ARTICLE

JUSTIFYING THE EFFICACY OF CONTRACT DISCRIMINATION

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In recent years, the insights of behavioral law and economics scholars have improved the efficacy of various forms of contract-regimes through substantive legal reforms ranging from the CARD Act to a revamped RESPA. These insights and reforms attempted to optimize consumer choice architecture and enhance overall consumer decision-making utility, primarily by a combination of new information-deployment techniques and various consumer nudges, in both standardized paper formats and online. But much more can be done to build on these insights and improve decision-making in this space – in order to maximize utility for historically marginalized groups. This Article argues that as more traditional commercial transactions move online, they can be more easily customized to directly engage consumers by directly taking into account a consumer's race and other demographic factors.

Encouraging discrimination in contract formation comes with potential barriers and costs. Certain federal and state regulations prohibit the acquisition and use of such data. Privacy experts caution against the expansive use of online tools and algorithms designed to inferentially gather such data. Consumer demand for racially customized online interactions is uncertain. And, the potential for corporate misuse of such data, to discriminate in harmful ways, is possible. But these concerns should be measured against potential market benefits and can be addressed by rigorous data analysis of completed contracts. In certain regulated consumer markets, digital platforms that would seek to acquire race data and customize contracts would be required to permit regulators to evaluate whether such contract disclosures and contract terms were discriminatory. Ultimately, in the absence of a more transparent and honest dialogue about the present acquisition and use of such information

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in online contracts, an unregulated market can utilize such information at will and without scrutiny – which runs the risk of harming consumers and carries unknown benefits.

INTRODUCTION: COUNTING RACE AND MAKING IT COUNT

    As individual consumers, we respond to, utilize, and learn from advertising, marketing, disclosure, and information regimes, in print and online, on a daily basis. As traditional consumer contract markets have moved to digital formats, contract-making has become both more personalized and more automated based upon the engagement of personal preferences.[1] Many of these consumer markets are regulated with a light touch, if at all, and thus the full extent of a typical market-seller's use of a customer's personal data to structure terms is unclear.[2]

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[1] *See* Rory Van Loo, *Digital Market Perfection*, 117 MICH. L. REV. 815 (2019) (predicting far greater automation of consumer transactions based on personal preferences). *See also* Joshua A.T. Fairfield, *Smart Contracts, Bitcoin Bots, and Consumer Protection*, 71 WASH. & LEE L. REV. ONLINE 35, 38 (2014).

[2] For this reason, it is difficult to assess whether and how the use of such data impacts consumer utility in those markets. To the extent that consumers are harmed in those markets, the interventions described here would prove costly. However, to the extent that the transparency proposed here identifies differential and negative market effects for certain consumer segments, such evidence could serve as the empirical basis to expand regulatory oversight of "light-touch" markets.

But, in other consumer markets, whether online or in-person, the federal government structures the methods by which market actors engage consumers from the earliest stages of the contract formation process, such as with mandated consumer disclosures for prescription drugs or consumer credit products.[3]

This Article argues that corporations subject to these additional oversight regimes should be encouraged to gather socio-demographic information for print and online transactions and customize contracts based upon that information. The decision-enhancing framework underlying consumer disclosure law finds its original source in law and economics principles, namely that individuals, once identified and provided with information, will "rationally optimize their choices, given their preferences, information, and the incentives they face."[4] The Truth in Lending Act ("TILA") was enacted with this basic premise.[5] Moreover, information's rationalizing effect should protect and enhance the interests of consumers by positioning them to make welfare-optimizing decisions. Policymakers are increasingly relying on digital intermediaries to play that rationalizing role through disclosures aimed at machines. If those machines are supposed to help consumers, and if a consumer's interests are tied to their socio-demographic background, why shouldn't corporations be able to incorporate and utilize this information in ways consistent with decision-enhancing principles?[6]

As leading scholars from other areas have recognized, race, gender and other factors can be excluded from evaluating and informing a

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[3] This principle can be broadly applied to a range of government sanctioned information dissemination regimes. Here, the information of particular value is consumer disclosure, specifically with respect to consumer finance. One of the earliest modern examples of this strategy, of course, is pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, as amended, (49 U.S.C. 30112(a), 30115). National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. §§ 30112(a), 30115 (1966). Under the Act, a motor vehicle manufactured for sale in the United States must have affixed a label certifying compliance with various mandates and applicable standards. The label, among other things, must identify the vehicle's manufacturer, its date of manufacture, the Gross Vehicle Weight Rating or GVWR, the Gross Axle Weight Rating or GAWR of each axle, the vehicle type classification (e.g., passenger car, multipurpose passenger vehicle, truck, bus, motorcycle, trailer, low-speed vehicle), and the vehicle's Vehicle Identification Number or "VIN." 49 C.F.R. § 567.4 (2013).

[4] *See* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1602 (2014). As explained *infra*, recent efforts by BLE scholars to improve such laws have necessarily challenged this assumption.

[5] Matthew Edwards, (quoting ELIZABETH RENUART & KATHLEEN E. KEEST, TRUTH IN LENDING § 1.1.1, at 33 (4th ed. 1999) (describing TILA as "Congress's effort to guarantee the accurate and meaningful disclosure of the costs of consumer credit and thereby to enable consumers to make informed choices in the credit marketplace").

[6] *See* Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L. J. 1267 (2017) ("The administrative state is leveraging algorithms to influence individuals' private decisions.")

decision-making process, but "from a technical perspective . . . this approach is naïve. Blindness to a sensitive attribute has long been recognized as an insufficient approach to making a process fair."[7] The resultant product is "insufficient to assure fairness and compliance with substantive policy choices."[8] Thus, to maximize the effectiveness of consumer transactions in a digital era, we may need to focus less on how such transactions affect consumers generally and more on how such transactions are designed for, utilized by, and impact marginalized consumer groups, particularly racial and ethnic groups.[9]

There are critiques of this approach, discussed later in Section III, including whether such a regime implicates privacy concerns and whether government's encouragement of "discrimination" in this context violates core moral or ethical principles. But it is useful to begin with a third critique about the underlying theory and evidence for such an approach: by and large, we do not know how, when, and why we might expect consumers from different groups to respond differently to particular types of contracts.[10] However, this absence of evidence is partly because much consumer contract and behavioral law and economics ("BLE") disclosure-centered scholarship has often swept socio-demographic variables like race under the behavioral rug, exacerbating this empirical dilemma.

A. *The Importance of Evaluating Racial Differences in Commercial Law Scholarship*

When we believe race matters, as an independent explanatory or causal variable to differentiate consumer interests, experiences, or

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[7] *See* Joshua A. Kroll, Joanna Huey, Solon Barocas, Edward W. Felten, Joel R. Reidenberg, David G. Robinson & Harlan Yu, *Accountable Algorithms*, 165 U. PA. L. REV. 633, 685 (2016) (discussing ECOA's Reg B. prohibitions – and their failings – within a larger framework about debiasing machine algorithms).

