Taskforce on Federal Consumer Financial Law

Competition Outline
Appendix: Dodd-Frank Act Citations

I. Introduction Competition and Financial Consumer Protection

"Painful as competition may be for the participants, it provides the ultimate protection for most consumers." NCCF 214

a. Introduction – competition and consumer protection

i. With this language in 1972, the National Commission on Consumer Finance endorsed the proposition that competition not only enhances consumer welfare but does so more effectively than any other influence on commercial behavior. Underlying the endorsement was the Commission's belief that "competition is the best regulator of the consumer credit marketplace…." (Id. At 4) Accordingly, the Commission recommended that antitrust agencies be "particularly alert to the dominance of consumer credit markets by a few firms, by barriers to entry, and to restrictive arrangements in the credit industry." (NCCF 3) The Commission also advocated the repeal of laws that fixed or prohibited loans or terms that would have evolved in competitive markets, and it urged the rescission of regulations that erected barriers between credit markets and prevented lenders in one from serving borrowers in another. (Id.)

ii. That competition is critical to consumer protection was neither novel nor controversial when the Commission espoused the idea. The best-selling economic text of the time (indeed of all time) was teaching the same lesson to college students and demonstrating how that lesson applied to credit markets.[1] Paul Samuelson, who won the Nobel Prize in Economics in 1970, explained in his text that year how competition can empower borrowers to obtain credit "at the cheapest possible terms" just as it allows shoppers to get the best prices from butchers.[2] In both markets, of course, costs and quantities will rise and fall on economic tides that depend on forces far removed from retail markets. In the case of credit, Samuelson observed, supply and demand in global capital markets would establish ranges of interest rates.[3] Low-risk borrowers – like trustworthy governments and companies that floated large bond issues – would obtain the best rates. Riskier ventures and personal borrowers would pay more to

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[1] Samuelson, Economics, 8th Edition (1970) 578-79. The remarkable popularity of the textbook is reported in Elzinga, Kenneth G., "The Eleven Principles of Economics," Southern Economic Journal, April 1992, 58:4, 861–79.
[2] Samuelson, Economics, at 579.
[3] Id. at 575.

reflect uncertainties of repayment, costs of investigating creditworthiness, and burdens of administering of transactions.[4]

iii. Samuelson was not the first economist to recognize the importance of competition in general, and its application to finance in particular. The same observations can be found in the work of the person generally acknowledged as the original economist. On the first page of *Economics,* Samuelson credits the birth of economics to Adam Smith and a treatise he published in 1776, *The Wealth of Nations*.[5] There, like Samuelson, Smith also recalled the butcher in explaining the working of a free market. He wrote, "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."[6] The market, like an "invisible hand," would direct sellers' self-interest to the service of buyers.

iv. But the market had to be competitive for buyers to benefit, Smith repeated often. He emphasized that sellers left to their own devices would find ways to take advantage of their clientele. They needed to be constrained, and the only constraint that would keep them honest and fair, he wrote, was the fear of losing customers to a competitor. That was the "real and effectual discipline" that "restrains his fraud and corrects his negligence."[7] That this principle applied to banks was obvious to Smith. Competition among banks:

> obliges all bankers to be more liberal in their dealings with their customers, lest their rivals should carry them away. In general, if any branch of trade, or any division of labor, be advantageous to the public, the freer and more general the competition, it will always be more so.[8]

b. A Brief History of Competition and Credit

i. Accounts of the growth of competition appeared well before the professional economists called attention to the phenomenon. Historians' descriptions of the rise and fall of civilizations also reveal the advance and decline of competition. villages of antiquity grew large enough to spawn rivals to the local blacksmith, potter, and tailor. The growth of civilization offers numerous examples of competition intensified as villages grew into towns and merchants multiplied **[of Antiquity, the early Common Era,**

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[4] Id.
[5] Samuelson at 1. The coincidence of Smiths publication with another notable event in 1776, the Declaration of Independence, was not by chance, said Samuelson: "[P]olitical freedom from the tyranny of monarchy was closely related to the emancipation of free-market pricing from the interfering hand of state regulation."
[6] Smith, Wealth of Nations (1776) 14.
[7] Wealth of Nations 129.
[8] WON 313 (Smith also explained how competition encouraged prudence, and in a premonition of modern concerns about institutions too big to fail, how competition diminished the risk of financial system failures.)

the Middle Ages, and industrial societies] accordingly, how trade among brought goods from outside the walls their numbers swelled when villages grew into towns and how incthe ease with which , , intensifying as those villages grow into towns that support a vast trade, growing towns accounts of markets. In ancient Greece, for example, competition thrived in trades that presented low barriers to people who sought saw quick and easy were easy to enter and villagers could ply easy to enter and pottery trade kept wages and prices low. With relatively few employees, little equipment, inexpensive supplies, and unobtrusive operations, potters could set up shop inside a town – near their customers, and their competitors. Ore refineries and tanneries, by contrast, were not popular neighbors. Aside from the odors they emitted (still an unfortunate byproduct today), tanners needed plenty of water, which they discharged too polluted for other uses, so their operations were often restricted to outskirts of cities and towns. That distance became an advantage, as transportation time and costs discouraged customers from playing one against another.[9]

ii. Overcoming competitive barriers, like transporting goods to customers, presented challenges throughout the Middle Ages as well. To attract remote vendors, towns maintained open squares that hosted regular markets, often organized to facilitate comparison shopping. "Sellers of particular goods…were typically set next to each other in areas so that competition was kept high."[10] Towns large enough to support permanent stores often found competing merchants clustered together on the same streets, which enhanced competition for customers and facilitated inspections by guilds and governments.[11] These towns enjoyed an abundance of specialized labor, trade, monetary exchange, and "a concentration of diverse monumental buildings, large churches, bell towers, warehouses, permanent market halls, guild halls, hospitals and so on." [12]

iii. Merchants were among the more prosperous citizens of medieval towns, thanks in part to the premiums they could charge for the convenience they offered. But that advantage dissipated when open markets came to town; prices in the stalls often beat prices in the shops.[13] Competition was especially keen during annual and seasonal fairs, large events that drew

[9] Acton, "___," in The Ancient Greek Economy: Markets, Households and City-States, edited by Edward M. Harris, David M. Lewis, David Martin Lewis, Mark Woolm, 158
[10] Mark Cartwright, "Trade in Medieval Europe, Ancient History Encyclopedia," (08 January 2019), available at [HYPERLINK "https://www.ancient.eu/article/1301/trade-in-medieval-europe/"]
[11] Id.
[12] Jordan, Europe in the High Middle Ages, Ch. 1 "Christendom in the year 1000." [get pin cite]
[13] Clerici, L., "Le prix du bien commun. Taxation des prix et approvisionnement urbain (Vicence, XVIe-XVIIe siècle)" [The price of the common good. Official prices and urban provisioning in sixteenth and seventeenth century Vicenza] in I prezzi delle cose nell'età preindustriale /*The Prices of Things in Pre-Industrial Times,* [forthcoming], Firenze University Press, 2017

many more merchants, lasted for weeks, and provided entertainment and lodging for customers who could stay for days and stock up for weeks. Not surprisingly these fares were very popular with the people,[14] but tough on stationary shopkeepers.

iv. Whether they operated in open markets or from fixed locations, merchants paid taxes and fees. Itinerant vendors who wanted to make good time from market to market encountered toll-takers on main roads. (Roads less traveled might hide highwaymen who could extract much larger assessments.) Once at the venues, merchants would pay landowners or towns for rights to set up stalls. But shopkeepers were easier for collectors to find, easier for inspectors to monitor, and easier for municipalities to regulate.

