, 1998 O.J. (L 166) 51, 52; see also West & Rose, *supra* note 71, § 10.3 (discussing attitude toward class actions in EU); David J. Schwartz, Note, *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, 28 GA. J. INT'L & COMP. L. 527, 537-38 (2000) (discussing limited effectiveness of Injunction Directive's group action provisions in accommodating absence of class action in Europe).

244. West & Rose, *supra* note 71, § 10.2.

addressing the legal response to this reality. In the United States, the propriety of enforcing arbitration clauses in consumer contracts has become one of the most hotly contested areas of consumer law and evokes with it basic conceptual issues about both contract law and federalism. The subject has been the focus of extensive scholarly debate.²⁴⁵ In the United States Supreme Court case of *Allied-Bruce Terminix Cos. & Terminix International Co. v. Dobson*,²⁴⁶ the contract law and institutional issues were conjoined. The *Terminix* case involved the enforceability of an arbitration clause in a termite protection plan originally entered into between a franchisee of the companies and the seller of the plaintiff's house in Alabama. The contract had been transferred to the plaintiff after he and his wife purchased the owner's house.²⁴⁷ Although the franchisee upon the sale re-inspected the house and found it free of termites, a termite infestation was discovered almost immediately after the sale.²⁴⁸ The franchisee made efforts to treat and repair the house, but the plaintiff found the efforts unsatisfactory and sued the franchisee and franchisors in Alabama state court.²⁴⁹

The defendants asked for the state court to stay the matter because the contract contained an arbitration clause providing that any controversy or claims arising out of or relating to the agreement were to be settled exclusively by arbitration.²⁵⁰ Under Alabama law, however, pre-dispute arbitration agreements were invalid and unenforceable.²⁵¹ The trial court therefore denied the motion for a stay, and on appeal the Alabama Supreme Court upheld the denial.²⁵² Although the Federal Arbitration Act (FAA) provides that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and

245. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1996) (critiquing Supreme Court jurisprudence regarding arbitration); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069 (1998) (summarizing views on fairness concerns regarding arbitration); Stephan J. Ware, *Consumer Arbitration As Exceptional Consumer Law (With A Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195 (1998) [hereinafter *Consumer Arbitration*] (exploring contract law dimension of enforcement of arbitration clauses); Stephan J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001 (1996) [hereinafter *Unconscionability*] (discussing the use of unconscionability doctrine).

246. *Terminix Int'l Co. v. Dobson*, 513 U.S. 265 (1995).

247. *Id.* at 268.

248. *Id.*

249. *Id.* at 268-69.

250. *Id.* at 268.

251. ALA. CODE § 8-1-41(3) (1993). Alabama is one of a small number of states refusing to enforce pre-dispute arbitration agreements.

252. *Allied-Bruce Terminix Cos. v. Dobson*, 628 So.2d 354 (Ala. 1993).

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,"²⁵³ the Alabama Supreme Court found the FAA inapplicable.²⁵⁴ The state court first interpreted the FAA's language of "evidencing a transaction involving commerce" as requiring that the parties at the time of entering into the contract "contemplated substantial interstate activity."²⁵⁵ Finding that the parties in the dispute—a local franchisee and a home purchaser—contemplated a primarily local transaction, the court refused to enforce the arbitration clause, as required by Alabama state law.²⁵⁶

The United States Supreme Court reversed the denial of the stay. It rejected the "contemplation of the parties" test applied by the Alabama Supreme Court and several other courts²⁵⁷ to determine whether the FAA applied and held that the FAA applied whenever there was interstate "commerce in fact," irrespective of the reasonable expectations of the parties.²⁵⁸ Because there was no dispute that the contract involved interstate commerce in fact, the FAA's broad validation of the arbitration clause applied irrespective of the state policy against enforcement.²⁵⁹ In response to arguments that the "commerce in fact" rule acted against the interests of consumers, the Court appeared to take the position that arbitration is often in the interest of individuals.²⁶⁰ While the Court indicated that states have some freedom to regulate individual arbitration clauses, such regulatory means appear to be limited only to employment of "general contract law principles" that do not treat arbitration clauses less favorably than any other sort of term.²⁶¹

Yet, "general contract law principles" provide a limited arsenal for consumer lawyers seeking to invalidate arbitration clauses in consumer contracts, most particularly in light of the Court's expansive reading of the FAA in other areas. A requirement that an arbitration clause be prominently displayed in a consumer contract most likely might be found to be inconsistent with the FAA.²⁶² That

253. 9 U.S.C. § 2 (1998).

