Who Wants to Watch? A Comment on the New International Paradigm of Financial Consumer Market Regulation

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I. INTRODUCTION

In November 2011, the leaders of the G20 nations adopted ten "High-Level Principles on Financial Consumer Protection" (Principles or High-Level Principles) and endorsed a report on "[o]ptions to strengthen financial consumer protection in relation to credit."[1] Prepared by the Organization of Economic Cooperation and Development (OECD) and the Financial Stability Board (FSB), respectively, the High-Level Principles and the options report form part of a package of measures by which economically powerful countries have attempted to respond in a coordinated manner to the 2007–2008 financial crisis.[2] Several elements of this response concern aspects of banking and finance that policymakers for many years have regarded as having an international dimension. These elements include prudential regulation of banks, corporate governance,

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1. *G20 High-Level Principles on Financial Consumer Protection*, ORG. FOR ECON. CO-OPERATION & DEV. (Oct. 2011), http://www.oecd.org/daf/financialmarketsinsuranceandpensions/financialmarkets/48892010.pdf [hereinafter *G20 High-Level Principles*]; *Consumer Finance Protection with Particular Focus on Credit*, FIN. STABILITY BD. (Oct. 26, 2011), http://www.financialstabilityboard.org/ publications/r_111026a.pdf [hereinafter *Consumer Finance Protection*].

2. The G20 held six summits between 2008 and 2011 (two per year) that were devoted to dealing with the global financial crisis. *See, e.g.*, *Previous Leaders' Summits*, G20, http://www.g20.org/index.php/en/previous-leaders-summits (last visited Nov. 3, 2012). The leaders' declaration at the end of the Pittsburgh summit in 2009 articulated a new role for the G20 as "the premier forum for economic cooperation" for the G20 members. *G20 Leaders Statement: The Pittsburgh Summit*, UNIV. OF TORONTO ¶ 50, http://www.g20.utoronto.ca/2009/2009communique 0925.html (last updated Nov. 29, 2011). The G20 members are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, the United States, and the European Union, as represented by the presidents of the European Council and the European Central Bank. *Members*, G20 http://www.g20.org/in dex.php/en/members (last visited Nov. 3, 2012).

and the wholesale finance and capital markets that shaped the financial sector's business models before the crash.[3]

Retail-finance markets, by contrast, are traditionally regulated locally, even though the financial firms that dominate their supply sides are usually global corporate groups.[4] Some international initiatives on the structure and regulation of consumer-finance markets had started before the collapse—most notably in relation to financial literacy education—and there are also regional projects such as the EU regulation to encourage cross-border shopping for retail-finance products.[5] Most regulatory standards pertaining to consumer finance, however, have been constructed at the national or subnational level with enforcement by local or na-

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3. A number of entities are responsible for setting international standards for regulation. The Basel Committee on Banking Supervision, established in 1974, sets international standards for prudential or "safety and soundness" regulation of the major financial and banking industries. *See History of the Basel Committee and Its Membership*, BANK FOR INT'L SETTLEMENTS, http://www.bis.org/bcbs/history.htm (last visited Oct. 27, 2012). Similarly, the International Organization of Securities Commissions (IOSCO), formed in 1983 out of an earlier regional association in the Americas, sets standards for securities market regulation. *IOSCO Historical Background*, INT'L ORG. OF SEC. COMM'NS, http://www.iosco.org/about/index.cfm?section=background (last visited Oct. 27, 2012). Also noteworthy is the International Association of Insurance Supervisors (IAIS), founded in 1994. INT'L ASS'N OF INS. SUPERVISORS, http://www.iaisweb.org/ (last visited Oct. 27, 2012). Finally, the OECD published international standards on corporate governance in 1999 and revised them in 2004. *OECD Principles of Corporate Governance*, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/corporate/ oecdprinciplesofcorporategovernance.htm (last visited Oct. 27, 2012).

4. *See generally Consumer Finance Protection*, *supra* note 1 (discussing the local nature of consumer financial protection regulation). Note in particular the assertion that "many jurisdictions require foreign consumer credit providers to be licensed and regulated locally." *Id.* at 4. For recent data on the rapid growth of "foreign banks," which often are large corporate groups, see Linda S. Goldberg, *Understanding Banking Sector Globalization*, 56 IMF STAFF PAPERS 171 (2009); *see also* Dietrich Domanski, *Foreign Banks in Emerging Market Economies: Changing Players, Changing Issues*, BIS Q. REV., Dec. 2005, at 69, *available at* http://www.bis.org/publ/qtrpdf/r_qt0512f.pdf ("Financial sector foreign direct investment in emerging market economies has surged over the past decade."). For earlier data and discussion of foreign banks in retail consumer markets, see Adrian E. Tschoegl, *FDI and Internationalization: Evidence from US Subsidiaries of Foreign Banks*, 33 J. INT'L BUS. STUD. 805 (2002); Adrian E. Tschoegl, *International Retail Banking as a Strategy: An Assessment*, 19 J. INT'L BUS. STUD. 67 (1987); Adrian E. Tschoegl, *The California Subsidiaries of Japanese Banks: A Genealogical History*, 20(2) J. ASIAN BUS. 59 (2004); Adrian E. Tschoegl, *"The World's Local Bank": HSBC's Expansion in the US, Canada and Mexico*, 5 LATIN AM. BUS. REV. 45 (2004).

5. Relevant EU directives include Directive 2002/65/EC of September 23, 2002, concerning distance marketing of consumer financial services, Directive 2007/64/EC of November 13, 2007, on payment services in the internal market, Directive 2008/48/EC of April 23, 2008, on credit agreements for consumers, Directive 2002/92/EC on insurance mediation, and Directive 2004/39/EC of April 21, 2004, on markets in financial instruments and investment services. *Good Practices for Consumer Protection and Financial Literacy in Europe and Central Asia: A Diagnostic Tool*, WORLD BANK (Sept. 2009) http://siteresources.worldbank.org/INTECAREGTOPPRVSECDEV/ Resources/GoodPractices_ConsumerProtection_Sep09.pdf [hereinafter *Good Practices*] (consultative draft).

tional authorities.[6] Substantial similarities in the regulatory objectives appear across jurisdictions.[7] But this policy isomorphism seems to be attributable to the entrepreneurship—or policy dominance—of a powerful country or industry sector, or to other regulatory convergence processes such as "lesson learning," rather than to explicit and concerted international direction.[8]

The launch of a concerted international reform project under the auspices of the G20 indicates an increasing interest among international policymakers in economic relations between consumers, financial firms, and consumer-finance-market regulators, and it holds out the prospect of uniform transnational principles becoming incorporated into the development of local consumer-finance markets across the globe. The G20 leaders envisage the High-Level Principles as contributing to global financial stability, but there remain questions about the ability of financial consumer protection regulation to further that end.[9] Equally unclear—and the focus of this Article—are the implications of this objective for the welfare of financial consumers. Several questions arise: whether retail-finance markets structured on the G20 model are more likely to deliver better products at lower prices in a nondiscriminatory manner; whether financial consumers are likely to be safer; and what kinds of safeguards there will be against the predatory practices of financial firms that to date have characterized this era of neoliberal financialization.