v. The history of competition in lending is more difficult to unearth, in part because the sector has had to operate inconspicuously for millennia. In 1750 BC, the Code of Hammurabi allowed interest (with limitations), [15] but charging interest for a loan ranged was disgraceful if not heretical in early Judaism, Christianity, and Islam.[16] Indeed, the original definition of usury encompassed collecting anything more than the principal originally advanced to a borrower. Numerous passages of the Torah (or the Old Testament) contain commands like these: "Thou shalt not lend upon interest to thy brother…. Unto a foreigner thou mayest lend upon interest….[17] Appeals for benevolence in the New Testament were likewise interpreted as admonitions against interest, and those admonitions became increasingly strict in successive ecumenical councils of the Catholic Church. In the Middle Ages, a lender caught charging interest could face excommunication,[18] as well as legal sanctions, since sovereigns derived their authority from the church, and courts could be instruments of the clergy.[19] Antipathy against interest remains a popular interpretation of

[14] Cartwright.
[15] CCAE 483
[16] Id.
[17] Deuteronomy 23:20-21. See CCAE 484 for additional references. The disdain for usury created an opportunity for Jewish merchants to focus on financial services, even though the charging of interest was regarded as unsavory in Judaism as well. Fortunately, Jewish teaching tolerated lending to borrowers outside the faith, which carved a unique segment of commerce in which Jews could compete, although laws and prejudices in many medieval jurisdictions followed Christian conventions.
[18] The Third Council of Lateran decreed in 1179, "We therefore declare that notorious usurers should not be admitted to communion of the altar or receive christian burial if they die in this sin." [HYPERLINK "https://en.wikipedia.org/wiki/Conrad_Henry_Moehlman"] (1934). "The Christianization of Interest". *Church History*. **3** (1): 6. [HYPERLINK "https://en.wikipedia.org/wiki/Doi_(identifier)" \o "Doi (identifier)"]:[HYPERLINK "https://doi.org/10.2307%2F3161033"]. [HYPERLINK "https://en.wikipedia.org/wiki/JSTOR_(identifier)" \o "JSTOR (identifier)"] [HYPERLINK "https://www.jstor.org/stable/3161033"].
[19] Jordan, Europe in the High Middle Ages,

Islamic strictures,[20] which continues to complicate financial transactions today.[21]

vi. Nonetheless, there is little doubt that credit has been essential to society throughout history. Medieval historian William Chester Jordan surveyed the literature and found, "Almost all the men and women who have studied so-called "primitive" societies…agree that life in those societies requires at least some use of credit."[22] The records of Antiquity are insufficient to draw firm conclusions about the extent to which credit developed and the forms it took, but it is clear that businesses and consumers resorted to credit quite often.

vii. Credit was both harder for consumers to obtain and more critical to their survival. Personal loans attracted more opprobrium, "but the alternative, for the borrower in distress, might be starvation or death."[23] Consumer loans were small and short term, typically repaid in a few weeks or months, almost always less than a year.[24] In barter societies, before currency was widely circulated, lenders could look like pawnbrokers of later eras. Security could be held in the form of physical goods – typically more valuable than the amount of the loan. Creditors came in many forms: shopkeepers, itinerant merchants, tavern keepers, notaries, monks, clerics skirting religious canons, and ostracized groups – especially Jews. Lending was also a sideline for women in the occupations available to them in the Middle Ages; alewives, pawnshop-keepers, garment makers, and discrete nuns all lent money.[25]

viii. Pawnbrokers probably always existed in medieval Europe, wrote Homer and Sylla in their *History of Interest Rates*:

> They were often tolerated and even officially licensed [sometimes] under the special protection of the prince, who participated through heavy license fees. …Often "manifest usurers" were Jews…They were early in the field, but their operations were usually small and marginal. In the tenth or eleventh century they were partly supplanted by the Lombards.…Later on, the State in the Low Countries and Italy set up public pawnshops which charged lower interest in an effort to supplant Lombards and Jews."[26]

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20 "Usury," Encyclopedia Britannica, [HYPERLINK "https://www.britannica.com/topic/usury"]

21 Hilary Osborne, "Islamic finance – the lowdown on sharia-compliant money," The Guardian, (29 Oct 2013), available at: [HYPERLINK "https://www.theguardian.com/money/2013/oct/29/islamic-finance-sharia-compliant-money-interest"].

22 Jordan, Women and Credit in Pre-Industrial and Developing Societies, (1993) 12.

23 Id. at 15.

24 Id. at 26.

25 Id. at 19-20. (Women accounted for an estimated 10-15% of the personal loans in some medieval towns.)

26 Sidney Homer, Richard Sylla, A History of Interest Rates (Wiley Finance Book 322) (Kindle accessed at ii. https://a.co/9b6CzW2)

ix. Nowhere was financial competition keener than in centers of commerce, which generated wealth and a multitude of sources of credit. Not surprisingly, they offered lower rates than their counterparts in the countryside. During the height of the Roman Empire, rates were typically lower in Rome than in the provinces.[27] In the Middle Ages, Italy's bustling port cities gave Europe the best rates. When Amsterdam became the commercial center of Europe in the 1600s, borrowers found better rates there than in England or France.[28] After European countries colonized other continents, loans to colonial ventures often commanded higher rates than local credit.

x. Even in the colonies local competition brought rates down. In Australia, when seven new banks opened for business in the 1820s, "competition brought the Bank of New South Wales's discount rate down from 10 to 8% in 1826…. To obtain funds, certain of these banks paid 5% on six-month time deposits."[29] Rates rose again in 1828, as banks struggled with booms and busts in the Australian economy.

xi. International trade allowed financial competition to cross country borders. The Dutch East and West India companies enjoyed prime rates of the 17th century. Capital mobility between London and Amsterdam in the 18th allowed money to flow where it could earn the best reward. As Homer and Sylla observed: "When the yield on safe investments in London rose well above the level in Amsterdam, Dutch capital flowed to London, and the rate of exchange moved in favor of London. Dutch capital in this way supported the exchange value of sterling in several crises."[30]

xii. No doubt some of the differences in rates across regions and over time reflected greater risks of investing at a distance and greater returns from ventures in new lands with untapped resources. The data available do not permit ready disentangling of various causes and effects. Improvident sovereigns, wars, and natural disasters can often be found in the midst of credit crises. Robust commerce and wealth accompany rate stability. But over time, but the affordability of credit consistently tracked the rise and fall of markets in which it could be obtained more readily:

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[27] Sidney Homer, Richard Sylla, A History of Interest Rates (Wiley Finance Book 322) [get pin cite – tables at n 95.]

[28] Id. ("Another contemporary said "it is a great advantage for the Traffick of Holland that money may be taken up by merchants at 3 ½% for a year without pawn or pledge." Amsterdam merchants are cited as borrowing at 3-4 ½% and lending in England and France at 6% or better."

[29] A History of Interest Rates (Wiley Finance Book 322) by Sidney Homer, Richard Sylla https://a.co/4qrxHhL

[30] A History of Interest Rates (Wiley Finance Book 322) by Sidney Homer, Richard Sylla https://a.co/8tpg83z.

> The mechanics of lending as individuals to other individuals on pawns or real estate or general credit is complex, burdensome, and potentially unpleasant, however giltedged the collateral. This difference of convenience alone may outweigh the factor of risk in explaining the tendency of ancients to hoard metal and invest in land.[31]

xiii. In barter societies, pawned security, tenders of gifts, expectations of favors, and other methods served as crude proxies for interest. These were especially useful in periods of religious and regulatory opposition to interest payments. As currency became ubiquitous, and recordkeeping more clearly documented the cost of credit, these proxies survived, and loans developed more elaborate disguises. For example, credit terms would be woven into other transactions. Farmers needing a loan to plant their crops would adjust the assumed yields or expected prices at harvest, so they would repay more than the principal when they sold their harvest. Merchants and sailors would combine credit with insurance against shipwrecks and pirates, making it difficult to identify how much of the repayment represented interest. Sometimes interest was treated as a gift, which lenders would keep off their books. Because interest rates remain capped below the levels that would prevail in competitive markets today (as is discussed in __), these tactics and others like them have survived the centuries.