254. *Allied-Bruce Terminix*, 628 So.2d at 355.

255. *Id.*

256. *Id.* at 351.

257. *See, e.g.*, *Lacheney v. Profitkey Int'l, Inc.*, 818 F. Supp. 922 (E.D. Va. 1993); *Burke County Public Schools Bd. of Educ. v. Shaver P'ship*, 279 S.E.2d 816 (N.C. 1981); *R.J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 642 P.2d 127 (Kan. Ct. App. 1982).

258. 513 U.S. at 278-80.

259. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 278-80 (1995).

260. *Id.* at 280-81 ("Indeed arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation").

261. *Id.* at 281.

262. *Cf. Doctors Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-88 (1996) (invalidating state law that required first-page prominent notice of arbitration clause). *Doctors Associates* was limited to state statutes requiring prominent notice, but the

the clause has not been brought to the consumer's attention could be largely irrelevant.²⁶³ In the notable case of *Hill v. Gateway 2000*,²⁶⁴ the court found enforceable an arbitration clause included in a list of terms shipped in the box along with the goods. The manufacturer employed an "accept-or-return" policy under which the list of terms would be deemed to have become part of the contract unless the goods were returned within thirty days.²⁶⁵ The court found such a practice binding on the consumer.²⁶⁶ In response to arguments concerning the unfairness of arbitration to consumers, the court merely stated that was an issue "for Congress and the contracting parties to consider."²⁶⁷

The patent hostility to consumer access to courts in the United States through judicial enforcement of arbitration clauses is by no means universal. Applying general contract principles, courts have refused to enforce arbitration clauses because of lack of mutuality of consent²⁶⁸ or by applying the doctrine of unconscionability.²⁶⁹ Enforcement also has been denied where enforcement of an arbitration agreement would create a barrier to the consumer's effective exercise of rights created under other consumer statutes.²⁷⁰ Such activist courts, however, appear to be the exception rather than representative of a pro-consumer trend in the courts.²⁷¹ The

Court implied strongly that common-law requirements also would run afoul of the FAA. See *id.* at 687 n.3.

263. Cf. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97 (1991) (enforcing forum selection clause).

264. *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997).

265. *Id.* at 1148.

266. *Id.* at 1150.

267. *Id.* at 1151.

268. See *Knepp v. Credit Acceptance Corp.*, 229 B.R. 821, 836-37 (Bankr. N.D. Ala. 1999) (finding no enforceable agreement to arbitrate due to lack of mutuality of consent).

269. See, e.g., *id.* at 837-38 (invalidating arbitration clause under unconscionability doctrine); see also, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 99 Cal. Rptr. 2d 745, 768-73 (2000) (invalidating one-sided arbitration clause as unconscionable absent valid business justification for one-sided nature); see also *Ware, Unconscionability*, *supra* note 245 (comprehensive discussion of use of doctrine of unconscionability in light of Supreme Court's views on FAA).

270. See *Randolph v. Green Tree Fin. Corp.-Ala.*, 178 F.3d 1149, 1151 (11th Cir. 1999) (refusing to enforce arbitration of TILA claims); *Shankle v. B-G Maintenance Management of Colo., Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999) (finding arbitration created unacceptable barrier to access to judicial forum); *Broughton v. Cigna Healthplans of California*, 988 P.2d 67, 71 (Cal. 1999) (finding claim that seeks injunctive relief under state UDAP statute to be inarbitrable).