Answers to these and similar questions depend in part on the standards set forth in the High-Level Principles and the ability of national and international regimes to implement and enforce them. More fundamentally, the answers depend on how the G20 model restructures the socio-economic relations of consumer-finance markets and whether its reforms are capable of changing those exploitative aspects of financial firm–

6. *Consumer Finance Protection*, *supra* note 1.

7. *Id.*

8. Isomorphism in this context refers to convergence or homogeneity of policy in different countries that is attributable to constraints and pressures other than deliberate, concerted decisionmaking to take a homogenous position. In the field of organizational theory, Paul DiMaggio and Walter Powell initially developed the socio-political construct of isomorphism. *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983). For useful accounts of its application in various policy settings and its relationship to other policy-transfer processes, see Christopher Knill, *Introduction: Cross-National Policy Convergence: Concepts, Approaches and Explanatory Factors*, 12 J. EUR. PUB. POL'Y 764 (2005). For an example of the application of the concept to EU policymaking, see Claudio M. Radaelli, *Policy Transfer in the European Union: Institutional Isomorphism as a Source of Legitimacy*, 13 GOVERNANCE 25 (2000).

9. This argument is developed in more depth in Toni Williams, *Continuity, Not Rupture: The Persistence of Neoliberalism in the Internationalization of Consumer Finance Regulation*, *in* INTERNATIONAL RESPONSES TO ISSUES OF CREDIT AND OVER-INDEBTEDNESS IN THE WAKE OF CRISIS (Therese Wilson ed., 2013).

consumer relations that triggered the crisis and have since intensified its effects.

This Article explores the capacity of the G20's model of financial consumer protection to reconfigure relationships between financial firms and consumers, focusing in particular on the market conduct of financial firms. Although this Article does not focus directly on Adolf A. Berle's work, it does engage with some of his enduring concerns about economic relations between corporations, regulators, and individuals; the social context of those economic relations; and the role of law and legal regulation in shaping market relations.[10] More specifically, this Article considers new international regulatory principles related to corporate social responsibility—a recurring theme of Berle's work[11]—in the somewhat novel context of consumer-finance markets. Part II describes the dominant paradigm of consumer-finance regulation before the crash and then outlines two important aspects of contemporary consumer-finance markets that bear on the relationships between firms and consumers—the increasing importance of household financing in the revenue streams of many global banks and the inequalities in the distribution of consumer debt. Part III outlines the elements of the G20 model and critically analyzes its understanding of consumer protection in retail-finance markets and its potential to realize that protection. Part IV concludes.

II. THE SHORT-TERM CONTEXT OF THE G20 REFORMS

A. Neoliberal Policy Before the Crash

The era of neoliberal economic policy that preceded the 2007–2008 crash treated consumption as a driver of economic growth and consumer-finance products as a critical enabler of that consumption.[12] Policymak-

10. *See*, *e.g.*, ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION (1954); ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932); Adolf A. Berle, Jr., *Legal Problems of Economic Power*, 60 COLUM. L. REV. 4 (1960); *The Adolf A. Berle, Jr. Center on Corporations, Law & Society*, SEATTLE UNIV. SCH. OF LAW, http://www.law.seattleu.edu/x1865.xml.

11. *See*, *e.g.*, A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931). This includes the well-known Berle–Dodd debate of the early 1930s in which Berle argued that corporate managers should be controlled to better protect shareholders' interests. A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1365 (1932). Dodd developed a conception of social responsibility toward consumers and workers based on "a view of the business corporation as an economic institution which has a social service as well as a profit-making function." E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932). By the mid-1950s, Berle had conceded that "the argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention." BERLE, *supra* note 10, at 169.

12. WORLD BANK, FINANCE FOR ALL? POLICIES AND PITFALLS IN EXPANDING ACCESS (2008), *available at* http://siteresources.worldbank.org/INTFINFORALL/Resources/4099583-11943735126

ers and large financial firms promoted product innovations that purportedly expanded access to finance and credit for individuals and households—credit's so-called democratization.[13] These innovations were coupled with measures to improve the quality of decisionmaking on the part of both firms and consumers.[14] This approach led to the replication around the world of institutions and policies to facilitate the expansion of consumer-finance markets, including credit bureaus to expand firms' access to information about financial consumers, disclosure obligations to decrease information asymmetry, financial literacy education to improve consumers' confidence and skills, and the establishment of financial ombudsmen to provide low-cost redress for problems.[15]

Although neoliberalism is often characterized as deregulatory, regulation was central to its pre-crisis model of consumer-finance markets. In practice, regulators did not control firms by implementing mandatory rules, but rather by indirectly steering them.[16] Regulators were tasked with enabling and maintaining the market conditions that would subject firms to competitive discipline, rather than with controlling the nature, safety, quality, or market price of financial products.[17] Among the contributors to the neoliberal project of intensified competitive discipline are policies to improve financial consumers' abilities to use their purchasing decisions to influence the conduct of financial firms. Activation of corporate social responsibility toward the consumer interest in effect would depend on the capacity of financial consumers to hold firms accountable to regulatory standards.[18]

32/FFA_book.pdf; Iain Ramsay & Toni Williams, *The Crash that Launched a Thousand Fixes: Regulation of Consumer Credit After the Lending Revolution and the Credit Crunch*, *in* LAW REFORM & FINANCIAL MARKETS: INSTITUTIONS AND FINANCIAL GOVERNANCE 221 (Kern Alexander & Niamh Moloney eds., 2011).

13. *See, e.g.*, BRIGIT HELMS, WORLD BANK, ACCESS FOR ALL: BUILDING INCLUSIVE FINANCIAL SYSTEMS (2006); ANJALI KUMAR, WORLD BANK, ACCESS TO FINANCIAL SERVICES-BRAZIL (2005); WORLD BANK, *supra* note 5; Ramsay & Williams, *supra* note 12.

14. Ramsay & Williams, *supra* note 12; *Good Practices*, *supra* note 5.

15. *See* sources cited *supra* note 14.

16. DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 25–48 (1992).

17. *See*, *e.g.*, FIN. SERVS. AUTH., ANNUAL REPORT 2004/05 (2005), http://www.fsa.gov.uk/static/pubs/annual/ar04_05/ar04_05.pdf. The Financial Services Authority, the U.K. regulator, expressed a regulatory preference in 2005 "to work with the grain of the market and facilitate market-led solutions." *Id*. at 17.

18. This idea of consumers influencing the market conduct of firms illustrates Julia Black's notion of decentered regulation in which the state does not command or direct conduct but pursues its regulatory goals by "coordinating, . . . influencing, and balancing interactions between actors . . . and . . . creating new patterns of interaction which enable social actors/systems to organize themselves." Julia Black, *Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World*, 54 C.L.P. 103, 111 (2001).