xiv. Both Samuelson and Smith warned against fixing interest rates below levels that would force financial institutions to lose money lending. And both drew from contemporary and ancient sources to make their points. Samuelson attributed usury to ancient misconceptions about money and interest.[32] Smith recounted the consequences of usury laws and rate ceilings in words that could describe the plight of consumers today with credit scores that disqualify them from bank accounts or credit cards:

> This regulation, instead of preventing, has been found to increase the evil of usury; the debtor being obliged to pay, not only for the use of the money, but for the risk which his creditor runs…. [The debtor] is obliged…to insure his creditor from the penalties of usury.[33]

[31] i. — A History of Interest Rates (Wiley Finance Book 322) by Sidney Homer, Richard Sylla https://a.co/cxfvTFA
[32] Economics 578-79.
[33] Id. at 339

Legal rates, Smith concluded, should remain above the rates that the best credit risks can command; otherwise the regulation ruins honest people, and "obliges them to have recourse to exorbitant usurers."[34]

c. Regulation, Competition and the Public Interest

i. Regulation of economic activity has come from four principal sources throughout history. Ever-present and inescapable are the endowments and forces of nature, which confer diverse advantages and disadvantages across regions and epocs. More parochial and almost as venerable are rulers and clerics, who sometimes were essentially the same. Lawyers and judges often held positions of power in the church. Even kings and queens gave deference to the religious authorities whose blessings conferred legitimacy on their crowns. Challenging the church was a hazardous affair for the most powerful sovereigns, as abundant history and literature recount.

ii. Less appreciated is the authority that organizations of competitors were able to wield over themselves. Perhaps the most pervasive economic regulators of the Middle Ages were the guilds, which merchants and craftsmen organized for a variety of purposes. Some were laudable, for example, joining forces to deal with external adversaries (like counterfeiters and tax collectors) and resolve internal disputes (like inferior products, unfair competitors and unscrupulous vendors). The regulations that the guilds enforced, sometimes with the aid of local ordinances, included measures designed to maintain quality and integrity of their specialized crafts and trades – from cobblers and candlemakers to painters and luthiers. Stradivarius honed his craft in in the Cremona guild of luthiers.)[35]

iii. Regulations that govern the norms of commercial behavior are likely to affect competition itself, and the guilds seldom limited their authority to the integrity of the trade. Prices, qualities, ingredients, materials, methods, and hiring became subjects of guild rules. Members sometimes bristled. Apprenticeships took too long. Crafting became too expensive. But the restrictions offered rewards for those who acquiesced. They avoided ruinous competition among themselves, restricted the entry of new rivals, and reaped high prices from the resulting scarcity. The great wealth accumulated by the guilds can still be seen in in the guildhalls that have been preserved as museums in London, Brussels, Gdansk and other cities

[34] Id. (Smith had little sympathy for prodigal borrowers, however, and he had no objection to limiting credit to them.)
[35] Jim Collins, A Short History of the Violin, Chicago Magazine, JUNE 24, 2011, available at [HYPERLINK "https://www.chicagomag.com/Chicago-Magazine/June-2011/String-Theory-and-the-Science-of-the-Violin-A-Short-History-of-the-Violin/"].

in Europe, as well as in the ornate windows and displays of churches and cathedrals erected with generous donations from the guilds.[36]

iv. In a passage often cited today, Smith declared that competitors "seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[37] He blamed guilds for devising the means to resist reducing prices. The goal of the guild, he wrote, was "to prevent this reduction of price, and consequently of wages and profit, by restraining that free competition which would most certainly occasion it…."[38] One of the gambits he recounted was the opposition of food merchants near London to the extension of turnpikes into more remote regions.[39] Better transportation threatened local monopolies and the rents they collected, and monopolies were the "great enemy to good management, which can never be established [outside] free and universal competition," Smith wrote.[40]

v. The guilds got away with it by paying off the king, and Smith blamed those sovereign enablers for allowing it to happen.[41] He urged that the conduct not be condoned. Public policies that benefit the interest of producers, he asserted, should be pursued "only so far as it may be necessary for promoting that of the consumer."[42] The proposition that regulations should favor consumers, was so self-evident to Smith that he thought it absurd to try to prove it. A regulation that benefits the producer "comes at the expense of the public, who suffer when markets are distorted and competition is reduced." [43]

vi. The protection of competition was taking root in the common law long before Smith inveighed against the guilds and their enablers of anticompetitive arrangements. In 1601 the Queen's Bench decided *Darcy*

[36] Jordan, EHMA Ch. 9.
[37] Id. at 128.
[38] (WON, (Book I, Chapter X, paragraph 72)
[39] WON 147-48 (They recognized the delivery of cheaper commodities would reduce their rents).
[40] Id.
[41] Id.
[42] WON 625
[43] Id. His argument on the economics was concise, and his prescription to policy makers was strong: "When the owners of capital propose a new regulation, therefore, it should be given the utmost scrutiny. It comes from a group whose interest does not coincide with that of the public, and who can and do gain by deceiving them. The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. It comes from an order of men, whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it." 23 The Wealth of Nations, Book I, Chapter XI, Conclusion of the Chapter, p. 267, para. 10. The Condensed 'Wealth of Nations' | 31

v. Allein, now known as the *Case of Monopolies*,[44] in which the court held that a monopoly in the manufacture of playing cards, granted by Queen Elizabeth, was invalid, as it would "be employed for the private gain of the patentee, and for the prejudice of the weal public." Likewise, common-law courts have long been skeptical of agreements not to compete. The reason, as stated in the 1711 decision in *Mitchel v. Reynolds*, was because of "the mischief which may arise from them, 1st, to the party, by the loss of his livelihood…; 2dly, to the public, by depriving it of an [sic] useful member."[45] Such agreements would only be enforced when they were reasonably related to legitimate endeavors. The rental of the bakery was legitimate, and the promise of the renter not to siphon business from the tenant was reasonable. Thus Mitchel, who had rented Reynolds' bakery, could hold Reynolds to a promise not to open another bakery in their parish during the term of their lease.

vii. This was the competition policy that the United States inherited. During its first century, the country largely left antitrust enforcement to private parties, who could litigate if necessary, to gain permission enter a trade or compete unencumbered in it. But only if the early American counterparts of Darcy or Reynolds were willing to plead their cases would anticompetitive practices face challenges in the courts. Meanwhile, as large manufacturers during the industrial revolution displaced the craftsmen and shopkeepers of the Middle Ages, lawyers created more sophisticated methods to coordinate their clients' behavior. The "corporations without charters" described in the Wealth of Nations evolved into trusts that could cover entire industries. By the end of the eighteenth century, these trusts were repeatedly accused of monopolistic and predatory behavior by customers and competitors.

viii. The sanctions of common law – recoveries of losses, injunctions against conduct, and voiding of contracts – were insufficient to satisfy growing demands for action against profitable trusts and conspiracies. Moreover, adjudications depended upon aggrieved parties to bring violators to justice. Consumers and small businesses were not likely to take on the trusts in court. As voters and taxpayers, however, the people could lobby for relief, and they did. Congress responded in 1890 with the Sherman Antitrust Act, which outlawed contracts, combinations and conspiracies in restraint of trade, prohibited anticompetitive conduct by monopolists, and condemned attempts to monopolize markets. The most serious violations under the Act were agreements that had no other purpose than to fix prices or suppress competition. Competitors who entered these combinations

[44] Darcy v. Allein, EngR 398 11 Co Rep 84 77 ER 1260 Noy; 173 Moore KB 671 1 Web Pat Cas 1 74 ER 1131; 77 Eng Rep 1260

[45] Mitchell v. Reynolds 1 PWms 181, 24 ER 347, 45 Digest (Repl) 395, [1558-1774] All ER Rep 26; see generally, THE ENGLISH COMMON LAW CONCERNING MONOPOLIES William L. LETWIN, THE UNIVERSITY OF CHICAGO LAW REVIEW 355, 377 n. 108 (1954)

could end up serving time in prison and paying three times the damages their conspiracies had inflicted.