271. See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 82 (2000) (Supreme Court reversal of lower court finding of unenforceability due to insufficient record regarding prohibitive cost of arbitration); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180-81 (3d Cir. 1999) (rejecting consumer's lack of mutuality argument); *In re Pate*, 198 B.R. 841, 844-45 (Bankr. S.D. Ga. 1996) (same); see also *Ware*,

vehemently pro-FAA case law from the Supreme Court, when coupled with judicial interpretations of state contract law regarding fundamental fairness and consent that often disfavor the consumer, has resulted in a strong—if not in some courts nearly irrebuttable—presumption that favors enforcement of arbitration clauses in consumer contracts.

While the issue of arbitration of consumer disputes in the United States is being addressed via the judiciary and rests facially upon doctrines of federalism and freedom of contract, in Europe a somewhat opposite attitude toward enforcement of mandatory arbitration clauses in standard form consumer contracts is emerging. Consumer arbitration clauses are gray-listed under the UTCC Directive discussed earlier.²⁷² While this EC action does not necessarily act to invalidate all mandatory arbitration clauses, because those terms only “may” be considered unfair under the Directive, the gray-listing is significant. Appearance on the Annex suggests a reversal of the presumption, implicit and virtually irrebuttable in U.S. case law, to the effect that arbitration acts in the interests of consumers.²⁷³ Thus, the two jurisdictions, while

Unconscionability, *supra* note 245, at 1017 n. 108 (discussing views on likelihood of using unconscionability successfully to deny enforcement to arbitration agreements).

272. See *supra* text accompanying notes 173-88. Paragraph (q) of the Annex to the UTCC directive provides that the following types of clauses may be considered unfair:

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

Council Directive 93/13/EEC (5 April 1993), Annex, ¶ (q). While mandatory arbitration is disfavored, voluntary extra-judicial settlement of consumer disputes is not viewed as inherently against the consumer interest. See, e.g., Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, O.J. 2000 C155/1, ¶ 4 (listing voluntary participation and other criteria that initiatives towards extra-judicial resolution should meet).

273. Substantial case law already has emerged regarding treatment of standard arbitration clauses and other related access to justice types of clauses under the UTCC Directive. See UTCC Report, *supra* note 174, at 44, 52 (reporting over six hundred cases in UTCC database concerning paragraph Q of Annex). The concern over mandatory arbitration of consumer disputes in the EU often lies in the presumed unfairness that occurs because of the exclusion or hindrance of the right to take legal action or seek a legal remedy. See *id.* at 44; Bradgate, *supra* note 190, at 32 (noting that mandatory arbitration clauses in U.K. consumer contracts are now presumptively unfair when disputed amounts are less than £3000); William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 19, 39-40 (1998) (noting EC and Member State legal trends protecting consumers from pre- and post-dispute arbitration agreements and pointing out that the “United States lags behind.”). Moreover, some evidence suggests that certain other types of informal dispute resolution systems fail to accommodate the consumer interest. While the EC's Economic and Social Committee has criticized

beginning from the same point that recognizes that arbitration is used as a consumer dispute mechanism, immediately diverge into different perspectives on the propriety of that mechanism.

These differences, moreover, exist despite the fact that the EU and U.S. approaches toward arbitration reflect similar federalizing notions. In each case, intervention through federal bodies is preferred over state action or policy, such as the strongly anti-arbitration policy of Alabama. While a pro-consumer anti-arbitration policy has been achieved through active Community-wide intervention in the European Union, such a policy has been unable effectively to be brought about in the United States. Thus, while the jurisdictions demonstrate analogous federalizing trends, they come out largely on different sides on the issue of the propriety of consumer arbitration.

Finally, the UTCC Directive differs significantly from the United States regarding basic contract law policy. By gray-listing terms in the consumer contract through the UTCC Directive, the European Union moves toward an anti-contract approach to consumer arbitration, in which consent plays less of a role in determining whether a term ought to be enforced. This approach stands in opposition to the current U.S. approach, which emphasizes contract and consent as primary issues, be that emphasis right or wrong.²⁷⁴