The international campaign adopting financial literacy as a policy priority illustrates this notion of consumer-driven accountability and represents influential ideas about the socioeconomic relations in retail-finance markets before the crash occurred.[19] Local financial education schemes led by public and private bodies have a long history, particularly in the United States.[20] Financial literacy became a particular focus of international policymaking in 2003 when the OECD launched its Financial Education Project, sponsored by Prudential PLC's Corporate Responsibility Program. It encouraged national governments to treat improved consumer financial literacy as a regulatory priority.[21] To this end, the OECD has sponsored national, regional, and international conferences, published a steady stream of promotional and evaluative reports, and founded an international network on financial education, which claims a membership of some 220 public institutions from 100 countries.[22] It also established a "global clearinghouse on financial education" as a repository for data, research, and other informational resources.[23]

This project was launched with the overtly market-expansionary objectives of improving the confidence, enthusiasm, and skill of financial consumers and increasing their participation in retail-finance markets.[24] Pursuit of these objectives was advocated to improve economic growth, reduce poverty, and potentially moderate the volatility of financial markets in emerging economies.[25] An economy populated by financially literate consumers also was expected to alleviate pressure on the public purse, as states sought to impute to individuals and households more financial responsibility for economic security and for the protection that

19. These ideas are developed more fully in Toni Williams, *Empowerment of Whom and for What? Financial Literacy Education and the New Regulation of Consumer Financial Services*, 29 LAW & POL'Y 226 (2007); *see also* Ramsay & Williams, *supra* note 12.

20. *See, e.g.*, WESLEY CLAIR MITCHELL, THE BACKWARD ART OF SPENDING MONEY (1937); HAZEL KYRK, A THEORY OF CONSUMPTION (1923), *discussed in* VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY (1994). For a comprehensive critique of the contemporary project of financial literacy education with a particular focus on the United States, see Lauren E. Willis, *Against Financial Literacy Education*, 94 IOWA L. REV. 197 (2008).

21. *Recommendation on Principles and Good Practices for Financial Education and Awareness*, ORG. FOR ECON. CO-OPERATION & DEV. (2005), http://www.oecd.org/finance/financialeducation/35108560.pdf [hereinafter *Recommendation on Principles*].

22. *Joining the INFE*, INT'L GATEWAY FOR FIN. EDUC. http://www.financial-education.org/join_INFE.html (last visited Oct. 28, 2012).

23. INT'L GATEWAY FOR FIN. EDUC., http://www.financial-education.org/ (last visited Oct. 28, 2012).

24. *Improving Financial Literacy: Analysis of Issues and Policy*, ORG. FOR ECON. CO-OPERATION & DEV. 35 (2005) [hereinafter *Improving Financial Literacy*]; *see also* Org. for Econ. Co-operation & Dev., *OECD's Financial Education Project*, 87 FIN. MARKET TRENDS 223 (2004); *Recommendation on Principles*, *supra* note 21.

25. *Improving Financial Literacy*, *supra* note 24, at 35.

social welfare programs and defined-benefit pension schemes used to provide.[26]

In addition to these macroeconomic benefits, financial literacy education was conceived as transformative for individual consumers' agency.[27] Financial literacy was expected to empower the individual to advance and to safeguard her own interests.[28] Able to manage the risks of illness, income loss, and biographical contingencies, the literate consumer is constructed also as serving a market disciplinary role as she proactively demands more and better-quality financial services from financial firms and products that enable her to more effectively smooth income flows and ensure economic security.[29]

Financially literate consumers thus could be expected to understand what information they need to make rational financial decisions, how to search for that information, and how to interpret that information.[30] They would take responsibility for their own decisions and have the skills and knowledge to protect themselves against the risks of most predatory practices.[31] In the view of the Financial Services Authority (FSA), the United Kingdom's main financial regulator, the literate financial consumer is able "to exercise a stronger influence in markets; to take greater responsibility for their own actions; and to protect themselves through less mis-buying and being less susceptible to mis-selling."[32] According to the FSA, there should be less need for regulatory intervention in markets populated by financially literate consumers, which in turn should "reduce the burden on firms."[33] In these ways, financial literacy is con-

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26. *About*, INT'L GATEWAY FOR FIN. EDUC., http://www.financial-education.org/about.html (last visited Oct. 28, 2012).

27. *See, e.g.*, *Improving Financial Literacy*, *supra* note 24; *Recommendation on Principles*, *supra* note 21; FIN. SERVS. AUTH., TOWARDS A NATIONAL STRATEGY FOR FINANCIAL CAPABILITY 21 (2003), [hereinafter FIN. SERVS. AUTH, NATIONAL STRATEGY] *available at* http://www.fsa.gov.uk/pubs/other/financial_capability.pdf; FIN. SERVS. AUTH., FINANCIAL CAPABILITY IN THE UK: ESTABLISHING A BASELINE 22 (2006) [hereinafter FIN. SERVS. AUTH., FINANCIAL CAPABILITY], *available at* http://www.fsa.gov.uk/pubs/other/fin cap_baseline.pdf. This claim is elaborated in Williams, *supra* note 19.

28. Williams, *supra* note 19.

29. *Id*.

30. *Id.*; *see also* Ismail Erturk et al., *The Democratization of Finance? Promises, Outcomes and Conditions*, 14 REV. INT'L POL. ECON. 553 (2007).

31. FIN. SERVS. AUTH., *supra* note 17.

32. *Id.* at 29.

33. FIN. SERVS. AUTH, NATIONAL STRATEGY, *supra* note 27, at 29; FIN. SERVS. AUTH., FINANCIAL CAPABILITY, *supra* note 27, at 22. The Financial Services Authority (FSA) was the lead agency on the development of the United Kingdom's National Strategy on Financial Literacy until 2010, when the statutory objective of "enhancing public understanding of financial matters" was transferred to a separate organization then called the Consumer Financial Education Body, since renamed Money Advice Service. For the legislative transfer of the statutory objective, see Financial Services Act, 2010, c.28, § 2 (U.K). For information about the Money Advice Service, see *About Us*,

ceived as transforming financial consumers into watchful "regulatory subjects" whose decisions have beneficial effects on the market conduct of financial firms. Just as consumer demand is supposed to increase price competition and stimulate innovation, so also is consumer vigilance supposed to discipline firms, reducing the need for regulatory action in consumer-finance markets.[34]

B. Changes in Banking Practice and the Growth of Debt

Since the 1980s, neoliberal regulation of financial markets generally is associated with an extraordinary expansion in financial sectors—an expansion that has been dubbed the "financialization" of economic, social, and political life.[35] For example, Adair Turner, the head of the FSA, cites a 234-fold increase in daily foreign-exchange trading activity between 1977 and 2010, as compared to a seven-fold increase in nominal GDP during the same period.[36] Similarly, the financial "innovation" that was rampant before the crisis resulted in the creation and rapid expansion of new investment categories and products, especially in the field of securitized credit, which in turn generated huge volumes of financial activity.[37]

A notable indicator of financialization that relates to the uptake of consumer-finance products is the increase in household debt.[38] During

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MONEY ADVICE SERVICE, https://www.moneyadviceservice.org.uk/en/static/about-us (last visited Feb. 5, 2013).