ix. Popular support for the proposition inspired the passage of laws protecting competition in the United States a century earlier, starting with the Sherman Antitrust Act of 1890, which prohibited anticompetitive agreements and monopolistic predations. The purpose of the Sherman Act was to give the Attorney General the power to prevent the damage that such practices could inflict on consumers and competitors. With this new authority, the Department of Justice pursued trusts and conspiracies aggressively and successfully.

x. The Federal Government first embarked on prosecutions to dismantle trusts and agreements that had spread through sectors such as coal, meat, railroads, tobacco, oil, and steel. In 1987, the Supreme Court declared illegal a rate-fixing agreement among members of a rail freight association.[46] The defense, that the agreement prevented ruinous competition, was rejected. In 1899, the Supreme Court upheld an injunction prohibiting six iron pipe manufacturers from coordinating bids.[47] Their defense, that the rigged prices were reasonable, was rejected. In 1911, the Supreme Court affirmed an order that broke the Standard Oil Company into thirty-three components.[48] The popularity of antitrust enforcement remains a lasting legacy of the presidency of Theodore Roosevelt – who brought dozens of cases from 1901 to 1909 and is often credited as the first trust-buster.

xi. Notwithstanding the successful prosecutions, cautious rulings in the courts fueled sentiment for stricter and broader statutes. This inspired the passage of additional antitrust laws. In 1914, Congress passed the Clayton Act, which would prevent mergers and acquisitions that could harm competition; and the Federal Trade Commission Act, which would establish an agency to define and police unfair methods of competition. Those laws, along with the Sherman Act, are the principal pillars of antitrust policy today.

xii. The Federal Trade Commission immediately took Smith's insight about the importance of competition to consumer protection and made it the law of the land. The first case that appears in the annals of the FTC was a 1916 decision that stopped a company called Circle Cilk from passing off cotton thread as "Circle Cilk Embroidery Floss."[49] The brand name, found the

[46] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897)
[47] Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899)
[48] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)
[49] FEDERAL TRADE COMMISSION v. CLARENCE N. YAGLE, LEROY H. MACAULEY, AND MURDOCK H. SMITH, TRADING AS CIRCLE CILK CO. 1 FTC Decisions 13 (1916) (The complaint had issued on September 29, 1914,) was filed

FTC, "deceived some of the consuming public into believing they are buying and receiving a product made of silk when in fact they are not."[50] The FTC also found that such advertising resulted in "damage to the trade and manufacturers who deal in silk products."[51] By protecting competition from unfair practices, the Commission had preserved its benefits for buyers and sellers alike.

xiii. It is no surprise that the early cases dealt with producers of physical goods and providers of capital-expensive services. Machinery, metalworking, textiles, agriculture and other activities had evolved into big businesses, and their owners had organized much like the guilds that Smith had condemned. Sectors such as these were, of course, the most visible manifestations of the industrial revolution.

xiv. Less visible and perhaps therefore less controversial were the competitive conditions of financial markets. But the antitrust laws cover competition in financial services as well, and the history of enforcement includes notable cases in the sector. An early target of prosecutors invoking the Sherman Act was the Chicago Board of Trade, which required its members to observe numerous terms and conditions for buying and selling contracts and restricted them from trading outside the exchange the Board had created. The Board's restrictions escaped condemnation, however, when the Supreme Court held that the rules were reasonable efforts to enhance competition,[1] but other financial institutions did not fare so well.

xv. Banking in Philadelphia provided the setting for a landmark decision on the relationship between concentration and competition in 1963. When two of the larger banks in the city tried to merge, the Antitrust Division of Department of Justice sought an injunction against the transaction on the grounds that it could reduce competition or tend to create a monopoly. The Supreme Court upheld the challenge, and with these words rejected the parties defense that regulation rendered competition enforcement unnecessary in this sector:

> The fact that banking is a highly regulated industry critical to the Nation's welfare makes the play of competition not less important, but more so. At the price of some repetition, we note that, if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected; and unless competition is allowed to fulfill its role as an economic regulator in the banking industry, the result may

[50] Id. at 15
[51] Id.

well be even more governmental regulation. Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy.

a. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 (1963)

xvi. Agreements among competitors to fix the financial terms and conditions of sales – including credit – have long been condemned as illegal. The Supreme Court has periodically reminded lower courts and litigants "that an agreement to eliminate credit was a form of price fixing."[52] As such, those agreements were illegal *per se* (illegal without inquiry of their asserted benefits) when competitors entered them.[53] And the consequences of per se violations are severe – liability of three times the damage that the violation causes, and the prospect of a prison term.

xvii. International banks recently discovered the gravity of committing criminal violations of the Sherman Act when the United States charged that they had conspired to manipulate the London Interbank Offered Rate (LIBOR)[54] Since 2015 several banks have pled guilty, and their personnel have been convicted and sentenced to prison for participation in the conspiracy. Criminal penalties in the United States have exceeded $2 billion. Civil litigation, with additional billions of dollars of at stake, continues in tribunals around the world today. Adding the penalties for fraud (conspiracies can take cover under deception), the financial consequences of these cases to the banks have exceeded $10 billion.[55] The damage to borrowers, including consumers whose loan rates were pegged to LIBOR, could be a multiple of those billions.

d. [Save for usury discussion]

i. Samuelson also explained how competition helped consumers when they were lenders, and how restraints on that competition hurt them. Money in checking and savings accounts are loans that consumers make to banks, he explained, and competition induced banks to pay interest on those loans. Banks had done just that, often paying 5 per cent on checking deposits during the 1920s, until Congress banned interest on checking accounts and

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[52] Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 [pin cite] (1980) (harkening back for emphasis to its rulings from 1905 and 1925, and to a common-law decision from 1861)
[53]
[54] RELEASE, Thursday, March 10, 2016, Two Former Rabobank Traders Sentenced to Prison for Manipulating U.S. Dollar and Japanese Yen LIBOR Interest Rates, available at [HYPERLINK "https://www.justice.gov/opa/pr/two-former-rabobank-traders-sentenced-prison-manipulating-us-dollar-and-japanese-yen-libor"]
[55] See, Council on Foreign Relations, "Understanding the Libor Scandal," (2016), available at [HYPERLINK "https://www.cfr.org/backgrounder/understanding-libor-scandal"]

placed interest caps on savings accounts during the Great Depression. One reason for these restraints was that industry "earnings would be better if rivals were kept by law from bidding" up rates. In addition, "aside from this cartel reason," as Samuelson put it, "many experts had jumped to the conclusion that *over-competition* among banks had given rise to unsound lending practices."[56] Thus did federal usury laws benefit banks for decades, while imposing costs on consumers who could not grow their savings as quickly as they would have in a competitive market.

ii. Over time, depositors found ways to mitigate the losses from leaving money in banks that did not pay prevailing rates, thanks to the legal cartel. Consumers switched to saving-and-loan companies and nonfederal banks. Corporations began to buy interest-bearing securities directly. Depositors had to spend time and attention allocating funds, and this represented a real cost in the days when moving money from savings to checking accounts meant a trip to the bank. Fortunately, the restraints to which Samuelson referred have since been repealed. Shrinking demand deposits in the banks made it increasingly obvious that the restrictions were imposing more costs than benefits, and ironically the customers' departure from demand deposits complicated the Federal Reserve's management of the money supply.[57]

e. The laws regulating consumer credit presume competitive markets.
  i. DFA
    1. Section 1021(a) (12 U.S.C. § 5511(a))—identifying the Bureau's statutory purposes, including to ensure "that markets for consumer financial products and services are fair, transparent, and competitive."
    2. Section 1021(b)(4) (12 U.S.C. § 5511(b)(4))—identifying five objectives for which the Bureau may exercise its authorities, including to ensure that "Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition."
  ii. Enumerated Statutes
    1. TILA, etc.
  iii. Complementary Laws
    1. FTCA, etc.

f. Long recognition of complementary roles of competition and consumer protection in market economy
  i. NCCF – "Painful as competition may be for the participants, it provides the ultimate protection for most consumers. Coupled with the shopping information provided by [TILA], increased competition is favored by the

[56] Samuelson at 302-03 (emphasis in original).
[57] Id.