[8] *Id.*

[9] Though not the primary focus of this Article, financial literacy and education regimes similarly suffer from a lack of focus on the information needs of marginalized groups. *See* Lauren E. Willis, *Against Financial Literacy Education*, 94 IOWA L. REV. 197, 228-29 (2008) (arguing that remedies must be context-specific to be impactful). *See also Final Report President's Advisory Council on Financial Capability*, FINAL REPORT, 10 (2013), http://www.treasury.gov/resource-center/financial-education/Documents/PACFC%20Interim%20Report%20-%20January%2018,%202012.pdf (stating that recommendations should "take into account the particular needs of traditionally underserved populations (e.g., women, minorities, low- and moderate-income consumers, and the elderly)").

[10] *See, e.g.*, Dalié Jiménez, D. James Greiner, Lois R. Lupica & Rebecca L. Sandefur, *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY L. & POL'Y 449 (2013).

contract outcomes, academics and government policy makers should encourage private actors and government regulators to acquire that information and then to utilize it to inform or improve law and public policy.[11] Similarly, when we see an absence of effort to gather or analyze or deploy such information, it sends a clear message that the underlying social phenomenon or policy problem either should not or does not implicate race or racial justice matters. In short, when race matters, government and private actors should count it, analyze it, and use the resulting knowledge and information to reduce disparities and improve public welfare.[12] Within academia, we expect the same level of effort.[13] While encouraging the acquisition of racial demographics for commercial transactions may not always yield an obvious net utility,[14] there is general agreement that racial difference permeates a variety of consumer contract regimes in a variety of ways.[15] But, in the context of recognizing the role of race in communicating with consumers, legal scholars in other fields are far ahead of commercial law academics.[16]

B. *Generic Consumer Contract Approaches*

We know the fallacy of the central assumption of traditional law and economics approaches to individual decision making — that consumers are rational maximizers of their strategic goals.[17,18] Drawing upon social science research, BLE scholars proved that human behavior and

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[11] This assumes that government generally seeks to make such policies better, rather than worse.

[12] *See* Ming Hsu Chen & Taeku Lee, *Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act*, 3 U.C. IRVINE L. REV. 359 (2013) (advocating for broader data gathering and data analysis by race to improve efficacy of voting rights laws).

[13] *See, e.g.,* Gregory S. Parks, *Toward a Critical Race Realism*, 17 CORNELL J. OF L. AND PUB. POL. 683 (2008) (encouraging critical race theorists to deploy social science data analysis methodologies when analyzing law and public policy problems). *See also* Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. OF L. & SOC. SCI. 149 (2014) (explaining how social science research offers critical race theory scholars a useful methodology).

[14] *See* Jonathan D. Kahn, *Patenting Race*, 24 NATURE BIOTECHNOLOGY, Nov. 2006, at 1349 (2006) (raising concerns about utilizing race as a variable when petitioning the government in patent and drug-approval spaces).

[15] *See, e.g.*, Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REG. 547, 579-80 (2016) (observing that sellers' algorithms have the potential to lessen some forms of racial discrimination and exacerbate others).

[16] *See, e.g.,* Dayna Bowen Matthew, *Race, Religion, and Informed Consent — Lessons from Social Science*, 36 J. OF L., MED. & ETHICS 150 (2008) (gathering and analyzing empirical and historical data to re-contextualize the role of race and ethnicity in informed consent agreements).

[17] *See, e.g.,* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

[18] Bubb and Pildes, *supra* note 4.

decision-making consistently differs from that of the rational actor.[19] Accordingly, such scholars contend that policymakers should legislate with an eye toward "minimiz[ing] the individual mistakes that create behavioral market failures and . . . mitigate their negative consequences."[20] With respect to one such area of law, disclosure law regimes, they believe that government-mandated disclosures – provided through market intermediaries, should "focus . . . on helping [real] people help themselves."[21]

"To date, the work in BLE has been surprisingly circumscribed,"[22] and, by assuming that "many" or "most" consumers exhibit the *same* behavioral biases that impact rational decision-making in the *same* way, much BLE literature falls victim to the presumptive errors also made in law and economics theory.[23] In other words, BLE improves upon rational-actor models by anticipating predictable forms of decision-making errors, but also assumes that all consumers act irrationally in *consistent* ways or make imperfect decisions using information in a predictably imperfect manner. By baselining these models, and then subsequent policy and law derived therefrom, on a "universal" person, this suggests, but does not explicitly state, that the consumer is racially white – and male.[24]

Thus, when relying on this assumption of a mythical universal generic consumer, there is less need to engage the efficacy, impact, or value of incorporating consumer demographic differences in consumer contracts, as there is no accompanying theoretical explanation for why such consumers would be expected to process information differently or yield different utility from similar decisions. Therefore, if this core BLE assumption were true, disclosure models or digital "smart contracts" created for a singular class of "irrational" consumers would prove effective in reducing noise, increasing decision-making efficiencies, and leaving consumers better off – as a whole – than without the information.

But what if a contract formation's utility function varies across a range of socio-demographic groups? For example, one of the few large-

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[19] See, e.g., Thaler and Sunstein, *supra* note 17.

[20] *Bubb and Pildes, supra* note 4, at 1605.

[21] *Id.* at 1604.

[22] *Id.*

[23] Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1219 (2003). ("[W]e can divide consumers into two types: those who are boundedly rational (in the sense described above) and those who are fully rational; and that (2) a fraction, p, of consumers fall into the boundedly rational category."),

[24] *See generally* IAN HANEY LOPEZ, WHITE BY LAW (1999).

scale credit-granting disclosure experiments confirms that the quality and visibility of consumer disclosures specifically matter for vulnerable high-risk populations, who "are rate sensitive only if the interest rate information is prominently disclosed."[25] Similarly, the empirical relationship between contract-formation choices, credit-card profiles, and certain socio-demographic information (especially race) is still uncertain, though suggestive of group-based differences.[26] Therefore, it is consistent with the limited scholarship that exists that certain population sub-groups could react sub-optimally (or simply differently) to proposed contracts and terms that others (a majority) use efficiently and rationally.[27] If this is true, even rational economic decision making - mediated through information - is not uniformly distributed.[28] Yet, contract disclosure and formation defaults, particularly as they are operationalized – in style, language, and substance – are effectively white. But in the digital world, the provision of information and disclosure could instead be focused on customizing the contract formation process to maximize the economic-utility and welfare of population sub-groups.[29] If the provision of information can be designed to maximize the utility of sub-groups such that it serves to enhance not

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[25] *See* Bruno Ferman, *Reading the Fine Print: Credit Demand and Information Disclosure in Brazil*, 62 MGMT. SCI. 3534 (2015) (conducting a large-scale credit card disclosure experiment in Brazil and finding, in part, that "most borrowers are highly rate-sensitive, whether or not interest rates are prominently disclosed in marketing materials. An exception is high-risk borrowers, for whom rate disclosure matters.")