34. *See* sources cited *supra* note 33.

35. RANDY MARTIN, FINANCIALIZATION OF DAILY LIFE (2002); ÖZGÜR ORHANGAZI, FINANCIALIZATION AND THE US ECONOMY (2008); Ronald Dore, *Financialization of the Global Economy*, 17 INDUS. & CORP. CHANGE 1097 (2008).

36. Adair Turner, Chairman, Fin. Servs. Auth., Clare Distinguished Lecture in Economics and Public Policy: Reforming Finance: Are We Being Radical Enough? (Feb. 18, 2011) (transcript available at http://www.fsa.gov.uk/pubs/speeches/0218_at_clare_college.pdf) (reporting that from 1977 to 2010, "[d]aily FX trading volumes increased 234 times," whereas the corresponding figure for nominal GDP is a seven-fold growth between 1977 and 2010).

37. Turner cites a growth in volume from zero in the 1980s to "many trillions" today. *Id.* According to a recent report from the Basel Committee on Banking Supervision, an estimated $2 trillion of securitized products were issued in the United States in 2007, which declined precipitously to $400 billion in 2008. Basel Comm. on Banking Supervision, *The Joint Forum Report on Asset Securitisation Incentives*, BANK FOR INT'L SETTLEMENTS 1 (2011), http://www.bis.org/publ/joint26.pdf.

38. META BROWN ET AL., THE FINANCIAL CRISIS AT THE KITCHEN TABLE: TRENDS IN HOUSEHOLD DEBT AND CREDIT (2010); Aldo Barba & Massimo Pivetti, *Rising Household Debt: Its Causes and Macroeconomic Implications—A Long-Period Analysis*, 33 CAMBRIDGE J. ECON. 113 (2009); Paulo L. dos Santos, *On the Content of Banking in Contemporary Capitalism*, 17 HIST. MATERIALISM 180, 181 (2009); Barry Z. Cynamon & Steven M. Fazzari, *Household Debt in the Consumer Age: Source of Growth—Risk of Collapse*, 3 CAPITALISM & SOC'Y, no. 2, 2008; Karen E. Dynan & Donald L. Kohn, *The Rise in US Household Indebtedness: Causes and Consequences* 1 (Fin. & Econ. Discussion Series, Working Paper No. 2007-37, 2007); Atif Mian & Amir Sufi, *Consumers and the Economy, Part II: Household Debt and the Weak US Recovery*, FED. RES. BANK OF

the five years preceding the crisis, household debt-to-income ratios in "advanced economies" rose by an average of 39% to reach 138% in 2007.[39] These ratios have since declined in the United States and the United Kingdom where the crisis hit the retail-finance sector hard.[40] But, as Table 1 indicates, that trend is by no means universal. By 2010, household debt-to-income ratios had increased well beyond the 2007 levels in countries such as Canada (from 137% to 150%) and Sweden (from 132% to 149%), and the 2010 ratios reported for Denmark (268%), Ireland (202%), and the Netherlands (249%) are considerably higher than the peak debt levels of the United States and the United Kingdom.[41]

Aggregate debt-to-income ratios may invite speculation about the reasons for intertemporal and interjurisdictional variation, but this type of data is a crude measure of the financial health of household or national economies. It is striking to note, for example, that Italy continues to report the second lowest debt-to-income ratio of all G7 countries and one of the lowest ratios in the EU despite its well-publicized fiscal problems.[42] It is also difficult to base interjurisdictional comparisons of household behaviors on these ratios because the numbers do not take into account variations in the incentive and institutional structures of consumer-finance markets that different countries may deploy, such as tax incentives that support high levels of mortgage borrowing. But the data do perhaps show that financial firms have continued to expand household

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S.F., http://www.frbsf.org/publications/economics/letter/2011/el2011-02.html (last visited Oct. 28, 2012).

39. INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK: GROWTH RESUMING, DANGERS REMAIN 89 (2012), http://www.imf.org/external/pubs/ft/weo/2012/01/pdf/text.pdf.

40. *Economic Outlook Annex Tables*, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/economy/economicoutlookanalysisandforecasts/economicoutlookannextables.htm (last visited Oct. 28, 2012); *see infra* Table 1. For a discussion of these trends, see ATIF R. MIAN ET AL., HOUSEHOLD BALANCE SHEETS, CONSUMPTION, AND THE ECONOMIC SLUMP (2012); Simon Kirby & Ray Barrell, *Prospects for the UK Economy*, 213 NAT'L INST. ECON. REV. F41, F48–49 (2012); Neil Bhutta, *Mortgage Debt and Household Deleveraging: Accounting for the Decline in Mortgage Debt Using Consumer Credit Record Data* (Fin. & Econ. Discussion Series, Working Paper No. 14, 2012), *available at* http://www.federalreserve.gov/pubs/feds/2012/201214/201214abs.html.

41. "To some extent, high household gross debt is a structural feature of the Danish economy." *In-Depth Review for Denmark in Accordance with Article 5 of Regulation (EU) No 1176/2011 on the Prevention and Correction of Macroeconomic Imbalances*, EUROPEAN COMM'N 7 (May 30, 2012) (working document), *available at* http://ec.europa.eu/europe2020/pdf/nd/idr2012_uk_en.pdf.

42. There is considerable media discussion of Italy's debt crisis and the austerity policies imposed by its unelected technocratic government. *See, e.g.*, Rachel Donadio, *In Turmoil, Greece and Italy Deepen Euro Crisis*, N.Y. TIMES (Nov. 08, 2011), http://www.nytimes.com/2011/11/09/world/europe/in-turmoil-greece-and-italy-deepen-euro-crisis.html?pagewanted=all&_r=0. For more general commentary and discussion, see Paul Krugman, *European Crisis Realities*, N.Y. TIMES (Feb. 25, 2012), http://krugman.blogs.nytimes.com/2012/02/25/european-crisis-realities/; *see also* RESOLVING THE EUROPEAN DEBT CRISIS (William R. Cline & Guntram B. Wolff eds., 2012).

lending in many countries with economies in various states of disrepair and distress notwithstanding the arrival of the Great Recession.