The experience with consumer arbitration clauses suggests that consumer access to justice—in the case of arbitration, consumer access to courts—may be shaped by attitudes regarding social policy (the propriety of consumer arbitration as a means of dispute resolution), federalism (state versus federal action), and contract law policy (the role of consent in consumer contracting). In the case of arbitration, this mix of pressures has led to significantly different legal responses in the United States and European Union. Nor is the difference confined solely to consumer arbitration. For example, attitudes toward informal dispute resolution or legal traditions regarding class actions may impact the remedies available to consumers. Federalism issues such as those surfacing in interpretations of the FAA by the U.S. Supreme Court and in implementation of the UTCC Directive also may affect available

certain national “institutional mediation systems” for their pro-business bias, it has applauded the “positive efforts” realized by “independent arbitration bodies” and “independent specialized mediators,” such as the U.K.’s Ombudsman. UTCC Report, *supra* note 174, at 26 (citing Economic and Social Committee Opinion on Consumers and the Insurance Market, 1998 O.J. (C 95) 72).

274. See, e.g., Carrington & Haagen, *supra* note 245 (criticizing prevailing contract approach of Supreme Court); Ware, *Consumer Arbitration*, *supra* note 245 (discussing contract and anti-contract perspectives on consumer arbitration); Ware, *Unconscionability*, *supra* note 245 (advocating contractual approach and advancing arguments for use of unconscionability doctrine to assess validity of arbitration clauses).

remedies. In these ways, substantive access to justice issues can be defined by, and interrelated with, institutional and systems issues that exist independently of consumer values and ideology.

D. Conclusion

As can be seen from the materials discussed in this Part III, a comparative institutional perspective on consumer protection law reveals a wide array of values, political considerations, structural concerns, systems issues, and cultural factors that potentially influence final legal responses to consumer protection issues. Even within narrow substantive areas, approaches sometimes may differ significantly, as demonstrated by the attitudes toward enforceability of consumer arbitration clauses in the European Union and United States just discussed. Yet, even where consumer values coincide among jurisdictions, as is the case often with respect to deceptive advertising²⁷⁵ or with respect to unfair contract terms,²⁷⁶ significantly different legislative or judicial approaches may emerge to address the issue. Nor can centralized or localized responses be necessarily tied to a specific consumer value. While the European Union and United States hold largely similar values regarding deception and unfair contract terms, for example, those concerns are addressed through different localized or centralized responses.

It has been argued that many of these differences may be related, if only partially, to environmental factors apart from consumer norms or goals, such as federalization and federalism, cultural and economic integration, and existing legal and social systems. This conclusion suggests that the traditional perspective on consumer protection law, which evaluates law primarily in terms of the underlying social policy goals it advances,²⁷⁷ perhaps overestimates the impact that consumer policy plays in the crafting of consumer legislation. At the same, the traditional framework arguably underestimates the impact that legitimate social and political institutions apart from consumer policy and ideology have on the decision of whether and how to intervene in consumer transactions and on the substance of the final legal product. The following section addresses some of the implications that this perspective may have on the development of consumer protection law and theory.

275. See *supra* Part III.A.1.

276. See *supra* Part III.A.2.

277. For a discussion of the institutional and traditional perspectives, see *supra* Part II.A.

IV. IMPLICATIONS OF INSTITUTIONAL THEORY FOR CONSUMER LAW

The wide-ranging formal legal responses to consumer issues reflected in the contrast of the U.S. and EU initiatives in the previous section raise a number of questions for consumer law and theory both in the United States and internationally. They first test some of the assumptions on which the current U.S. discourse about consumer law, if only intuitively, proceeds. They also call into question reliance on perceived shared policy goals when analyzing and critiquing recent consumer initiatives. Finally, they point toward whether—even assuming that the current discourse relies upon often flawed lines of argument—any alternatives exist to proceeding along as in the past, albeit imperfectly.