[26] A number of studies have shown correlation between (perceived) race and credit scores, suggesting that, in fact, there are clear financial health differences by population, although the causes of such differences remain largely unknown. *See, e.g.*, EEOC, *May 16 Hearing Record* (statement of Adam T. Klein) (citing the 2000 Freddie Mac National Consumer Credit Survey) (correlation between race and credit score); Bd. of Governors of the Fed. Reserve Sys., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT 80–81 (2007), available at http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf. (finding African-Americans and Latinos have lower credit scores than other racial/ethnic groups); Matt Fellowes, Brookings Inst., CREDIT SCORES, REPORTS, AND GETTING AHEAD IN AMERICA 2 (2006), https://www.brookings.edu/research/credit-scores-reports-and-getting-ahead-in-america (showing correlation between percentage of racial minority residents and a U.S. county's average credit score).

[27] *See, e.g.,* David Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595 (2016) (demonstrating, in part, that socio-demographic differences in consumer groups are associated with differing views about the contract formation process and the implications for contract breach).

[28] *See, e.g.*, Mintel, HISPANIC FINANCES AND FINANCIAL SERVICES (2009) (finding higher Latino race-differential response rates to the question "I know nothing about financial services/investments.")

[29] *See* Shmuel I. Becher, Yuval Feldman, and Orly Lobel, *Poor Consumer(s) Law: The Case of High-Cost Credit and Payday Loans* in LEGAL APPLICATIONS OF MARKETING THEORY, Jacob Gersen & Joel Steckel, eds., Cambridge University Press (2019, Forthcoming).

only the general public welfare but the welfare and maximal utility of sub-groups as well, the result would be a more optimal outcome than the status-quo.[30] And while some scholars have innovatively encouraged a "performance test" of various disclosure and contract-formation regimes to further enhance consumer utility, [31] such tests still compare the utility maximizing effect of such differentiated regimes on the outcomes for the consumer population *as a whole* – rather than distinct sub-groups. Instead, the approach here contemplates a variant of what others have described as a consumer finance "randomized control trial," in which digital experimentation with how consumer contract disclosures are provided and the efficacy of particular terms will allow for a real-time gathering of evidence of what works best – holding the socio-demographics of the reference-group constant.[32] Such experimentation can be achieved faster through digital contracts and the use of online platforms, which would also allow for a more rapid aggregation of evidence about the efficacy of this approach.

However, recognizing that this approach is not without its weaknesses, this Article responds to those who may believe this approach to contract formation will do more harm than good.[33]

I. CRITIQUES OF DISCLOSURE LAW AND A CRITIQUE OF THOSE CRITIQUES

Because the purpose of disclosure law, as mentioned, is to enable rational decision-making by consumers, the law and economics movement—and its critics—have comprised the foundation of scholarly commentary on the impact and efficacy of consumer disclosure laws, to the exclusion of those focused on achieving racial justice. Most

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[30] *See* Kroll, et. al., *supra* note 7, at 682 (acknowledging privacy concerns and reviewing potential discriminatory effects in using algorithms but suggesting that "there may be cases where allowing an algorithm to consider protected class status can actually make outcomes fairer. This may require a doctrinal shift, as, in many cases, consideration of protected status in a decision is presumptively a legal harm.")

[31] Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1316 (2015) (footnotes omitted).

[32] *See, e.g.*, Jimenez et. al., *supra* note 10, at 470 (describing a large-scale mixed-methods research study to gauge the effectiveness of financial health interventions via a "consumer incentive to undergo financial counseling, an offer of attorney representation, and the two treatments in combination.")

[33] *See, e.g.*, Lea Shepard, *Toward A Stronger Financial History Antidiscrimination Norm*, 53 B.C.L. REV. 1695, 1711-718 (2012) (questioning empirical assumptions associated with an employer's use of job applicants' financial histories and arguing, in part, for a more robust anti-discrimination norm with respect to consumer credit-information regimes due to the potential racially disparate impact associated with their use.)

particularly, the behavioral economics movement has dedicated significant resources "to tak[ing] the core insights and successes of economics and build[ing] upon them by making more realistic assumptions about human behavior . . . [seeking to provide] a better description of the behavior of the agents in society and the economy."[34] Such scholars have drawn upon psychological and sociological scholarship that has not only acknowledged the countless cultural and environmental factors that impact how individuals respond to contract-formation stimuli, but have also embraced them as variables to predict future behavior.

But, this scholarship has failed to acknowledge, explain, or even identify whether – and how – race, ethnicity, and other socio-demographics impact – or are impacted by – the very disclosure regimes such scholars seek to change. Thus, celebrated law scholars in this space whose work is rightly lauded for its general behavioral insights have remained curiously silent about whether sub-group differences exist in responding to optimizing information distribution in similar welfare enhancing ways.[35]

Current scholarship denotes disclosure policy as a political device *designed* to remedy information asymmetries in the market place.[36] Nonetheless, those endorsing such laws and regulations cannot ignore evidence identifying the deficiencies in disclosure law's implementation. Those questioning the merit of the current regime predominantly point to "empirical evidence and theories regarding consumer behavior," "deficiencies of the disclosures themselves," as well as "the [in]ability or [un]likelihood [that] consumers . . . use the

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[34] Christine Jolls, Cass Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1487 (1998).

[35] Pathbreaking in a variety of ways, such works simply fail to engage the role of consumer race, ethnicity, and culture (as well as sex), as if these variables are not factors in how consumers receive, process, or act on disclosure. *See, e.g.,* Margaret Jane Radin, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2012); Oren Bar-Gill, SEDUCTION BY CONTRACT (2012); Omri Ben-Shahar and Carl E. Schneider, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2015). Perhaps one reason these scholars and others see disclosure as so ineffective is precisely because of its lack of experimental differentiation with terms across consumer sub-groups. Compare this absence of discussion in commercial law literature with the engagement of race variables and critical theory in other substantive fields, such as health law. *See, e.g.,* Khiara Bridges, Terence Keel & Osagie K. Obasogie, *Introduction: Critical Race Theory & the Health Sciences*, in Symposium Critical Race Theory & the Health Sciences, 43 AM. J. OF LAW & MED. 179 (2017).

[36] Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL'Y 199 (2005).

information"[37] among the reasons for its ineffectiveness. Perhaps the absence of much socio-demographic information is the real cause.

Scholars have also identified the possibility of supply-side issues – that the complexity and volume of information may render it meaningless to a confused or overwhelmed consumer. First, evidence has shown that complexities in the law itself can stunt the compliance efforts of regulated entities.[38] While this is true for all populations, there is increasing evidence that demonstrates that the complexity is particularly salient for population sub-groups more so than the general population and that it causes members of these sub-groups to make, on average, more inefficient decisions with the same information.[39] Similarly, an oft-cited defect of contract-formation that behavioral theorists recognize is "information overload," the argument that "consumers [are] cognitively unable to cope with the voluminous nature of the mandated . . . disclosures."[40] With respect to TILA, subsequent to its 1980 emendation, scholarship dedicated to dissecting this particular issue somewhat subsided.[41] Nonetheless, "home mortgage borrowers [are still] . . . buried in paper, with little guidance as to which documents contain the most crucial information to facilitate credit decision-making."[42] Most (if not all) consumers find this problem familiar, as they attempt to process overwhelming amounts of information online to make the most efficient contracting choices.