Table 1: Household Debt-to-Income Ratios During the First Decade of the Twenty-first Century, G7 + Selected European Countries[43]

Country	**2000**	**2007**	**2010**
Canada	112.6	137.3	150.5
France	69.4 [54.2]	91.8 [72.4]	80.4 [80]
Germany	116.4 [106.63]	103 [94.19]	97.5 [88.92]
Italy	54.7 [33.67]	70.7 [57.04]	89.5 [65.12]
Japan	133.8	129.4	125.7
United Kingdom	117.1 [100.4]	183.1 [151.77]	165.2 [143.07]
United States	100.7	137.6	124.4
Denmark	184	254.6	268.19
Ireland	–	196.91	202.63
Netherlands	151.56	222.33	249.49
Norway	118.5	176.22	177.91
Portugal	83.75	126.79	130.11
Spain	68.90	129.94	127.81
Sweden	96.19	132.73	149.4

43. *Economic Outlook Annex Tables*, ORG. FOR ECON. CO-OPERATION & DEV., at tbl.58, http://www.oecd.org/economy/economicoutlookanalysisandforecasts/economicoutlookannextables.htm (last visited Oct. 28, 2012) (providing data on G7 economies). Eurostat also estimates gross debt-to-income ratios for several countries. *Gross Debt-to-Income Ratio of Households*, EUROSTAT, http://epp.eurostat.ec.europa.eu/tgm/download.do?tab=table&plugin=0&language=en&pcode=tec00104 (last visited Oct. 28 2012). The OECD data are consistently higher than the Eurostat numbers for countries that are in both tables—the United Kingdom, Germany, France, and Italy. OECD data for those countries are provided first with Eurostat data in square brackets.

Moreover, other important changes have occurred in banking practice over the past thirty years. These changes include the declining significance of both interest rate spreads as a source of income and enterprise lending as a core activity, the growth of trading in opaque derivative assets, and the engineering of new lines of banking business in capital markets.[44] Mortgage and consumer credit are among many personal finance products that financial firms have aggressively peddled to retail consumers during the past thirty years or so, with pension, insurance, and investment products also featuring in scandals about the predatory misselling of retail-finance products in many countries.[45]

Consumer lending products alone now account for a significant portion of revenue generation at large banking groups.[46] Paulo dos Santos details how "banking has become heavily dependent on lending to individuals and the direct extraction of revenues from ordinary wage-earners."[47] Data from his survey of the corporate disclosure documents of major global banking groups indicate that in 2006, for example, the consumer-finance divisions of Citigroup and HSBC generated substantial shares of the groups' profits—56% in the case of Citigroup[48] and 43% of total profits at HSBC—outperforming commercial divisions, which accounted for 27.3% of profits, as well as investment-banking divisions, which accounted for 26.3% of profits.[49] Further, between 1976 and 2006, the U.K. banks in dos Santos's study almost quadrupled the proportion of

44. For an insightful discussion of these developments, see Peter Gowan, *Crisis in the Heartland*, NEW LEFT REV., Feb.–Jan. 2009, at 5.

45. *See, e.g.*, *Australia Faces Its Sub-prime Mortgage Scandal*, ABC (Aug. 13, 2012), http://www.abc.net.au/7.30/content/2012/s3566922.htm; PARLIAMENTARY JOINT COMM. ON CORPS. & FIN. SERVS., INQUIRY INTO THE COLLAPSE OF TRIO CAPITAL (2012) (Austl.), *available at* http://fraud.govspace.gov.au/files/2011/03/Inquiry-into-the-collapse-of-Trio-Capital.pdf (reporting on "the largest superannuation fraud in Australian history," in which more than 6,000 Australians lost "[r]oughly $176 million" that was invested in fraudulently managed superannuation—pension—funds run by Trio Capital). From January 2011 to August 2012, under the regulatory complaints and redress scheme set up by the FSA, financial firms paid out more than £6.5 billion for misselling payment-protection insurance to U.K. consumers. For case studies of Canadian financial frauds, see CANADIAN FOUND. FOR ADVANCEMENT OF INVESTOR RIGHTS, A REPORT ON A DECADE OF FINANCIAL SCANDALS: FAIR CANADA CALLS FOR A NATIONAL ACTION PLAN TO TACKLE INVESTMENT FRAUD (2011), *available at* http://faircanada.ca/wp-content/uploads/2011/01/Financial-scandals-paper-SW-711-pm_Final-0222.pdf. For a discussion of two major U.S. scandals in the past fifty years, see KITTY CALAVITA ET AL., BIG MONEY CRIME: FRAUD AND POLITICS IN THE SAVINGS AND LOAN CRISIS (1999); KATHLEEN ENGEL & PATRICIA MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE AND NEXT STEPS (2011).

46. Dos Santos, *supra* note 38, at 181; Thorsten Beck et al., *Who Gets the Credit? And Does it Matter? Household vs. Firm Lending Across Countries*, 12 B.E. J. MACROECON., no. 1, 2009.

47. Dos Santos, *supra* note 38, at 181.

48. According to Citigroup's website, its "Global Consumer Banking (GCB) business" accounted for "50 percent of total revenues within Citicorp in 2011." *Consumer Businesses*, CITI, http://www.citigroup.com/citi/about/consumer_businesses.html (last visited Oct. 28, 2012).

49. Dos Santos, *supra* note 38, at 191.

their direct-lending activity in retail markets, increasing the share of individual lending from 11.6% to 40.7% of total direct lending.[50] They also increased lending to the financial intermediaries that serve retail markets from 20% to 32% of total lending—a 50% increase.[51] By December 2006, individual lending accounted for over 40% of the loan portfolios of Barclays and HSBC, two major U.K. banking groups, and more than 75% of the total loan portfolios of Citigroup and Bank of America.[52]

This expansion of consumer lending and other personal finance products has been accompanied by the creation of lucrative revenue streams from fees, charges, and ancillary services such as credit insurance.[53] Citing to a professional bankers magazine, dos Santos notes that late fees on U.S. credit cards mushroomed from "insignificant levels" in 1990 to more than $1 billion in 1996 and then to $9 billion just seven years later in 2003.[54] He further observes that his own survey of bank disclosure documents shows account service charges amounting to more than 25% of the revenues of some U.K. and U.S. banks in 2006.[55] A 2006 Government Accountability Office (GAO) report found that the late-payment penalty fees charged by major credit card issuers in the United States had almost tripled in ten years, rising from an average of $13 in 1995 to $34 in 2005, and that these fees had been levied on 35% of "active U.S. accounts" in 2005.[56] A 2008 market study on current personal accounts, published by the United Kingdom's Office of Fair Trading, found that bank revenues from those accounts amounted to £8.3 billion in 2006, of which £2.6 billion consisted of fees levied on insufficient funds and over-limit transactions.[57]

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50. *Id*. at 184.

51. *Id.* Mortgage lending unsurprisingly is a high proportion of lending to individuals, but there is also considerable nonmortgage lending. *See, e.g.*, *id* at 191.

52. *Id.* at 190 tbl.4.

53. Ismail Erturk & Stefano Solari, *Banks As Continuous Reinvention*, 12 NEW POL. ECON. 369 (2007); Paulo L. dos Santos, *At the Heart of the Matter: Household Debt in Contemporary Banking and the International Crisis*, 72 EKONOMIAZ 54 (2009).

54. Dos Santos, *supra* note 38, at 194.

55. Notably, Barclays reported account-service charges as 27.9% of its revenues, and Bank of America reported that these charges constituted 30.5% of revenues. *Id.* at 193.

56. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-929, CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURES TO CONSUMERS 5 (2006), *available at* http://www.gao.gov/assets/260/251427.pdf. "Active accounts" are "accounts of the top six issuers that had had a debit or credit posted to them by December 31 in 2003, 2004, and 2005.*" Id.* at 5.

57. OFFICE OF FAIR TRADING, PERSONAL CURRENT ACCOUNTS IN THE UK (2008), *available at* http://www.oft.gov.uk/shared_oft/reports/financial_products/OFT1005.pdf. Litigation arose concerning the unfairness of these charges. *See* Office of Fair Trading v. Abbey National Plc, [2009] UKSC 6, [2009] 3 WLR 1215, [2010] 1 All ER 667, [2010] 1 Lloyd's Rep. 281; Office of Fair Trading v. Abbey National Plc, [2008] EWHC 875, [2008] 2 All ER 625.

Personal finance products evidently produce substantial revenues for their suppliers in the form of apparently randomly calculated penalties and charges as well as the allegedly risk-based pricing of interest rates.[58] These revenues represent a transfer of household income obtained from sources such as employment, pension, or social security payments.[59] Expansion of the economy of personal finance under neoliberalism thus increased financial firms' access to household income during a period of stagnating or even declining household incomes.[60] Financial firms then used this revenue stream as a resource that fuelled trading in the lucrative secondary markets,[61] the collapse of which then led to additional loss of income as well as assets for many financial consumers.

This general account of developments in the role of consumer-finance products in the business models of large financial firms provides some insight into changes in their dealings with financial consumers during the period leading up to the crash. Of particular interest to this Article's focus on the protection of financial consumers against exploitation is the vulnerability of consumers of debt products to fees, charges, and penalties levied by firms.

C. The Unequal Distribution of Debt

Aggregate data on consumer debt may influence economic policy and may also inform debates about the appropriate regulatory frameworks for realizing policy goals. Recent studies indicate, for example,

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58. The characterization of charges as "apparently randomly calculated" and "allegedly" risk-based reflects findings about the opacity of credit card charges and fees. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 56. The GAO reported on the difficulty of estimating how much money the credit card issuers made from penalties and charges:

> Determining the extent to which penalty interest charges and fees contribute to issuers' revenues and profits was difficult because issuers' regulatory filings and other public sources do not include such detail. Using data from bank regulators, industry analysts, and information reported by the five largest issuers, we estimate that the majority—about 70% in recent years—of issuer revenues came from interest charges, and the portion attributable to penalty rates appears to have been growing. The remaining issuer revenues came from penalty fees—which had generally grown and were estimated to represent around 10 percent of total issuer revenues—as well as fees that issuers receive for processing merchants' card transactions and other sources.

Id. at 8, 67−68.

59. Dos Santos, *supra* note 38, at 181; Dos Santos, *supra* note 53.

60. *See*, *e.g*., KAREN E. DYNAN ET AL., THE EVOLUTION OF HOUSEHOLD INCOME VOLATILITY (2012) (reporting that about 10% of U.S. households took as much as a 50% plunge in income over a two-year period in the run-up to the Great Recession); *see also* Barba & Pivetti, *supra* note 38, at 114 (arguing that "rising household indebtedness should be seen principally as a response to stagnant real wages and retrenchments in the welfare state, i.e. as the counterpart of enduring changes in income distribution").

61. Colin Crouch, *Employment, Consumption, Debt, and European Industrial Relations Systems*, 51 INDUS. REL. J. ECON. & SOC'Y 389 (2012).

that high levels of household debt tend to "amplify downturns and weaken recoveries,"[62] and that this compounding effect does not simply reflect the loss of household wealth associated with significant falls in house prices.[63] These findings would seem to make a robust case for government policies to strengthen social safety nets and facilitate restructuring of household debt rather than the austerity programs that recently have dominated economic policymaking in many countries affected by the Great Recession.

Aggregate data may be misleading, however, when analyzing economic relations between financial firms and consumers because household or personal debt, like household income and financial assets, is unequally distributed. A comparison of the change in household debt-to-income ratios with recent studies reported in the Bank of England's quarterly bulletins illuminates this point.[64] Table 1 above shows that the proportion of U.K. households with some kind of debt increased their debt-to-income ratio by 50%, jumping from 117.1% in 2000 to 183.1% in 2007.[65] But as Table 2 indicates, there was almost no overall widening of debt-holding during this period as the proportion of households with debt changed very little, increasing by only two percentage points from 55% to 57%.[66]

Table 2: The Unequal Distribution of Debt Among British Households, 2000–2006[67]

Distribution of Debt	2000	2004	2005	2006
None	45	42	43	43
Unsecured Only	15	23	20	22
Secured Only	18	13	16	14
Both	21	22	21	21

62. INT'L MONETARY FUND, *supra* note 39; *see also* Mian & Sufi, *supra* note 38.

63. INT'L MONETARY FUND, *supra* note 39. For a discussion of recent changes in household debt and their implications, including changes in the United States, see Barba & Pivetti, *supra*, note 38; Meta Brown et al., *supra* note 38.

64. Matt Waldron & Garry Young, *The State of British Household Finances: Results from the 2006 NMG Research Survey*, BANK ENG. Q. BULL., no. 4, 2006, at 397.

65. *Economic Outlook Annex Tables*, *supra* note 40.

66. Waldron & Young, *supra* note 64.

67. The data comprising Table 2 is taken from Waldron & Young, *supra* note 64.

In terms of these indebted households, the data indicate variations in the ways that holdings of different types of debt portfolios changed over the six-year period.[68] These data show a decline from 18% to 14% in the proportion of households holding secured debt only, which in the United Kingdom essentially refers to home mortgages. This decrease seems to reflect the ongoing increase in outright home ownership.[69] Among households that do hold mortgages, there was no change between 2000 and 2006 in the proportion also holding unsecured debt, which was 21%.[70] By contrast, there was a sizeable increase of 7% over the same period in the proportion of the households owing unsecured debt only.[71]

Closer scrutiny of the data reveals additional trends and distributional inequalities between indebted households. Mortgaged households as a whole owed 62% of the unsecured debt and 96% of the entire stock of household debt in 2006.[72] From 2000 to 2007, a period in which the U.K. housing markets were considerably overheated, there was a corresponding shift from smaller to larger amounts of household secured debt. About 75% of secured-debtor households in 2000 owed less than £60,000.[73] Seven years later, the percentage of secured-debtor households with a mortgage of less than £60,000 had fallen to about 40%, and about 40% of mortgaged households owed more than £90,000.[74] The debt-to-income ratios of some mortgaged householders also changed substantially during this time. Whereas about 10% of mortgaged households owed more than three times their pretax annual income in 2000, the proportion of mortgaged households owing more than three years income amounted to about 25% by 2007.[75]

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68. *See id.*

69. The broad trend toward outright ownership has been ongoing since the early 1990s. Matt Waldron, *Household Debt and Spending: Results from the 2007 NMG Research Survey*, BANK ENG. Q. BULL., no. 4, 2007, at 512, 513 chart 1. It has been estimated that, if this trend continues, the number of homes owned outright may exceed the number of mortgaged homes as early as 2014. Vanessa Houlder, *Over Half to Own Home Outright by 2014*, FIN. TIMES (Sept. 17, 2012), http://www.ft.com/cms/s/0/ccd11d88-0019-11e2-a30e-00144feabdc0.html (discussing a Hometrack paper that analyzed relevant snippets of the census data and made the point that an increase in the proportion of outright owners among homeowners partly reflects the higher entry barriers that first-time buyers face in obtaining a mortgage).