The influence that existing institutional factors may have in the development of consumer law raises again the question, posited earlier, concerning the proper approach toward formulating and evaluating legal responses to consumer issues. The prevailing approach often posits that ostensibly shared values be the dominant, if not exclusive, basis for evaluating a consumer protection measure. Thus, for example, under this approach a particular measure such as the enforcement of arbitration clauses in consumer contracts would be evaluated on whether such enforcement would advance a particular consumer value, such as fairness, efficiency, or other values or goals held to be dominant.²⁷⁸ Under this rubric, factors related to the underlying environment from which such measures emerged, such as institutional constraints, organizational values, political culture, and social context, are, if not completely irrelevant, certainly downplayed as less than central to the inquiry. By contrast, as discussed earlier in Part II, an institutional approach would employ a much less precise methodology that attempts to accommodate context, including organizational roles and values apart from substantive consumer policy or theory, within its overall framework of analysis. Such an accommodation occurs even at the expense of rejecting modern conventions of formal rationality.²⁷⁹

The comparative discussion in the previous section highlights the tenuous assumptions upon which the traditional social policy model of legal analysis builds. First, the model often assumes that the values or social policy goals used to evaluate any particular legal issue or action are widely shared. The comparison of U.S. and EU consumer protection initiatives, however, suggests that, even across very similar Western cultures and economies, the premise of shared values can be a debatable point. For example, the regimes are beginning to demonstrate substantially different perspectives on

278. See *supra* notes 24-33 and accompanying text.

279. See *supra* text accompanying note 51.

consumer arbitration as a systems value, and that difference resonates in their consumer law. Even where shared values coincide, institutional responses legitimately may vary given political or social considerations. Institutions and organizations matter, as does the context in which they are formulated and operate. The assumption that legitimate political and social values apart from substantive consumer policy do not properly enter into a lawmaker's decision to regulate, and how to regulate, consumer transactions is flawed. Significant questions therefore exist regarding whether structuring a discourse around consumer policy values or goals alone either accurately results in describing fully legislative and legal activity in the consumer arena or provides a foundation upon which to develop consumer law in an increasingly pluralist and global environment. In such an environment, legal responses must be responsive to not only different values but also to different institutional environments.

From the domestic U.S. perspective, a values-oriented approach to consumer protection analysis, which eschews the underlying institutional arrangements and environment in the name of consumer values alone, therefore needs to be rejected. This is most particularly the case given the influence that such approaches have secured in recent years. One can discern some of the underpinnings of such an approach in many of the debates emerging from the revisions to the UCC.²⁸⁰ Underlying many critiques of the uniform laws legislative process in the United States is the suggestion that individual legislatures have a particular, or perhaps special, competence in promulgating particular types of consumer protection laws. For example, in the United States either the federal or state governments have been suggested to be of significant importance in protecting consumers.²⁸¹ In a similar argument, it has been suggested that some legislatures, such as the NCCUSL and ALI, perhaps are elite institutions, at least comparatively viewed, through which the "best," or at least "better" consumer protection law should emerge.²⁸² Thus, under this argument, in order to attain the desired goal through legislative action, the question should become merely one of organizational selection. By reverse implication, if the desired goal is not obtained through the chosen legislative process, that fact alone seems authoritatively to speak on legislative competence. In other words, under this line of analysis because the selection of lawmaker presumptively was correct, the final product can be scientifically examined to discern pathologies in the process, such as

280. See *supra* text accompanying notes 4-6.

281. See, e.g., Patchel, *supra* note 4, at 160-62 (suggesting that NCCUSL make evaluation as to whether state or federal government should enact its consumer protection provisions in order to ensure high level consumer protection).

282. See Overby, *supra* note 4, at 655 (delineating perspectives regarding qualitative superiority of NCCUSL products).

interest group influences or perhaps ineptitude of the body.²⁸³ In the face of those identified pathologies, substantial reform or even abolishment of the lawmaker may be warranted.

A fair articulation of this extreme critique of the uniform laws process is that legislatures, courts, and other legal actors involved in the lawmaking process are producers of products. The lawmaker's task, as manufacturer, is to align the particular product with shared social goals, be they paternalism, policing market failure, advancing efficiency, or ensuring consumer justice. Failure to produce a product that is aligned with the shared value suggests that the lawmaker acted for less than legitimate reasons, acted under interest group influences—whether legitimate or otherwise—or simply got it wrong. The “legislature as producer,” and the connected concept that desirable law is only a step away from the matter of choosing the right legislature that knows its job and does it well, is closely linked to the traditional framework of consumer law analysis advanced earlier in this Article.²⁸⁴ By evaluating law and legislative action largely by how efficaciously their rules advance specific consumer values, the uniform laws process critique is grounded in the traditional legal framework set forth above.