II. IMPLEMENTATION

The following examples build on a premise not universally shared by BLE scholars – that particular population sub-groups may exhibit non-random decision-making errors with respect to evaluating contract disclosures and terms.[43] This non-random error distribution can result

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[37] *Id.* at 204.

[38] *Id.*

[39] *See, e.g.,* Kleimann Communication Group, KNOW BEFORE YOU OWE: POST-PROPOSAL CONSUMER TESTING FOR THE CFPB OF THE SPANISH AND REFINANCE INTEGRATED TILA-RESPA DISCLOSURES (2015) (discussed *infra*).

[40] Edwards, *supra* note 36, at 221.

[41] Edwards attributes three explanations to this: (1) "the application of information overload theory to legal regulation has been subjected to a significant amount of scrutiny and criticism," (2) wariness surrounding "advocating a position that might lead towards recommendations of less disclosure for consumers," and finally, (3) that the amended regulations arguably "ameliorated the worst of TILA's overload problems." *Id.* at 222.

[42] *Id.* at 223.

[43] *See, e.g.*, Shmuel I. Becher et. al., *supra* note 29 (explaining that certain BLE assumptions about consumer financial behavior are not evenly associated with certain groups – and may be particularly flawed for marginalized groups.)

from a variety of causes. Here, I'll focus on three of them: (a) language barriers, (b) unique socio-demographic differences in the processing or utilization of information, or (c) a non-randomly distributed lack of engagement with information. Each of these root causes, if proven, would lead to a different set of proposed information-based solutions particularly suitable for digital transactions, in part because the costs typically associated with the deployment of socio-demographically varied disclosure and terms in print form would be substantially reduced. We can think about these solutions as falling within three broad frameworks: (a) improving contract-formation utility by clarification, (b) improving contract-formation utility by addition of group-relevant topics, and (c) improving contract-formation utility by individuation. Each of these solutions requires the gathering and use of socio-demographic variables and robust evidence testing. Each of them is also particularly easy to test and execute for digital contracts, because a controlled experiment incorporating the modification of contract terms or disclosure language and evaluating differential responses can be accomplished at higher speed and lower cost than creating, distributing, and evaluating responses from differentiated printed and distributed versions of the same material.

Example: Online Credit Card Applications

In order to prove a claim that the utility of information might vary across subgroups, one would prefer empirical validation from real-world evidence. Lacking that in this case forces speculation – on both sides. On the one hand, BLE scholars assume without proof that no differences exist, and their models reflect this. Here, as a thought experiment, let me illustrate a universe where the utility of contract-formation information *does* vary across subgroups – in order to postulate what we might do in response were this to be so.

First, let us imagine a scenario where, prior to the implementation of the Credit Card Accountability and Disclosure ("CARD") Act's revised disclosure and education model, a simulated online test was run using three versions of that model. One of the goals of the new model embedded within the CARD Act is to educate consumers that an increase in the amount paid per month will reduce the overall cost of a medium-term extension of credit.[44] The goal is to increase monthly payments through the education function of disclosure, which over time will enhance the welfare of consumers because they will spend less money for the extension of credit over time. Let us speculate that three different versions of online disclosure were tested with that goal in mind, across particular demographic sub-groups with the same number of participants, with results as follows:[45]

GROUP / POPULATION	CARD Act Experiment	CARD Act Experiment2	CARD Act Experiment3
	Disclosure A	Disclosure B	Disclosure C
Group A	$15	$5	$20
Group B	$15	$5	$20
Group C	$15	$5	$20
Group D	$15	$5	$20
Group E	($25)	$5	($30)
Group F	($25)	$5	($30)
Average Add. Payment	$2	$5	$3

In the above experimental framework, the primary goal is to maximize the additional monthly payment of the consumer population as a whole in order to reduce the long-term cost of credit. In that scenario, Disclosure B is the optimal choice, because it maximizes the average additional payment for the entire population. But what if the information *effects* of the disclosure are not randomly distributed across different groups? Disclosures A and C represent that scenario, which this Article suggests is more likely than not. Comparing Disclosure A to Disclosure C, if the goal is to maximize overall welfare, Disclosure C is the preferred choice. Most groups will increase their minimum payments, even if two groups do not. But if the goal is to increase

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[44] *See, e.g.,* Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967, 969, 1003-05 (2012).

[45] The amount is the increase in average monthly payments made pursuant to a given type of disclosure, with red amounts signifying that the disclosures resulted in a decreased average monthly payment.

payments while also minimizing harm (reducing payments), Disclosure A is the correct choice. How then to maximize utility for all groups? In the world of digital contracting, it would be possible, instantly, to display the utility maximizing disclosure at the beginning of the formation process – to different consumer groups – yielding optimal choices.

The aforementioned example illustrate the limits of both the law and economics and BLE approaches to disclosure and contract formation. It is not just that consumers are not rational. It is not just that BLE insights can help reduce general error rates across the entire population. In fact, it may be that error rates are non-randomly distributed across groups for a variety of reasons, and if so, corrective measures require a differentiated and discriminating contract formation regime to maximize the utility of sub-groups collectively. This will allow for higher social welfare across all groups compared to a standardized approach using a single blunt disclosure instrument or formation method. And digital platforms provide both an easy test method and a cost-less ability to make contract-formation changes.

But why might decision-making errors be non-randomly distributed across certain consumer populations and how would a race-conscious contract-formation process solve for them? A few detailed examples might provide further context. First, language differences might result in formation inefficiencies. Second, socio-demographic differences might cause formation inefficiencies. Finally, differentials in consumer engagement with contract terms and disclosures might cause formation inefficiencies. Let's take each case in turn.

A. *Language Barriers*

Scholars have focused on comprehension issues with respect to disclosure, insofar as disclosures are to be designed to reflect a uniform consensus about how standard English language speakers process information. Even if one accepts as a given that disclosures are generally designed to reflect text for consumers with an 8th grade reading level, this still presumes that all consumers read English at that level – and in the same way. These assumptions are false.[46]

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[46] Almost ¼ of the U.S. population over the age of 5 speaks a language other than English at home. *See*, *e.g.*, U.S. Census Bureau, *2016 American Community Survey 1-Year Estimates, Language Spoken At Home by Ability to Speak English for the Population 5 Years and Over* ("2016 ACS Home Language Data"), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_B16001&prodType=table.