70. Waldron & Young, *supra* note 64.

71. *Id.* These households include both the relatively asset-rich ones in which the homes are owned outright as well as renter households. *Id.*

72. Waldron & Young, *supra* note 64. About 70% of U.K. households own their homes or are in the process of buying their homes, which makes it seem as if renters (comprising 30% of households) must be overrepresented among unsecured debtors. *Id.* But the 38% of unsecured debt that is not owed by mortgagors is split between renters and households that own their homes outright. *Id.*

73. Garry Young, *Household Debt and Spending: Results From the 2007 NMG Research Survey*, BANK ENG. Q. BULL., no. 4, 2007, at 512.

74. *See id.* at 513 & chart 3.

75. *Id.* at 514 & chart 4.

Renter households owe a small proportion (about three percent) of the United Kingdom's total household debt, but debt levels also increased within this group during the first decade of the twenty-first century. Data reported by the Bank of England show that the percentage of indebted-renter households expanded from just above 40% in 2000 to about 50% in 2007.[76] In 2006, about two-thirds of these households owed less than £5000, which is about the same proportion of renters with debts under £5000 as in 2000.[77] But again there are striking inequalities. The Bank of England's report on 2006 data observes that while "[t]he majority of renters with debt owed small amounts with seemingly affordable repayments . . . a small minority (9% of renters with debts) had unsecured debts in excess of their annual pre-tax income."[78]

In sum, the burden of the United Kingdom's approximately 50% increase in household debt-to-income ratio from 2000 to 2007 fell differentially on U.K. households. Almost half of the households were unaffected, as they held no debt at all. Debt holding generally broadened among renter households, and it may have intensified substantially for about one in ten indebted renter households. Debt holding deepened significantly among mortgaged households that also held unsecured debt. These findings about the intensification of retail lending markets are consistent with claims discussed above about financial firms extracting revenues from household incomes that are most accessible to them, for example through the second mortgages and refinancing of households that already hold secured debt. The resulting inequality in the distribution of debt is a significant indicator of social injustice, particularly in so far as debt inequalities exacerbate, compound, and interact with other income, asset, and social inequalities. Findings about inequalities in the distribution of household debt therefore reinforce the need for critical scrutiny of how firms conduct their business in retail-finance markets.

III. THE G20 MODEL OF REFORM

A large and growing literature documents the many failures of consumer-finance markets during the first decade of the twenty-first century, particularly in the United States, and evaluates various options for changing the legal architecture of those markets to ensure more effective protection of financial consumers.[79] The ten High-Level Principles formu-

76. *Id.* at 513 & chart 2.

77. Waldron & Young, *supra* note 64, at 398.

78. *Id.*

79. *See, e.g.*, Jean Braucher, *Form and Substance in Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. (forthcoming 2013); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008); Leonard J. Kennedy et al., *The Consumer Financial Pro-*

lated by the OECD and adopted by the G20 leaders in November 2011 also use the language of financial consumer protection. Even as they endorsed these principles and committed to their implementation, the G20 leaders intimated that they had adopted the project of financial consumer protection as a means of advancing their goal of greater financial stability.[80] Thus, the principles do not dwell on matters such as the distribution of market and contracting power between firms and financial consumers, but instead focus on factors that purport to strengthen competitive dynamics and improve consumer confidence and capacity in "a well-functioning" market.

The preamble to the High-Level Principles opens with the claim that "[c]onsumer confidence and trust in a well-functioning market for financial services promotes financial stability, growth, efficiency and innovation over the long term."[81] This claim illustrates the connection between the Principles and the neoliberal view of financial regulation as enabling market expansion and fostering consumer participation in financial markets.[82] Neoliberal themes also feature in the preamble's rationale for a "renewed focus" on consumer-finance regulation. These themes are particularly evident in the characterization of consumer finance regulation as responding to the "increased transfer of opportunities and risks to individuals and households" and the "increased complexity of financial products and rapid technological change."[83] These developments are presented as established facts rather than as consequences of political and economic choices that could be changed.[84] Similarly, the assertion that consumer rights "come with consumer responsibilities"[85] merely reiterates neoliberal confidence in the ability of rights-bearing financial consumers to exert market discipline. This "new focus" glosses over the complex and contestable political choices about the relative responsibilities of firms, regulators, and consumers to protect individuals

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tection Bureau: Financial Regulation for the Twenty-First Century, 97 CORNELL L. REV. 1141 (2012); Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream* 26 YALE J. ON REG. 143 (2009); Luke R. Nottage & Souichirou Kozuka, *Lessons from Product Safety Regulation for Reforming Consumer Credit Markets in Japan and Beyond*, 34 SYDNEY L. REV. 129 (2012). *See generally* Ramsay & Williams, *supra* note 12.

80. *Cannes Summit Final Declaration—Building Our Common Future: Renewed Collective Action for the Benefit of All*, G20 ¶ 33 (Nov. 4, 2011), http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html.

81. *G20 High-Level Principles*, *supra* note 1.

82. *Id.* at 4.

83. *Id.*

84. *Id.*

85. *Id.*

and safeguard financial markets against the consequences of predatory practices and dangerous financial products.[86]

Within the Principles themselves, there are further examples of the persistence of neoliberal norms that characterized the pre-crisis era in many jurisdictions. Perhaps the most explicit example is principle ten's advocacy of "nationally and internationally competitive markets . . . to provide consumers with greater choice amongst financial services and create competitive pressure on providers to offer competitive products, enhance innovation, and maintain high service quality."[87] This principle again expresses faith in the power of competition to discipline financial firms. Several other principles draw on regulatory practices that were well established in various jurisdictions before the crisis. These include principle four's focus on disclosure and transparency,[88] Principle five's promotion of financial education and awareness,[89] Principle seven's protection of consumer assets against fraud or misuse,[90] Principle eight's emphasis on data protection and consumer privacy,[91] and principle nine's focus on redress and handling of complaints.[92]

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86. *Id*.

87. *Id.* at 7.

88. "Financial services providers and authorised agents should provide consumers with key information that informs the consumer of the fundamental benefits, risks and terms of the product. They should also provide information on conflicts of interest associated with the authorised agent through which the product is sold." *Id.* at 6.