These arguments have attained substantial practical impact. They have, for example, impacted the drafting process for the UCC revisions, one of the most significant projects impacting commercial law in the United States. In a debate that has surrounded the revisions, concerns have been raised over the ability of the uniform laws process to accommodate the interests of the consumer and the perceived influence of business interests in the drafting process often buttressing these arguments by close analysis of the ideological bases or the bare form of the law produced.²⁸⁵ As discussed above, however, many of the assumptions that seem to underlie this critique are, if not critically flawed, certainly tenuous. The weaknesses arise not only from the issue of whether any consensus upon shared values, assumed by the argument, in fact exists. More importantly, the view

283. See Rubin, *supra* note 4, at 781-88 (substance of revised Articles 3 and 4 evidences interest group influence, should not be enacted, and ALI and NCCUSL should be reformed or abolished); Rubin, *supra* note 9, at 1925 (NCCUSL and ALI “are under the control of merchant interests” and that resulting statute allows for “serious market failures” due to that control); Schwartz & Scott, *supra* note 6, at 637-50 (suggesting that interest group influence can be rationally identified through rigorous analysis of final form of rule generated by lawmaker); Scott, *supra* note 6, at 1616-22 (arguing that form of rules generated by UCC lawmaking process will be dictated by interest group power balance during process).

284. See *supra* Part II.A.

285. See generally sources cited *supra* note 283. Henry D. Gabriel, *The Revisions to the Uniform Commercial Code—Process and Politics*, 19 J.L. & COM. 125 (1999) (providing a detailed discussion of the general parameters of this debate and a collection of sources reflecting the positions taken).

that the activity of legislatures, lawmakers, and legal products readily can be analyzed solely by reference to consumer values and policy, without reference to other political, institutional, and social values is highly questionable. As suggested in the previous section, such an easy comparison cannot obviously be drawn. Consider the issues that an analysis of the product of the NCCUSL versus that of the European Union, or that of a Member State of the European Union, or that of the state or federal government in the United States in fact raises. It is hard to imagine that such an analysis can proceed without reference to context and culture, in other words, to institutional and political values such as federalism, legal and social culture, attitudes toward—and systems designed to ensure—access to justice, and other factors completely independent of consumer ideology but important components of the institutional arrangements and environment.

Attempting to measure the quality or performance of a lawmaker principally by a quasi-scientific evaluation of the normative desirability of its product, another tenet often implicit in many critiques of the NCCUSL drafting project, is a similarly questionable enterprise. If the UTCC Directive discussed earlier in the Article²⁸⁶ were decided to be “better” in terms of protecting the perceived consumer interest, that fact alone is not dispositive on the “quality” of the legislative body enacting the legislation. Desirability alone, in other words, under held values, does not lead logically and inescapably to the conclusion that the European Commission lacks interest group pressures or resists them more successfully than the NCCUSL drafting process does. As suggested above, factors such as cultural integration and federalism values in fact may impact the content of the final product. Thus, any coherent and complete analysis of legislatures and legislative products demands much more than applying accepted views about efficiency or consumer justice or any favored and desired consumer goal to the product.

In addition to relying upon debatable assumptions regarding fungible law and even more fungible lawmakers that exist and create law independent of any political and social constraints, the values-oriented approach also often fails to provide guidance on when and how to create uniformity or to tolerate diversity in consumer law. While the need for uniformity is a long honored goal of commercial law codification and harmonization efforts and uniformity generally is considered beneficial, uniformity and harmonization do have costs.²⁸⁷ Consumer law may become largely uniform through a

286. See *supra* text accompanying notes 173-211.

287. See, e.g., Ribstein & Kobayashi, *supra* note 6, at 137-41 (discussing benefits and detriments of uniform state laws); Stephan, *supra* note 9, at 744-51 (discussing benefits of harmonization in international law).