One real-life illustration of this fallacy shall suffice. The Consumer Financial Protection Bureau ("CFPB") thoughtfully reassessed its consumer education program with respect to Real Estate Settlement Procedures Act ("RESPA") and TILA disclosures for home-buyers, and it launched an innovative new education regime for the entire U.S. population of mortgage consumers.[47] Proactively recognizing that a large segment of U.S. home buyers spoke Spanish as a first language, the CFPB undertook the process of translating the finished English-language mortgage acquisition information and disclosure materials into Spanish. This is no small empirical feat. Literal translation – of the Google Translate variety – is not effective for the sort of sophisticated consumer education such documents are intended to convey. Further, dictionary translations across languages have at their core a false equivalency assumption – namely that standard and familiar terms can be easily translated across languages without cultural context clues.[48]

After the CFPB outsourced its English-language disclosure and information materials and translated the material for a Spanish language audience, the CFPB and its language translation team learned through small-scale focus group testing that the translations were not effective.[49] In their words, their translation team "identified particular concepts that could pose problems in the translation. These concepts did not translate directly into Spanish, did not have a definite term across multiple dialects, or the concepts behind the terms were inherently difficult. These terms included: *Appraisal, Balloon Payment, Borrower, Escrow, Final Payment, and Origination Charges*."[50]

Through extensive revision, the CFPB was able to find the appropriate language benchmarks, notwithstanding inter-cultural differences in

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[47] *See* Alexander Bader, *Truly Protecting the Consumer in Light of the Subprime Mortgage Crisis: How Generally Applicable State Consumer Protection Laws Must Be a Key Tool in Keeping Lending Institutions Honest*, 25 J. CIV. RTS. & ECON. DEV. 767, 782-83 (2011) ("[A]n unfortunate reality of both RESPA, and its predecessor TILA, is that they had little effect on borrowers' decision-making because many mortgages are difficult for a lay person to understand on his or her own.").

[48] Consider a reverse example. The Korean idiom 똥 묻은 개가 겨 묻은 개 나무란다 literally translates in English to "A dog with feces scolds a dog with husks of grain" when in its cultural context, is meant to communicate an idea similar to the English-language idiom "People who live in glass houses shouldn't throw stones."

[49] The difficulty of having an English dominant approach to multi-lingual focus groups, the challenge of translating concepts, and the interpretation of the meaning of such concepts as tied to identity are difficult subjects for any researcher to tackle, especially the CFPB. *See, e.g.,* Taeku Lee, Language-of-Interview Effects and Latino Mass Opinion (April 2001). JOHN F. KENNEDY SCHOOL OF GOVERNMENT FACULTY RESEARCH WORKING PAPER SERIES 01-041.

[50] *See* Kleinmann Communication Group, *supra* note 39, at p. vi.

interpretation across various Spanish-speaking subgroups.[51] In 2016, the CFPB's mortgage disclosure and information regimes were finally translated to Spanish as a result of an expensive and thoughtful proactive government response. How should the remaining millions of non-native English speaking home-buyers be educated about the process of home ownership? Should government bear the considerable burden of multiple iterations and translations of standard disclosures?[52] If not, should financial institutions and other large corporations be accountable?[53] If neither should be accountable (as most present regimes contemplate), how should we expect millions of English as a second language speakers to correctly interpret disclosure materials and contract terms that they not only do not understand in English but that may, in fact, be incorrectly "translated" into false-equivalent terms through the use of basic technological translation devices that consumers might seek on their own? The solution is straightforward – allowing for consumers to have unrestricted language opt-in and requiring testing and refining of translated disclosure by regulated entities. Further, the dissemination cost (and perhaps the efficacy) of such disclosure is substantially reduced when it is deployed through digital methods, rather than burdensome traditional mailings or in-person lengthy disclosure forms.

B. *Socio-demographic Decision-Making and Behavioral Differences*

Levels of financial education, educational attainment, and the interactions of those factors with a consumer's socio-demographics may structure market choices and contract formation in complicated ways.[54] But the provision of standardized disclosure and standardized contract terms ignores these differences and assumes a uniform mono-cultural response. And, financial regulations like the Equal Credit Opportunity Act ("ECOA") impose race-gathering restrictions on various creditors and financial institutions and prohibit them from considering a consumer's

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[51] *Id.*

[52] As of January 2019, consumer ECOA guidance brochures, for example, are only available in English and Spanish. See *Final Language Access Plan for the Consumer Financial Protection Bureau* available at https://www.federalregister.gov/documents/2017/11/16/2017-24854/final-language-access-plan-for-the-consumer-financial-protection-bureau#footnote-4-p53482 (Last visited Feb. 24, 2019).

[53] Market leaders may benefit by customer acquisition and satisfaction if they engage this effort. *See, e.g.*, Molly Kissler, *400,000 Chase customers opt for Spanish-language statements*, PHX.   BUS.   J.   (Aug.   6,   2010), https://www.bizjournals.com/phoenix/stories/2010/08/02/daily72.html (describing Chase's commitment to Spanish-language access.)

[54] *See* Richard Epstein, *The Dangerous Allure of Libertarian Paternalism*, 5 REV. OF BEHAV. ECON. (2018) at 405-406.

background, even when such consideration might benefit the consumer, or at the very least, provide the consumer with data that could be used in a potential claim for effects-based discrimination.[55]

Compare the commercial-law approach to race-uniform decision-making to decision-making architecture in other areas. For instance, medical research shows disparities in the ways in which different races and genders approach medical issues.[56] Analyzing the differences in disease and treatment across different races/ethnic groups and genders has become a focus of medical research in topics ranging from lung cancer[57] to heart disease,[58] including over 200 drugs that currently have an FDA label including specific genetic recommendations – all in order to maximize not the "general health" but sub-population health.[59] Thus, health research and policy increasingly affirmatively discriminates with respect to information provided to consumers. While this approach has been met by some

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[55] U.S. Gov't Accountability Office, *Data Limitations and the Fragmented U.S. Financial Regulatory Structure Challenge Federal Oversight and Enforcement Efforts*, CQ TRANSCRIPTIONS, LLC, 19-20 (July 15, 2009), stating that

 A final data limitation is that depository institution regulators generally do not have access to personal characteristics data (for example, race, ethnicity, and sex) for nonmortgage loans, such as business, credit card, and automobile loans. In a 2008 report, we reported that Federal Reserve Regulation B generally prohibits lenders from requesting and collecting such personal characteristic data from applicants for nonmortgage loans. . . . In the absence of personal characteristic data for nonmortgage loans, we found that agencies tended to focus their oversight activities more on mortgage lending rather than on areas such as automobile, credit card, and business lending that are also subject to fair lending law. . . . [S]uch procedures had a high potential for error and were time-consuming and costly.