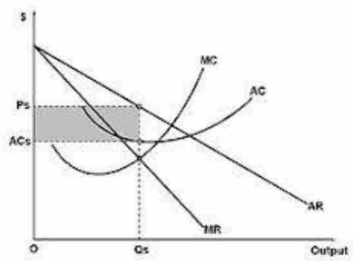
Commission as the best means to assure that most consumers pay a fair price for their credit services." (R 214)
1. Low income consumers warrant special attention (R Ch. 10)

ii. NCCF – critical functions of lawmakers include:
1. Promoting and maintaining competition among numerous sources of credit. Competition is the key ingredient "of a finance industry capable of providing an adequate supply of credit at reasonable rates"
2. Assuring "access *by all* to these alternate sources" (emphasis in original)
3. Preventing "excesses which the "system" may invoke against the borrower." (NCCFR 2)

iii. General scholarship
1. Credit Reports *Marquette National Bank,* and Entry, (Durkin, et al. CCAE 268-70)
2. Usury and segmentation (CCAE 501-510 and sources cited)
3. Highlight others

II. Competition **(Bill)**

a. Competition values

i. Classic consumer welfare: prices approximate costs
1. Deadweight loss and excluded purchases in monopoly
2. 

3. [HYPERLINK "https://en.wikipedia.org/wiki/Monopolistic_competition"]

ii. Dynamic interpretations: product improvement and innovation

iii. Discourages discrimination

iv. Encourages access

b. Characteristics of competitive markets

i. Rivalry, numerosity

ii. Dynamism, entry, exit

iii. Information
1. Note benefits of TILA, DFA, FTCA

- iv. Customer sovereignty – found in satisfaction evidence
  1. Complaint comparisons – longitudinal and cross section
- v. Greater access; less discrimination – compare across markets with different competitive characteristics

c. Threats to competitive markets
- i. Exclusion
  1. Private means
     a. Unfair methods
     b. Barriers
  2. Public means
     a. Compliance costs
     b. Regulatory segmentation
     c. Prohibited products (e.g. usury)
     d. Dodd-Frank? (adverse impacts?)
- ii. Combination
  1. Consolidation
  2. Collusion
- iii. Anticompetitive combination typically requires exclusion
  1. Entry can defeat cartels and anticompetitive combinations
- iv. History in credit markets: NCCF observations
  1. Be alert to collusion (NCCFR xxiii, 3, 138-39)
  2. Be alert to dominance and barriers (Id. 3, 138-39)
  3. Observations on discrimination – gender, origin, racial, etc.
     a. NCCF found widespread evidence of gender but not racial discrimination (R 160)
  4. Note: Consider weaving above into each of the following segments or in the preceding overview, or both.

[redacted]

[redacted]

d. Competition/innovation sector reviews
- i. Deposits, payments and services
  1. Dynamism assessment
     a. Sticky bank accounts
     b. Unbanked populations
     c. Disparate access
  2. Walmart entry attempts
  3. Lending
     a. Mortgage lenders and servicers
        - i. 99% of post 2010 loans are current (RMRP 9/3/19)
          1. [RMRP cites CreditForecast.com [Subscription-only; DHH to obtain from Markets. We'll need to update this statistic in light of Covid-19.]]

[redacted]

ii. Unconcentrated 10-firm CR 40%. Nondepositories at 60% of market. (Id. @ 2)
    1. [RMRP cites (i) Inside Mortgage Finance, Top 100 Lenders 2018 [Subscription-only; DHH to obtain updated version from Markets]; (ii) Urban Institute, Housing Finance at a Glance: A Monthly Chartbook (June 2019), [HYPERLINK "https://www.urban.org/sites/default/files/publication/100454/june_chartbook_2019.pdf"]. [DHH to obtain updated version]]

iii. CFPB, *2013 RESPA Servicing Rule Assessment Report* (2019), [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing-rule-assessment_report.pdf"].
    1. Trends in delinquencies and foreclosures 2003-2017 (pp. 38-40) E.g., percentage of loans that became newly 90+ days delinquent rose from 0.5% at end of 2006 to 2% at end of 2008, but the percentage has since returned to pre-crisis levels.
    2. Other Servicing Marketing Trends (pp. 54-56). Non-depository institutions have increased their share of servicing market and are 6 of the 10 largest services as of 2017, while some large banks have reduced their servicing portfolios in the last few years. Largest 15 services increased their market share in 2007 and 2008, but it has since declined to roughly pre-crisis levels.
    3. Summary of the Rule's Effects on the Incidence of Foreclosure and Delinquencies. (pp. 90-91). "The statistical evidence indicates that the changes in foreclosures and recoveries coincide with the effective date of the Rule, rather than being the continuation of a pre-existing trend. However, an important limitation of these analyses is that they cannot distinguish between the effect of the Rule and the effect of any other events that occurred on or around January 2014. In particular, the GSE

[redacted]

Streamlined Modification program was rolled out widely to servicers in January 2014, and the Bureau's 2013 Ability-to-Repay/Qualified Mortgage Rule145 became effective on the same day as the 2013 RESPA Servicing Rule. Moreover, this analysis of the overall effects of the Rule cannot distinguish between the effects of individual provisions of the Rule. Based on this analysis alone, it is possible for individual provisions to have contributed to all, some, or none of the overall change in foreclosures and recoveries, and it is even possible that some provisions had a detrimental effect on foreclosures and recoveries that was offset by positive effects from other provisions." (p. 91)

a. See also Overall Effects of the Rule on Incidence of Foreclosure (pp. 65-80). "This result indicates at a minimum that the timing of the effect shown in Table 1 lines up with the effective date of the Rule, although the model cannot rule out the possibility that some other policy change or other factor that took place in January 2014 contributed to the decline in the incidence of foreclosures. Still, given the substantial effects of specific provisions of the Rule on foreclosure outcomes described later in this report, it seems plausible that the Rule is an important driver of this effect." (p. 80)
b. Overall Effects of the Rule on the Incidence of Recovery from Delinquency (pp. 81-90). "The figure shows that even after controlling for other factors in the model, there was a slight downward trend in the incidence of recovery around the effective date of the Rule.

Following the effective date of the Rule, the incidence of recovery increased substantially, then began to trend upward somewhat. This result at a minimum indicates that the timing of the effect shown in Table 2 lines up with the effective date of the Rule, although the model cannot rule out the possibility that some other policy or other factor that took place in January 2014 contributed to the increase in the incidence of recovery." (p. 90)

4. Effects of the Rule on Servicing Costs (pp. 100-111). [DHH: this section seems less helpful for our purposes because of data limitations.]

iv. CFPB, *ATR/QM Assessment Report* (2019), [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_ability-to-repay-qualified-mortgage_assessment-report.pdf"].