myriad of means, but three general legislative methods have emerged. At the lowest and highest levels, private institutions such as the NCCUSL and international bodies such as the United Nations Commission on International Trade Law may play a significant unifying role by promulgating model or uniform acts for enactment by public legislatures.²⁸⁸ At the federal or quasi-federal level, institutions such as the Congress in the United States or the EC in the European Union, may create uniformity through action either by federal legislation or directive, as the case may be. At all levels, the failure to act may result in diversity and bring with it values and costs attained thereby. Rigid assumptions about law as product and legislature as producer fail to provide any workable rubric for determining the proper "level" or legal mechanism by which uniformity should emerge or diversity should be tolerated.²⁸⁹

Beyond the question of the level of government—the local, the central, or the international—and the mechanism by which desirable law should emerge, a consumer values approach, finally, fails to provide standards from which acceptable levels of uniformity or non-uniformity can be identified. As discussed in the previous section, significant lack of uniformity may emerge as a result of concerns apart from consumer values alone. For example, preservation of self-regulatory schemes at the local level may occur, such as is the case with the Misleading Advertising Directive, partially responsive to concerns over centralization and federalization. A uniform response may fail due to limited integration across borders as consumer credit disclosure initiatives in the European Union suggests. Even where uniformity is possible, it may not be desirable. For example, an approach that leads to substantial uniformity at the state level in the United States may not necessarily be viewed as satisfactory to the extent that a proposed uniform law might marginalize domestic states from the international community at large. Given that greater diversity in approaches and attitudes towards consumer issues inevitably will emerge when issues are viewed across cultures or globally, the emergence of globalization makes the traditional emphasis on consumer values seem even more parochial.

In sum, a consumer law discourse that proceeds largely along consumer social policy goals provides, at best, a woefully incomplete picture of consumer lawmaking in action. It overlooks key factors such as federalism, social and cultural values, economic and legal integration issues, and differing access to justice systems. Yet, those factors impact the evolution of consumer protection law. At the same

288. A. Brooke Overby, *Will Cyberlaw Be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce*, 7 *TUL. J. OF INT'L & COMP. L.* 219 (1999) (discussing harmonization role of UNCTRAL).

289. *Cf.* Scott, *supra* note 26 (analyzing whether U.S. common law or state uniform laws process better promotes goals of uniformity).

time, it fails to provide a satisfactory framework for assessing the need for uniformity in commercial law, the level at which uniformity might be obtained, and the means by which uniformity will emerge, all issues that will remain increasingly important as globalization proceeds.

Yet, what alternatives exist to such an approach? What would a comprehensive, institutional-regarding framework for analysis of consumer protection law look like? It might begin by returning first to one premise of institutional analysis, one that rejects as wholly authoritative Western—and usually U.S.—concepts of formal rationality.²⁹⁰ Such a move would begin by accepting that consumer law is shaped as much, if not more, by the underlying governance structures and institutional environments through which the law emerges as by held notions of what is right or by the clash of interest group desires. A perspective based on comprehensive rationality is not, however, a flight from rationality but rather an attempt to move towards accommodating within consumer law a comprehensive perspective on what a truly rational law might look like.²⁹¹

Such an institutional approach toward law would adopt a much broader perspective on legal analysis and law reform than that advanced by the traditional values-oriented approach. In the specific area of consumer protection, an institutional and comprehensively rational framework for evaluating consumer protection would seek to

290. See *supra* text accompanying notes 51-54.

291. The need for new perspectives on the way in which culturally determined notions of rationality impact legal analysis has been identified, perhaps not surprisingly, in the international context, as the following statement illustrates:

The more pressing problem for internationalists is to come up with a concept of rationality that accommodates interchanges between persons from different cultures. It is all good and well to assert that individuals seek to maximize their welfare, but what behaviors achieve that end, and therefore receive positive reinforcement, will vary among cultures. Persons with different backgrounds—linguistic, historical, class, gender, erotic, or other cultural determinants—will carry with them different intuitions and understandings of what makes sense. When these people interact, they either will be doomed to misunderstanding, or they will learn new conceptions of rationality that take into account the other's different characteristics. If an internationalist is to use the concept, then special care must be taken to avoid culture-bound conceptions of rationality.