[56] Anna Kline, *Pathways into Drug User Treatment: The Influence of Gender and Racial/Ethnic Identity*, 31:3 SUBSTANCE USE & MISUSE 323 (1996) (analyzing patterns of behavior in different races and genders; finding, for instance, that 'Hispanics' were more likely to delay medical treatment than other races due a discomfort or reluctance to acknowledge their addictions).
[57] Delia A. Dempsey et al., *Genetic and Pharmacokinetic Determinants of Response to Transdermal Nicotine in White, Black and Asian Non- Smokers*, CLINICAL PHARMACOLOGY & THERAPEUTICS (2013) (available at doi:10.1038/clpt.2013.159) (stating that lung cancer is typically correlated with smoking behavior, such as number of cigarettes per day and ability to quit, and such behavior is linked to the rate of metabolism of nicotine, which varies by race and ethnicity).
[58] Nicholas Wade, *Race-Based Medicine Continued...* N.Y. TIMES (Nov. 14, 2004), http://www.nytimes.com/2004/11/14/weekinreview/14nick.html?_r=0 (discussing research that indicated that the heart disease medication BiDil was more successful in treating Black patients and discussed the human genome project, which is likely to produce diagnostic tests and treatments specifically tailored to specific populations).
[59] Linda M. Hunt, Nicole D. Truesdell, & Meta J. Kreiner, *Genes, Race, and Culture in Clinical Care: Racial Profiling in the Management of Chronic Illness*, 27:2 MED. ANTHROPOLOGY Q. 253 (2013).

criticism, medical research continues to look for areas to personalize medicine – by race – in order to increase its effectiveness.[60]

C. *Differential Disengagement*

Much has been written about whether individuals actually read disclosure, concluding that they do not, we accept the insights of that literature as given.[61] Thus, a portion of the population derives no utility from disclosure. If non-readers generally make less efficient choices for contract terms, how might the existing disclosure regime be modified to induce the behavior that it seeks? Questions regarding the quality of information provided in a disclosure and the nexus of such information to being read and understood are difficult to answer and rarely asked.[62]

Some speculations follow. Perhaps a consumer might opt into interest-based financial education through a disclosure regime by an online provider.[63] The provider might be permitted to inquire about a consumer's key interests (whether sports, dance, film, etc.) Then, disclosures and explanations of key contract terms could be modified or supplemented with consumer finance scenarios that directly engaged the consumer's core interests. For example, a music fan might receive a disclosure that involved purchasing a pair of concert tickets on a credit card and explaining how the face-value of the tickets might not reflect the actual cost if the tickets were carried as credit card debt for three months at a given interest rate. Perhaps the information could use music analogies or local artists as examples to generate more consumer interest and thus increase the likelihood that the disclosure would be both accessed and understood.

With due care, lenders could also use cultural references that resonated with their audience. Thoughtful critics have suggested that tailored messages during contract formation might prove to be culturally insensitive. One response might be that, at present, the entire online

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[60] *Id*. (stating, "[s]ome argue that taking race/ethnicity into consideration is clinically useful and can provide convenient insight into a patients' genetic heritage, behavioral habits, and socioeconomic status (citation omitted). Others argue that such practices are not scientifically defensible and may increase disparities by promoting stereotyping.")

[61] *See, e.g.,* Florencia Marotta-Wurgler, *Does Disclosure Matter?*, NYU LAW & ECON. RES. PAPER NO. 10-54 (2010).

[62] *See, e.g.,* J. H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 WM. & MARY L. REV. 899, 939 (2015) (evaluating information-forcing default rule research about how to make such rules effective, and finding only "a few scholars" have produced such work.)

[63] *See*, *e.g.*, Woodrow Hartzog, *Website Design as Contract*, 50 AM. U. L. REV. 1635 (2011) (providing framework for how such an approach can balance privacy and information security and be achieved using traditional contract principles).

contract formation regime is culturally insensitive, because it simply ignores race and other variables under the guise of a uniform "generic" disclosure or standard set of formation terms. In short, if consumers who are not presently engaged with the information in the disclosure were provided incentives to read the disclosure, those incentives would improve utility at no cost to those who did not receive the information.[64] Or, more creatively, disclosures could take the form of videos, snapchats, music, or other forms of communication that might more effectively reach and engage the intended audience.[65] Though this technique does *not* require the use of race variables, the methodology by which customers preference-ordered or shared information might be correlative.[66]

Therefore, with respect to the broad categories above (language access differences, socio-demographic or cultural differences, and information engagement differences), the gathering of socio-demographic information and its associated use to calibrate more efficient and effective contracts would have the net effect of enhancing overall consumer utility *and* net utility of marginalized groups. Further, corporations that excel at reducing such disparities would retain a unique marketplace advantage: proof that diverse customers of "Citilend" default on loans less frequently, demonstrate greater increases in credit scores over time, are more likely to gain access to other credit products, and other such indicators would enhance Citilend's customer base and serve to calibrate its brand identity, particularly within communities that are skeptical of large financial institutions.[67] But right now, with government controlling and mandating

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[64] In other contexts, such as Google Ad placement, responses to inquires suggested that perceived race of the person "queried" was utilized to differentiate ads returned in the query response, presumably maximized to get a higher click-through rate. *See* Latanya Sweeney, *Discrimination in Online Ad Delivery,* DATA PRIV, LAB (2013), https://dataprivacylab.org/projects/onlineads/1071-1.pdf). Such algorithms could also be used to create, modify, or supplement disclosures in a manner consistent with the grantee's requests for more information.

[65] *See*, *e.g.*, M. Ryan Calo, *Against Notice Skepticism in Privacy (and Elsewhere)*, 87 NOTRE DAME L. REV. 1027, 1032–34 (2012).

[66] In an alternative framework (separate from race), for example, lenders and issuers could ask a series of drop-down questions about a consumer's interests (similar to how Tivo or Netflix or Amazon fine-tune recommendations based on ratings and/or viewing/buying behavior). This preference ordering could be used to deliver extremely granular information –making it more likely to be seen and utilized by the consumer. I thank Josh Bowers for this observation.

[67] *See*, *e.g.*, Erik Oster, *Most Marketers Agree Diverse Images in Ads Help a Brand's Reputation, According to New Report*, ADWEEK (Dec. 5, 2017), available at https://www.adweek.com/brand-marketing/most-marketers-agree-diverse-images-in-ads-help-a-brands-reputation-according-to-new-report/ (explaining that in product advertising, for example, "[m]arketers are also recognizing that choosing images that are relatable to diverse groups benefits their brand's reputation."); *See also* Phil Schrader, *Why Committing to LGBT Equality and Embracing a Diverse Workplace Is So Good for Brands*, ADWEEK (April 16, 2017)

the entirety of the disclosure product in many regimes, the marketplace value (for providers *and* consumers) for better financial disclosure, among other things, is simply unknown.[68]

III. OBJECTIONS TO THE SUB-GROUP DISCRIMINATION APPROACH

A restructuring of our existing approaches to contract disclosure and formation to incorporate consumer-level sub-group differences might raise a variety of objections. First, what evidence do we have that subgroup-specific disclosures would lead to more efficient consumer behaviors than the existing disclosure models? Second, the gathering and use of this information raises online privacy concerns. Third, to successfully implement a sub-group disclosure and formation model, government must permit discrimination–or at least delineation–between certain types of sub-groups at a time when such discrimination is frowned upon in other contexts.