1. Mortgage Market Pre- and Post-Rule (pp. 69-79). Discusses changes in pricing and costs of different types of loans. Also concludes generally that: "While the above reported trends clearly establish that the revenues and expenses associated with originating mortgage loans have increased over the past decade, it is uncertain whether the increase or some part of it was caused by the ATR/QM Rule." (p. 79)
2. Effects of the General QM DTI Limit on Loan Performance (pp. 106-115). "Overall, the Rule appears to have reduced the share of mortgages originated with DTI over 43 percent, while potentially increasing the share originated with DTIs at or just below 43 percent. These patterns are studied in more detail in Chapter 5. Further, both above and below the DTI threshold of 43 percent, the improvement in performance of non-GSE loans relative to GSE loans

provides some evidence that those loans that continue to be made under the General QM, other non-Temporary GSE QM, or non-QM ATR guidelines are underwritten in a way that reflects consumers' ability to repay." (p. 115)

3. Effects of the Rule on Access to Mortgage Credit and Cost of Credit (pp. 116-187). See in particular summary of findings on pp. 117-118.

b. Autos
   i. Delinquencies 2% @ 30, .67% @ 60)
      1. Source: RMRP Auto 7/1/19, citing (i) Experian–Oliver Wyman Market Intelligence Report 2018 Q2, (ii) and Experian State of Automotive Finance Market 2018 Q2. [Subscription-only; DHH to obtain updated versions from Markets]
   ii. Minority Borrowers Who Paid Higher Rates for Auto Loans Will Receive Up to $21.9 Million40
   iii. i. WASHINGTON, D.C. - Today the Consumer Financial Protection Bureau (CFPB) and Department of Justice (DOJ) resolved an action with Toyota Motor Credit Corporation, under which Toyota Motor Credit will change its pricing and compensation system to substantially reduce dealer discretion and accompanying financial incentives to mark up interest rates. As part of today's order, Toyota Motor Credit is also required to pay up to $21.9 million in restitution to thousands of African-American and Asian and Pacific Islander borrowers who paid higher interest rates than white borrowers for their auto loans, without regard to their creditworthiness, as a result of its past practices." [HYPERLINK "https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-reach-resolution-with-toyota-motor-credit-to-address-loan-pricing-policies-with-discriminatory-effects/"]
   iv. Economists studied the data: "In this paper we analyze negotiations for new cars, a $340 billion industry in the United States in 2010. Our results suggest that search costs, incomplete information,

[redacted]

and bargaining disutility have an economically significant effect in real-world negotiations: we estimate that relative to an uninformed consumer, a consumer with basic information about the seller's reservation price and his own outside options captures 15% of the average dealer margin from selling an automobile. We also find that a buyer's search cost and bargaining disutility have significant effects on bargaining outcomes. Finally, our results show that while search is common, there remains a substantial group of consumers who do not engage in any of the search behaviors we measure."

Economics of Auto Loans – Scott Morton, F., Silva-Risso, J. & Zettelmeyer, F. What Matters in a Price Negotiation: Evidence From the U.S. Auto Retailing Industry. Quant Mark Econ (2011) 9: 365. doi:10.1007/s11129-011-9108-1, available at [HYPERLINK "https://link.springer.com/article/10.1007/s11129-011-9108-1"]

c. Student
   i. Dominated by DOE – 92% (RMRP 9/5/19)
      1. [RMRP cited New York Fed data; DHH to obtain updated figures.]
   ii. 91+ day delinquencies 8-10% (Id.)
      1. [RMRP cited New York Fed data; DHH to obtain updated figures.]
   iii. Three RMR research papers (Id. @ n. 4,5)
      1. CFPB & DOE, *Private Student Loans* (2012) (report to Congress), [HYPERLINK "https://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf"].
      2. CFPB, *Data Point: Final Student Loan Payments and Broader Household Borrowing* (2018), [HYPERLINK "https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcfp_data-point_final-student-loan-payments-household-borrowing.pdf"].
         a. 94% of borrowers repay student loans early, often with a large lump

[redacted]

[redacted]

sum payment. Median lump sum payment equal to 55 times the monthly payment (implying that borrower pays off loan at least 55 months early) (p. 4)

b. Of 6% who repay student loans on schedule, large share put money formerly allocated to repaying student loans to repaying other debts (e.g., to another student loans or to cred card debt) (p. 4)

3. CFPB, *Data Point: Student Loan Repayment* (2017), [HYPERLINK "https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_student-loan-repayment.pdf"].

[redacted]

d. General - banks, finance companies, credit cards, installments,
   i. NCCF concerned about regulatory protection of competitors, which could undermine competition (R 209)
   ii. Credit Card highly concentrated, with large tail of small providers (RMRP 11/20/18)
   iii. [RMRP has no cite for this proposition; DHH to obtain.]
   iv. Check Biennial Reports
   v. CFPB, *The Consumer Credit Card Market* (2019).

[redacted]

      1. Delinquency and Charge-off (pp. 39-47). E.g., delinquency rates rose from 2016-2018. For general purpose cards, 1.5% delinquency rate is similar to pre-recession average. For private label cards, delinquency rates higher than at any point during the recession. (pp. 39-40). E.g., annualized charge-off rates are 5.7% for general purpose cards, and 10.5% for private label cards (pp. 46-47).
      2. Total Cost of Credit (pp. 56-71). E.g., total cost of credit increased from 2016-2017, due primarily to interest rates.
      3. Availability of Credit (pp. 72-98). E.g., 43% of applications submitted on mobile devices in 2016, up from less than 20% in

2015; mobile applications now surpass online applications (pp. 77-78). E.g., approval rates decreased since 2015 (pp. 80-84).

vi. General purpose 5.6% annual W/O; Proprietary 8.4%) (Id. @ 2) [DHH: Per 2019 Card Act Report cited above, these rates are now 5.7% and 10.5%, respectively]

e. Short-term loans – overdrafts, payday

i. RMRP on overdrafts (6/11/13; 7/31/14; 8/4/17) should be checked.

[redacted]

ii. CFPB, *CFPB Study of Overdraft Programs: A White Paper of Initial Data Findings* (June 11, 2013), [HYPERLINK "https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf"].

1. Between 20% and 27% of accounts opened in 2011 had one or more overdraft or NSF transaction. Of accounts with one or more such transaction, average fees were $225 in 2011. (pp. 4-5)
2. Between 13.5% and 27.8% of accounts with at least one overdraft or NSF transaction had at least 10 such transactions. (p. 5).
3. 6% of consumer accounts open during 2011 were involuntarily closed by banks. (p. 5)
4. Consumers with 10 or more overdraft or NSF transactions in 2011 opted in to overdraft fees at a much higher rate (44.7%) than other consumers (15.2%). (p. 5)
5. Bank's policies, such as regrading posting or holding funds, can affect whether a transaction causes an overdraft. (p. 5)

iii. CFPB, *Data Point: Checking Account Overdraft*, (July 31, 2014), [HYPERLINK "https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf"].

1. Overdraft and NSF fees constitute the majority of the total checking account fees that consumers incur. For consumers who opted in to such fees, they account for about 75 percent of the consumer's total checking

account fees and average over $250 per year. (p. 5)

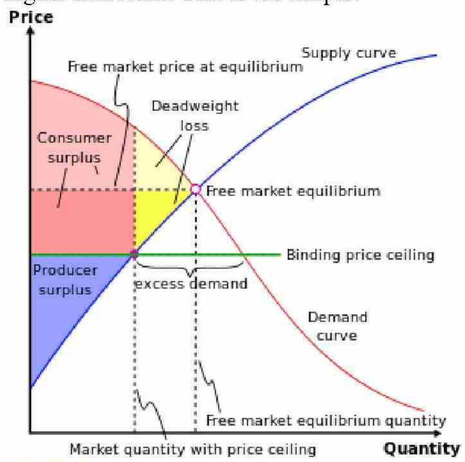
2. 8% of consumer accounts are responsible for nearly 75% of all overdraft fees. (p. 5)
3. Opted-in accounts 3 times as likely to have more than 10 overdrafts per year, and incurred more than 7 times as many overdraft fees, as accounts that were not opted-in. (p. 5)
4. The median amount of a debt-card transaction that causes an overdraft fee is $24. The median amount of any transaction that causes an overdraft fee is $50. (p. 5)
5. Most consumers who overdraft bring their accounts positive quickly, with over half becoming positive within 3 days and 76% within one week. (p. 5)

iv. CFPB, *Data Point: Frequent Overdrafters* (Aug. 4, 2017), [HYPERLINK "https://www.consumerfinance.gov/documents/5126/201708_cfpb_data-point_frequent-overdrafters.pdf"]. Example data findings:

1. Consumers with 10+ overdrafts or NSFs in one year make up 9% of all accounts but 79% of all overdraft or NSF fees. Consumers with 20+ overdrafts or NSFs in one year make up 5% of all accounts but 63% of all overdraft or NSF fees. (p. 5)
2. Consumers with 10+ overdrafts or NSFs in one year are credit constrained: they have lower credit scores, are less likely to have a general-purpose credit card, and those with a general-purpose credit card have lower limits than other consumers. (p. 5)
3. Account usage and characteristics vary for frequent overdrafters. E.g., 70% of frequent overdrafters have low-end-of-day balances, low or moderate credit scores, and low or moderate monthly deposits. But the remining 30% have lower or higher such characteristics. (p. 6)
4. Consumers who opt in to overdraft fees pay significantly more overdraft fees but incur

only slightly more overdrafts than consumers who did not opt in. (p. 6).