Paul B. Stephan III, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 745, 751 (1995). While the above quotation implies problems with applying concepts of "rationality" and with communication across seemingly radically different cultures, for example between the developed countries of the West and developing countries of the Third World, such a comprehensively rational approach is, in the author's view, equally applicable even where similar environments are at issue, as the discussion of the EU and United States in this Article demonstrates, and even where, in spite of cultural homogenization in certain areas, significantly different perspectives on orienting values exist, such as is the case with United States consumer protection law internally.

take into account the organizations and the institutions that guide and constrain them, as well as values and concerns such as federalism, integration, and existing social and legal systems, when making any assessment of a particular consumer protection issue. Instead of rejecting these factors as inconsequential in the way that the traditional approach so frequently does, an institutional approach would validate such concerns as legitimate considerations to be weighed when addressing consumer lawmaking and to be employed in legal analysis of consumer protection initiatives.

To provide two examples of how such a comprehensively rational and institutional analysis of consumer protection might proceed, consider first the debates that have surrounded the NCCUSL and the UCC revision process, discussed above. Evaluation of a NCCUSL consumer protection issue under a new institutional framework would proceed within a matrix of the role that NCCUSL plays in the state, national, and global lawmaking process, of federalism values, of local state culture and legal systems, and of the historical development of the uniform laws process. Values such as interstate uniformity, legal diversity, state autonomy in regulating the subject areas, federalism concerns, organizational integrity, and integration among the states would be important considerations when evaluating any particular UCC provision, in addition to consumer ideology and contract law theory. This is not to suggest that consumer and contract values are irrelevant even under an institutional framework, but rather that any failure to advance specific values through a rule, or to express those values through a particular form of rule, does not end the inquiry or prove in and of itself much regarding the law or lawmaker.

The differing treatment of consumer arbitration clauses in the United States and European Union suggests another example for how an institutional dialogue might proceed.²⁹² The UTCC Directive's gray-list approach recognizes the consumer concerns with arbitration as a means of dispute resolution by presumptively invalidating such clauses. By contrast, the United States broadly validates arbitration clauses under the rubric of freedom of contract, with the domestic argument largely devolving into one of whether or not enforcement is sound as a matter of consumer policy. An institutional approach toward consumer arbitration would bring into the debate issues of federalization, preemption, and state autonomy in regulating contracts. Moreover, the fact that EU entities recognize consumer concerns rejected frequently in the U.S. approach would not be regarded as inconsequential.

Such an institutional framework for developing and critiquing consumer law holds greater promise for broader application than a

292. See *supra* Part III.C.

values-based approach, thereby circumventing the parochialism of the latter approach. The institutional model provides a framework for analyzing consumer law that is capable of working across political boundaries. By providing a matrix through which local institutional environments and governance structures that impact consumer lawmaking are taken into account, an institutional framework remains sensitive to cultural difference and local political values while providing a mechanism for comparative assessment of consumer law. Thus, fully developed, it holds the promise of being capable of guiding lawmakers on when uniformity is acceptable while remaining respectful of local culture, issues of increasing consequence in a quickly shrinking world.

V. CONCLUSION

This Article has examined recent consumer protection initiatives in the United States and European Union to identify values and institutional factors other than purely consumer policy values that may act to shape consumer protection law. The wide disparity in approaches toward misleading advertising, unfair contract terms, consumer credit issues, and access to justice problems demonstrates that institutional constraints and culture may play a much stronger role in determining the shape and scope of consumer protection law than perhaps previously thought. Values such as federalism and federalization, organizational competence and constraints, economic and cultural integration, and existing systems do impact the shape and form of consumer law. Thus, the prevailing framework for evaluating consumer law is flawed when it assumes, as it all too frequently does, that factors such as these are largely irrelevant. An institutional legal approach that would give weight to the differing functions that lawmaking bodies play in local contexts in the global community, to economic and social integration factors, and to existing legal systems provides a better methodology by which to critique consumer law and to formulate new consumer protection initiatives in an era of globalization.

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