The first objection, lack of evidentiary proof of sub-group differential disclosure efficiency, is firmly rooted in empirics–and an absence of evidence. We know that a uniform format and dissemination model, in some contexts, works to enhance decision-making and utility for the group as a whole.[69] We do not know, as applied, whether it works the same way for population sub-groups, and there are a variety of reasons discussed above to think that it may be harmful. The best way that we can acquire objective answers to that question would be to permit or encourage a natural information experiment.[70] Those who believe that responses to disclosure and consumer errors are not randomly distributed across groups are most likely to permit or encourage a natural information experiment. Whereas those who believe that consumer errors are randomly distributed would continue to prefer the current regime. Certainly, large scale focus group testing could be conducted by corporations, by the CFPB, or by researchers. But here the focus is on real-world financial behavior and

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available at https://www.adweek.com/brand-marketing/why-committing-to-lgbt-equality-and-embracing-a-diverse-workplace-is-so-good-for-brands/) (LGBT equality measures and sub-group centered initiatives benefit corporations by attracting talent, among other factors.)

[68] *See, e.g.*, Bruce R. Huber, *The Fair Market Value of Public Resources*, 103 CAL. L. REV. 1515, 1552-53 (2015) (describing valuation inefficiencies for public resources when exclusive government control of the resource obviates natural open-market pricing mechanisms).

[69] *See generally* KAZUHISA TAKEMURA, BEHAVIORAL DECISION THEORY: PSYCHOLOGICAL AND MATHEMATICAL DESCRIPTIONS OF HUMAN CHOICE BEHAVIOR (2014).

[70] *See generally* Jimenez et. al., *supra* note 10. Of course, researchers in this space can conduct focus groups and surveys, which are valid measurement tools and would inform this discussion. But here one should be particularly concerned with measuring real outcomes under real conditions–and the most critical experimental tool is thus the changing of disclosure–in context.

outcomes for marginalized groups in the United States–not merely opinions about a consumer's hypothetical behavior over time–and so any conclusions drawn from such field or one-off experiments would be necessarily limited for this reason.[71]

But the lack of empirics may exacerbate the problem. For example, "information on consumer race and ethnicity is required to conduct fair lending analysis of non-mortgage credit products, but auto lenders and other non-mortgage lenders are generally not allowed to collect consumers' demographic information. As a result, substitute, or "proxy" information is utilized to fill in information about consumers' demographic characteristics."[72] And these proxies are quite imprecise.

The second objection, that encouraging individuals to further identify race and other socio-demographic factors in online contracting may implicate privacy concerns, prompts a few responses.[73] First, failing to ask about socio-demographic factors may signal government's disinterest or communicate that government thinks race, in this setting, is not important. Second, such that permitting the use of such variables enables consumers to promote self-realization or positive identity construction, the ability to self-identify race and other factors in consumer contract regimes subject to certain restrictions can serve to enhance, not undermine, individual interests.[74] Third, the nexus of socio-demographics to privacy in the digital era is less clear than one might expect, given that privacy law scholars have not typically engaged race and other socio-demographics as key data-

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[71] *But see* Marianne Bertrand, Dean Karlan, Sendhil Mullainathan, Eldar Shafir, & Jonathan Zinman, *What's Advertising Content Worth? Evidence from a Consumer Credit Marketing Field Experiment*, 125 Q. J. ECON. 263, 263 (2010) (discussing a South African experiment demonstrating that consumers responded differentially to a loan-advertisement's experimentally varied terms and content). However, the path-breaking study was necessarily limited to a specific context: "mailers were sent exclusively to clients who successfully repaid prior loans from the Lender. Most had been to a branch within the past year and hence were familiar with the loan product, the transaction process, the branch's staff and general environment, and the fact that loan uses are unrestricted." Further, the study's exploration of the nexus of cultural or racial cues to response rates was inconclusive, "Given our lack of strong priors on how any advertising content effects might vary with consumer characteristics, and statistical power issues, we will not devote much space to discussing heterogeneity in responses to advertising content."

[72] *See* Consumer Fin. Prot. Bureau, *Proxy Methodology Report* 3 (2014), https://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf.

[73] *See* Shmuel I. Becher et. al., *supra* note 29, at 31 (acknowledging same with respect to tailoring proposals to low income consumers); *See also* Woodrow Hartzog and Frederic Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 1-2 (2013).

[74] *See, e.g.,* Jonathan D. Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33:2 SETON HALL L. REV. 371, 373-74 (2003).

points warranting additional scrutiny.[75] And, such that socio-demographic data obtained through this process is abused or misused, government can design remedies designed to penalize merchants who violate a consumer's and the government's expectations about the sharing, use, or misuse of this particularly personal information.[76] Alternatively, companies choosing to gather and use such data for these purposes could be encouraged to provide for warnings or disclosures or "demographic opt-outs," which could increase transparency and salience for consumers, allowing them to choose a more generic approach if so desired.[77]

The third objection is a moral one, that encouraging the use of socio-demographics in this way encourages invidious discrimination. For those opposed to this approach, the best way to reduce the likelihood of a discriminatory market outcome with respect to racial and other socio-demographic sub-groups in the consumer finance disclosure regime would be to prevent market-actors, government, and digital platforms – from permitting – and encouraging – discrimination on the basis of race.[78] But a response might be that we expect the government and private markets to encourage 'positive' discrimination in other contexts – such as affirmative action – where the utility of such discrimination may not be equally enhancing for all groups or may be perceived by some to be more harmful to other groups. Even in these other contexts, the gathering and analysis of "consumer" data serves as a core component of the analysis of the effectiveness of such programs.[79]

With respect to online contracts in markets that are heavily regulated by government, such as those governing financial services, mandated information gathering about race, ethnicity, and other factors is critical for

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[75] *See*, *e.g.*, Will Thomas DeVries, *Protecting Privacy in the Digital Age*, 18 BERKELEY TECH. L.J. 283, 305-11 (2003) (surveying the array of concerns as the U.S. transitioned into a more digitally connected era, suggesting changes to traditional privacy law to modernize its focus, but not discussing socio-demographic information as an area of concern.)

[76] *See* Ari Ezra Waldman, *Privacy as Trust: Sharing Personal Information in a Networked World*, 69 U. MIAMI L. REV. 559, 628 (2015) (reframing privacy debate as one centered on trust between the sharer and the recipient and identifying a framework valuing "the socially beneficial effects of sharing and [giving] judges a coherent scheme for answering limited privacy questions.")

[77] *See, e.g.*, Gerhard Wagner and Horst Eidenmüller, *Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences: Regulating the Dark Side of Personalized Transactions*, 86:2 U. CHI. L. REV. 581 (2019).

[78] *See Parents Involved in Community Schools vs. Seattle School District #1*, 551 U.S. 701 (2007).