f. Online Debt sales – separate category?
   i. Big share are payday
g. Anti-Usury enforcement and competitive effects,
   i. Policies to promote competition "should be given the first priority, with adjustment of rate ceilings used as a complement to expand the availability of credit. As the development of workably competitive markets decreases the need for rate ceilings to combat market power in concentrated markets, such ceilings may be raised or removed." (NCCFR 149)
   ii. Adapt standard model to recognize variable costs of higher-risk loans. This is too simple:



[HYPERLINK "https://en.wikipedia.org/wiki/Price_ceiling"]

ii. Credit Ratings
   1. Dominant provider FICO, used in 90% of transactions (RMR CRMP 7/15/19 @1)
      i. [DHH to obtain new source. RMRP cites a Feb. 2018 press release that refers to a study, but the study does not appear to be available. See [HYPERLINK "https://www.mercatoradvisorygroup.com/Press_Releases/FICO%C2%AE_Scores_Used_in_Over_90__of_Lending_Decisions_According_to_New_Study/"]]
   b. Potential private and public barriers

[redacted]

i. "The Justice Department has opened an antitrust investigation into Fair Isaac Corp., the financial company whose credit scores underlie nearly all U.S. consumer credit decisions, according to information obtained by POLITICO.

   The probe follows years of complaints from rivals about Fair Isaac's dominance, and comes amid efforts by Congress and financial regulators to inject more competition into the credit score market. Fair Isaac's FICO scores are a measure of risk that banks and credit card companies use to make lending decisions, and are used by Fannie Mae and Freddie Mac to determine creditworthiness of mortgage applicants." [HYPERLINK "https://www.politico.com/news/2020/03/13/justice-fair-isaac-antitrust-129204"]

ii. "CFPB Orders TransUnion and Equifax to Pay for Deceiving Consumers in Marketing Credit Scores and Credit Products"
   Credit Reporting Companies Misstated the Cost and Usefulness of the Credit Scores and Products They Sold, Lured Consumers into Costly Recurring Payments" [HYPERLINK "https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-transunion-and-equifax-pay-deceiving-consumers-marketing-credit-scores-and-credit-products/"]

iii. Credit Reporting
   1. 11% adult population are "invisible" and another 8% too thin for reliable score. (RMR CRMP 7/15/19 @1)
      a. [RMRP relies on CFPB, *Data Point: Credit Invisibles* (2015), at 6, [HYPERLINK "https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf"]]
   2. FCRA, FACTA effects
   3. NCCF concerned about regulatory barriers to information transmission; suggests consideration of charters (R 213)
   4. CPPA; GDPR
   5. Suppression effects – e.g. ban the box in 35 states.

iv. Debt Collection
   1. FDCPA effects
      a. Costs of compliance

[redacted]

b. See Romeo & Sandler, *The Effect of Debt Collection Laws on Access to Credit* (2018), examining the effects of recent state-level debt collection laws.

[redacted]

  i. "We find that tightening of debt collection laws reduces access to credit and credit limits on average, but that the effect is very small in magnitude. For interest rates we find a tightly estimated zero effect. . . . [T]he effect of these debt collection restrictions is equivalent to an error that lowers consumers' credit scores by 8 points or less." (pp. 1-2)

2. Industry consolidating (RMRP 8/28/19)
   a. But very low concentration – (8K collectors).

   [redacted]

      i. [RMRP cites Anna Amir, *Debt Collection Agencies in the US*, IBIS World (Dec. 2019)), for the proposition that the number of debt collection firms declined from 10,550 in 2012 to 8,377 in 2019. But the source is unavailable.]
      ii. See also CFPB, *Fair Debt Collection Practices Act: Annual Report 2020*, at 7 (Mar. 2020), [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2020.pdf"] (stating that there are approximately 7,800 collection agencies).
   b. pros and cons
   c. CFPB or DOE measures compliance – review reports

   [redacted]

      i. CFPB, *Fair Debt Collection Practices Act: Annual Report 2020*, at 7 (Mar. 2020), [HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2020.pdf"].
         1. Financial services debts comprised 37% of debt-collection revenue in 2019. (Id. 8.)
         2. "From January 1, 2019, through December 31, 2019, the Bureau received approximately 75,200 debt collection complaints—a decrease of approximately 8% compared to 2018." Approximately 45% of complaints concerned "attempts to collect a debt not owed." (Id. 13-14)
         3. In 2019, Bureau opened three new enforcement matters and resolves two, and

the FTC opened or resolved matters involving 25 defendants. (Id. 24-25)

v. FinTech (more on this, maybe all, in next chapter)

e. Emerging competitive landscape (more on this, maybe all, in next chapter)
   i. Prospects
   ii. Impediments
f. Conclusions & Recommendations

III. Innovation **(Bill)**

a. History
   i. Note examples covered in other chapters
b. FinTech: Potential & Risk
   i. Expanding access
   ii. Wild west?
c. Open banking
   i. "Google is planning to break into banking with new checking account offerings" Gregory Magana Nov 14, 2019, 11:05 AM
   ii. "…We think legacy banks are unlikely to feel the sting from Google in these early days — and that Google's bank partners will likely stand to benefit from the tie-up. Incumbent banks have huge customer bases and a wealth of expertise in navigating the regulatory complexities of the banking sector, which big tech companies like Google lack — hence its partnerships with incumbents." [HYPERLINK "https://www.businessinsider.com/google-will-begin-offering-checking-accounts-2019-11"]
   iii. Walmart redux?
d. Artificial Intelligence

[redacted]

   i. FICO found 95% reduction in hours to build new credit models (RMR IAP 7/16/19 @ 2)
      1. Source: Fair Isaac Corporation, *Machine Learning and FICO Scores*, at 6 (2018), [HYPERLINK "https://www.fico.com/en/latest-thinking/white-paper/machine-learning-and-fico-scores"] ("FICO's research team found that building a gradient-boosted decision tree scoring model analogous to the FICO® Score took only 40 resource-hours [when using machine learning], compared to the roughly 800 resource-hours typically required to build the scorecards that compose a FICO® Score model.").
   ii. Used to protect security (Id. @ 3)
      1. Source: Ponemon Institute, *2017 Cost of Cyber Crime Report*, at 33, [HYPERLINK "https://www.accenture.com/_acnmedia/PDF-62/Accenture-2017CostCybercrime-US-FINAL.pdf" \l "zoom=50"] (stating that 28 percent of surveyed financial institutions reporting using automation, orchestration, and machine learning in their security systems).
e. Dynamic Disclosure

i. **A lot of research on pros and cons, including Craswell** (Interactive information / Market Intelligence Spotlight 11/18)
ii. E.g., Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 Wash. L. Rev. 333 (June 2013).
iii. Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. Cal. L. Rev. 549 (1991).

f. Data Aggregators
  i. Relatively small # of providers – perhaps six. (RMRP 7/12/19)
    1. Financial data aggregators: MX, Finicity, CashEdge/Fiserv, ByAllAccounts, Yodlee/Envestnet, and Plaid/Quovo.
    2. Source: MX Technologies Inc., A List of Financial Data Aggregators in the United States (Mar. 5, 2018), [HYPERLINK "https://www.mx.com/moneysummit/a-list-of-financial-data-aggregators-in-the-united-states"] (listing seven financial data aggregators, two of which (Plaid and Quovo) have since merged, and noting that Intuit stopped offering its account aggregation services to third parties in 2016).
    3. *See also* Tearsheet, *A Buyer's Guide to Data Aggregation* (Feb. 19, 2019), [HYPERLINK "https://tearsheet.co/data/a-buyers-guide-for-data-aggregation/"] (comparing the six top financial data aggregators).