[79] *See, e.g.*, Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CAL. L. REV. 1063, 1065-66 (2006) (exploring nexus of social science research about implicit bias and the effectiveness of affirmative action programs as solutions for discrimination).

supporting the type of anti-discrimination lawsuits that form the core of civil rights litigation in a variety of contexts, including acquisition of credit. For example, in the markets for consumer loans and home mortgages, lenders subject to the Housing Mortgage Disclosure Act ("HMDA") and/or Regulations B[80] and C have long been subject to rigorous data-gathering requirements, including asking online and in-person borrowers about race and other criteria. On an aggregate level, civil rights advocates and federal government researchers and law enforcers have been able to utilize this demographic information in statistical models, identify disparities across institutions, and then sue to recover damages and to eliminate racially discriminatory practices.

Absent the gathering of such data as transactions become more digitized, it is extraordinarily difficult to prove, for example, disparate impact claims. The data analyses underlying those claims must use proxies for race, ethnicity, and gender, since the variables themselves are not collected. Thus, the failure to gather (whether secretly through online tracking or openly by asking) race and ethnicity information can unintentionally benefit lenders and financial institutions, because these proxy methodologies used by regulators are imperfect and tend to overstate disparities, thus allowing lenders and others to call their validity into question.[81] It is not terribly hard to find weaknesses in the proxy measures. For example, the CFPB utilized Census track surname data from *Census 2000* to construct its associated consumer contract race and ethnicity measures – until *April 2017*.[82]

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[80] Reg. B institutions that receive "an application for credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence, where the extension of credit will be secured by the dwelling, shall request as part of the application" the marital status, age, ethnicity, race, and gender of the applicant. Historically Reg B data included five data fields: ethnicity, race, sex, marital status, and age, while HMDA included only ethnicity, race, and sex. Regardless, these socio-demographic variables could be used in a statistical analysis in order to test for their effects holding constant other factors, like credit scores.

[81] *See, e.g.*, Am. Fin. Serv. Ass'n, *Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities* 2 (June 25, 2018), https://www.afsaonline.org/portals/0/Legal%20and%20Reg/AFSA%20-%20RFI%20on%20Inherited%20Rules%20-%20June%2025%202018.pdf (critiquing the ability of plaintiffs to prove disparate impact for a variety of reasons, including the lack of self-disclosed individual level data). *But see* D Adjaye-Gbewonyo et al., *Using the Bayesian Improved Surname Geocoding Method (BISG) to Create a Working Classification of Race and Ethnicity in a Diverse Managed Care Population: A Validation Study*, 49(1) HEALTH SERV. RES. 268, 277-81 (2014) (concluding the BISG method [which is the CFPB's preferred] may indeed be useful for classifying race/ethnicity of health plan members when needed for health care studies).

[82] *See, e.g.*, *Update to Proxy Methodology,* GITHUB (Apr. 2017), https://github.com/cfpb/proxy-methodology.

Now imagine how such race proxies are operationalized when it comes to that have become more digitized over time; this digitization does not necessarily expand anti-discrimination norms nor follow a Bentham-like utility maximizing path. Consider the case of the CFPB's now-rescinded indirect auto-lending discrimination rules. Indirect auto-lenders were subject to the same ECOA restrictions as credit-card companies–namely they were forbidden from gathering certain socio-demographic information, including race, ethnicity, and sex.[83] As a result, it was difficult to test for disparate impact or discrimination in the auto-lending market, because such information was not available. However, indirect auto-lenders engaged in lending practices that yielded differential effects by racial sub-groups, through practices such as differential mark-ups on the "dealer reserve".[84] To solve for the information-analytics gap, civil rights advocates lobbied the CFPB and others to allow for the use of "race proxies" in the data-analysis process, because neither in-person nor online transactions permitted its acquisition.

But this use of such proxies gave indirect auto-lenders an easy rhetorical target–a flawed methodology would lead to industry ruin. When indirect auto-lenders saw that the CFPB intended to subject them to ECOA scrutiny for alleged discriminatory pricing racial disparities using this flawed methodology, they lobbied Congress to overturn the regulation.[85] And, though not solely for that reason, Congress agreed. The indirect auto-lending regulation was overturned on May 21, 2018.[86] Now the leading online direct/indirect auto-lending markets still lack broad-based race-data and may have discriminatory racial impacts, but there is still no way to directly test for such impacts or to provide consumers with a socio-demographically attuned contract model. This same lack of supply-side socio-demographic information from those searching for online pay-day loans also undermines efforts to prove that pay-day lending contracts are discriminatory.[87]

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[83]   *See* Cons. Fin. Prot. Bureau, *CFPB Bulletin 2013-2* (2013), https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf (describing the CFPB's then-interpretation of ECOA with respect to indirect auto-lenders).

[84] They were able to mask discriminatory behavior, in part, due to the *absence* of race data associated with each consumer contract.

[85] *See, e.g.*, Daniel Goldstein, *Car Dealers Win First Round in Congress Against CFPB Over Auto Loan Discrimination*, MARKETWATCH (Aug. 1, 2015), https://www.marketwatch.com/story/did-congress-just-make-it-easier-for-auto-dealers-to-discriminate-against-you-2015-08-0*1*.

[86] *See* Cons. Fin. Prot. Bureau, *Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act* (Mar. 21, 2013), https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.

[87] *See*, *e.g.*, Paige Marta Skiba, *Regulation of Payday Loans: Misguided?*, 69 WASH. & LEE L. REV. 1023, 1038-41 (2012).

CONCLUSION

Scholars have improved both traditional and digital contract disclosure and formation models by incorporating behavioral insights in an effort to improve choice architecture and enhance overall utility. But these efforts fail to engage the utility of tracking the effect of race on contracting norms, selection of contracting terms, and contract literacy/engagement. To encourage the gathering (and the analysis) of such information, particularly when government has a role in the contract-acquisition and formation process between merchants and consumers, government must mandate that online disclosures and consumer contracts seek race and other demographic information. It is clear that the present incarnation of the CFPB, which could lead this effort, seems to have substantially downgraded the importance of analyzing race, sex, and other socio-demographic factors related to consumer information provision and consumer anti-discrimination principles in both print and digital spaces.[88]

We are just at the beginning stages of understanding how race matters in consumer disclosure and consumer contracts. But, if gathering and experimenting with such information allows for online platforms to customize interfaces and disclosures such that they more effectively reach and engage diverse consumers, then there may be an increase consumer utility. Further, a more transparent gathering and use of such data will allow government (and private actors) to better maintain and enforce anti-discrimination principles because they can monitor outcomes in ways that are presently deeply imperfect. Although this race-conscious approach can be operationalized across many sectors, its value may be most salient in digital transactions in regulated industries, such as consumer finance, where government has the greatest interest in evaluating market engagement of consumers of various racial backgrounds to ensure fairness.

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[88] *See, e.g.*, Cons. Fin. Prot. Bureau, *Summer 2018: Supervisory Highlights,* 12 (Sept. 2018), https://files.consumerfinance.gov/f/documents/bcfp_supervisory-highlights_issue-17_2018-09.pdf (discussing none of these subjects, absent a single sentence).