[redacted]

g. Regulatory Framework
  i. Flexible regulatory framework for innovation
h. Principled v. Prescriptive
  i. Cooperative Regulator
    1. Potential for partnering between regulatory and trade for market improvements
    2. Tech sprints
  ii. Regulatory sandbox
i. Regulatory modernization
j. Alternative data
k. Conclusions & Recommendations

IV. Appendix

I. Summary of Statutory References to Competition and Efficiency

- The DFA mentions "competition" in four places:
  - Section 1021(a) (12 U.S.C. § 5511(a))—identifying the Bureau's statutory purposes, including to ensure "that markets for consumer financial products and services are fair, transparent, and competitive."
  - Section 1021(b)(4) (12 U.S.C. § 5511(b)(4))—identifying five objectives for which the Bureau may exercise its authorities, including to ensure that "Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition."
  - Section 1031(c) (12 U.S.C. § 5531(c))—stating that the Bureau may not declare an act or practice to be unfair unless it has a reasonable basis to conclude that the act or practice causes or is likely to cause substantial injury and that "such substantial injury is not outweighed by countervailing benefits to consumers or to competition."
  - Section 1100(f)(2) (12 U.S.C. § 5107(f)(2))—identifying factors that the Bureau must consider when promulgating rules to implement the SAFE Act, including "the need to ensure a competitive origination market that maximizes consumer access to affordable and sustainable mortgage loans."
- The DFA mentions "efficient" markets, regulations, or enforcement in three places:
  - Section 1021(b)(5) (12 U.S.C. § 5511(b)(5))—identifying five objectives for which the Bureau may exercise its authorities, including to ensure that "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."
  - Section 1013(c) (12 U.S.C. § 5493(c))—identifying the functions of the Bureau's Office of Fair Lending and Equal Opportunity, which include "coordinating fair lending efforts of the Bureau with other Federal agencies and State regulators, as appropriate, to promote consistent, efficient, and effective enforcement of Federal fair lending laws."
  - Section 1013(g)(3)(E) (12 U.S.C. § 5493(g)(3)(E))—identifying the duties of the Bureau's Office of Financial Protection for Older Americans, including to "coordinate consumer protection efforts of seniors with other Federal agencies and State regulators, as appropriate, to promote consistent, effective, and efficient enforcement."

- At least three of the eighteen enumerated consumer laws identify ensuring competition or efficiency as among their purposes:
  - FCRA section 602(a)(1)) (15 U.S.C. § 1681(a)(1))—listing Congressional findings, including that, "Inaccurate credit reports directly impair the efficiency of the banking system."
  - FDCPA section 802(e) (15 U.S.C. § 1692(e))—identifying the FDCPA's purposes, including "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."
  - TILA section 102(a) (15 U.S.C. § 1601(a))—listing Congressional findings, including that, "The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit."
- By comparison, the FTC Act explicitly prohibits unfair methods of competition:
  - Section 5 (15 U.S.C. § 45)—prohibiting unfair methods of competition and empowering and directing the FTC to prevent persons from using unfair methods of competition.

<u>II. Statutory Text</u>

- Below are the relevant statutory provisions from the Dodd-Frank Act, FCRA, FDCPA, TILA, and FTC Act.
- References to competition are highlighted in yellow.
- References to efficiency are highlighted in blue.

<u>Dodd-Frank Act</u>

DFA section 1021 (12 U.S.C. § 5511). Purpose, objectives, and functions.

(a) Purpose. The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.

(b) Objectives. The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services—

(1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions;

(2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;

(3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;

(4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and

(5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

DFA section 1031(c) (12 USC 5531(c)). Prohibiting unfair, deceptive, or abusive acts or practices.

. . .

(c) Unfairness.—

(1) In General. The Bureau shall have no authority under this section to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that—

(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and

(B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

(2) Consideration of Public Policies. In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

DFA section 1100 (12 U.S.C. § 5107). Bureau of Consumer Financial Protection backup authority to establish loan originator licensing system.

. . .

(f) Regulation Authority.—

(1) In General. The Bureau is authorized to promulgate regulations setting minimum net worth or surety bond requirements for residential mortgage loan originators and minimum requirements for recovery funds paid into by loan originators.

(2) Considerations. In issuing regulations under paragraph (1), the Bureau shall take into account the need to provide originators adequate incentives to originate affordable and sustainable mortgage loans, as well as the need to ensure a competitive origination market that maximizes consumer access to affordable and sustainable mortgage loans.

DFA section 1013 (12 U.S.C. § 5493). Administration.

. . .

(c) Office of Fair Lending and Equal Opportunity.—

(1) Establishment. The Director shall establish within the Bureau the Office of Fair Lending and Equal Opportunity.

(2) Functions. The Office of Fair Lending and Equal Opportunity shall have such powers and duties as the Director may delegate to the Office, including—

(A) providing oversight and enforcement of Federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the Bureau, including the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act;

(B) coordinating fair lending efforts of the Bureau with other Federal agencies and State regulators, as appropriate, to promote consistent, efficient, and effective enforcement of Federal fair lending laws;

(C) working with private industry, fair lending, civil rights, consumer and community advocates on the promotion of fair lending compliance and education; and

(D) providing annual reports to Congress on the efforts of the Bureau to fulfill its fair lending mandate.

. . .

(g) Office of Financial Protection for Older Americans.—

. . .

(3) Duties. The Office shall—

(A) develop goals for programs that provide seniors financial literacy and counseling, including programs that—

(i) help seniors recognize warning signs of unfair, deceptive, or abusive practices, protect themselves from such practices;

(ii) provide one-on-one financial counseling on issues including long-term savings and later-life economic security; and

(iii) provide personal consumer credit advocacy to respond to consumer problems caused by unfair, deceptive, or abusive practices;

(B) monitor certifications or designations of financial advisors who advise seniors and alert the Commission and State regulators of certifications or designations that are identified as unfair, deceptive, or abusive;

(C) not later than 18 months after the date of the establishment of the Office, submit to Congress and the Commission any legislative and regulatory recommendations on the best practices for—

(i) disseminating information regarding the legitimacy of certifications of financial advisers who advise seniors;

(ii) methods in which a senior can identify the financial advisor most appropriate for the senior's needs; and

(iii) methods in which a senior can verify a financial advisor's credentials;

(D) conduct research to identify best practices and effective methods, tools, technology and strategies to educate and counsel seniors about personal finance management with a focus on—

(i) protecting themselves from unfair, deceptive, and abusive practices;

(ii) long-term savings; and

(iii) planning for retirement and long-term care;

(E) coordinate consumer protection efforts of seniors with other Federal agencies and State regulators, as appropriate, to promote consistent, effective, and efficient enforcement; and

(F) work with community organizations, non-profit organizations, and other entities that are involved with educating or assisting seniors (including the National Education and Resource Center on Women and Retirement Planning).

<u>Fair Credit Reporting Act</u>

FCRA section 602 (15 U.S.C. § 1681). Congressional findings and statement of purpose.

(a) Accuracy and fairness of credit reporting. The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

<u>Fair Debt Collection Practices Act</u>

FDCPA section 802 (15 U.S.C. § 1692). Congressional findings and declaration of purpose.

(a) Abusive practices. There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws. Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods. Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce. Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes. It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

Truth In Lending Act

TILA section 102 (15 U.S.C. § 1601). Congressional findings and declaration of purpose.

(a) Informed use of credit. The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

(b) Terms of personal property leases. The Congress also finds that there has been a recent trend toward leasing automobiles and other durable goods for consumer use as an alternative to installment credit sales and that these leases have been offered without adequate cost disclosures. It is the purpose of this subchapter to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements.

Federal Trade Commission Act

FTC Act section 5 (15 U.S.C. § 45). Unfair methods of competition unlawful; prevention by Commission.

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade.

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)—

(A) For purposes of subsection (a) of this section, the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that--

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

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