89. *Id.* Principle 5 provides as follows:

> Financial education and awareness should be promoted by all relevant stakeholders and clear information on consumer protection, rights and responsibilities should be easily accessible by consumers. Appropriate mechanisms should be developed to help existing and future consumers develop the knowledge, skills and confidence to appropriately understand risks, including financial risks and opportunities, make informed choices, know where to go for assistance, and take effective action to improve their own financial well-being.

Id.

90. "Relevant information, control and protection mechanisms should appropriately and with a high degree of certainty protect consumers' deposits, savings, and other similar financial assets, including against fraud, misappropriation or other misuses." *Id.* at 7.

91. "Consumers' financial and personal information should be protected through appropriate control and protection mechanisms." *Id.*

92. *Id.* Principle 9 provides as follows:

> Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient. Such mechanisms should not impose unreasonable cost, delays or burdens on consumers. In accordance with the above, financial services providers and authorized agents should have in place mechanisms for complaint handling and redress. Recourse to an independent redress process should be available to address complaints that are not efficiently resolved via the financial services providers and authorized agents internal dispute resolution mechanisms. At a minimum, aggregate information with respect to complaints and their resolutions should be made public.

Id.

The ideological continuities with neoliberalism in the G20 principles are not unexpected, but the benefit to financial consumers of internationalizing these particular principles is unclear. G20 countries are relatively rich, with mature economies. Even if they have not historically maintained regulatory agencies with specific responsibilities for retail finance, they all have consumer protection laws that provide for at least some of the matters covered by these principles, such as information disclosure and protection against fraud.[93] An absence of an explicit regulatory provision in an established area of consumer protection covered in the principles noted above—such as the lack of a comprehensive legislative regime of consumer privacy and data protection in the United States[94]—is likely to reflect the political dynamics of policymaking in that jurisdiction rather than a lack of knowledge or understanding of the particular aspect of consumer protection. These local dynamics may not be particularly susceptible to reforms derived from external agencies, no matter how concerted the international pressure.

In addition to the well-known norms of consumer protection described above, the G20's High-Level Principles on Financial Consumer Protection include four standards that are less familiar in some G20 jurisdictions. Principles one and two concern local institutional frameworks for the development and implementation of financial consumer protection regulation.[95] These principles respond to the options report of the FSB, which noted the relatively low profile of retail-finance market regulation in many jurisdictions.[96] The FSB reported that the mandates of financial sector authorities or consumer protection agencies in some countries might appear to encompass consumer-finance marketing, transactions, and disputes, but that in practice, finance authorities may have little knowledge or understanding of issues in consumer markets, and the expertise of consumer market agencies seldom extended to financial products.[97]

Principle one seeks to close this gap in regulatory capacity, which the FSB believed tended to inhibit the proactive development of a comprehensive regime of financial consumer protection.[98] It requires financial consumer protection to become "an integral part of the legal, regulatory and supervisory framework" of a country's financial sector, and it

93. *See Consumer Finance Protection*, *supra* note 1.

94. FED. TRADE COMM'N, PROTECTING CONSUMER DATA IN AN ERA OF RAPID CHANGE—A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS (Dec. 2010), *available at* http://ftc.gov/os/2010/12/101201privacyreport.pdf.

95. *G20 High-Level Principles*, *supra* note 1, at 5.

96. *Consumer Finance Protection*, *supra* note 1.

97. *Id.*

98. *Id.*

requires firms and their agents to be "appropriately regulated and/or supervised."[99] Principle two adds the institutional dimension to financial consumer protection by requiring the designation of oversight bodies with explicit responsibility for consumer protection and "the necessary authority to fulfil their mandates."[100] In addition to their roles in the regulation of particular domestic consumer-finance markets, these oversight bodies are responsible for coordinating their work internationally so as to maintain "a level playing field across financial services," especially in international transactions and cross-border sales.[101]

The remaining principles—three and six—arguably have the potential to reshape economic relations between financial consumers and firms if implemented in a proactive manner. Principle three requires consumers to be "treated equitably, honestly and fairly at all stages of their relationship with financial service providers" and states that this "treating customers fairly" principle should be "integral" to the "good governance and corporate culture of all financial services providers and authorized agents."[102] Principle six requires financial firms and their agents to conduct their business responsibly in consumer-finance markets.[103] This norm is elaborated to require firms generally to "work in the best interest of their customers" and take responsibility "for upholding financial consumer protection."[104] Principle six also details specific areas of a firm's operations that should be organized to reflect the responsible business conduct standard. These areas include systems of accountability for the conduct of authorized agents; the responsible sale of financial products and services to individual customers; management of conflicts of interests; and staff qualification, training, and remuneration.[105]

This brief account of the High-Level Principles illustrates that one strand of the G20's model of financial consumer protection largely relies on, and reproduces, a construct of competitive market relations that envisages restless sovereign consumers selecting among standardized products provided by myriad competing suppliers. It imagines that these choices influence and constrain the conduct of financial firms and the contracts they supply to retail markets. That this construct of the watch-

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99. This principle also stipulates that consumer-finance regulation "should reflect and be proportionate to the characteristics, type, and variety of the financial products and consumers, their rights and responsibilities and be responsive to new products, designs, technologies and delivery mechanisms" and that the participation of consumer organizations in policy development "should be facilitated and enhanced." *G20 High-Level Principles*, *supra* note 1, at 5.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 7.

104. *Id.*

105. *Id.*

ful consumer persists despite its implausibility seems to reflect the resilience of neoliberal ideas about regulation facilitating the expansion of consumer-finance markets. Dominated by giant banks and insurance companies that epitomize the late modern corporation, these markets are more directly shaped by the visible hand of internal corporate planning than by ascribed organic spontaneity of classical market forces.[106] These businesses tend to constitute markets for their products rather than respond to them.[107] While financial firms may point to their market research as responding to, or at least engaging with, the preferences of financial consumers, their investigations may be more about creating demand, marketing products, or differentiating products than about meeting the desires and preferences of buyers.

The managerial decisions of these global corporate empires may be influenced by many factors including shareholder value, vanity, ambition, fashion, irrational exuberance, fear, and the dynamics of their internal bureaucracies. But there is little evidence that the preferences of financial consumers exert significant influence on their conduct. For example, how many individuals wish to expose themselves to the risk of paying fees and charges that were unknown to them when they opened a bank account or responded to a credit card solicitation? How many would choose to be subjected to the aggressive and exploitative sales practices associated with the misselling of many consumer-finance products including credit insurance, subprime mortgages, and pension funds? What proportion of households intends that their incomes be used to fuel financial trading in secondary markets?

A second strand of the Principles purports to modify the conduct of financial firms and hold them accountable for their decisions, and to subject retail market conduct to explicit regulatory oversight throughout the G20. This strand targets firms' interactions with financial consumers, and it establishes a regulatory standard of consumer-focused decisionmaking that purports to govern all aspects of a firm's participation in consumer-finance markets. This aspect of the Principles appears to have greater potential to alter the power relations of financial consumer markets because it challenges traditional ideas about the firm's autonomy over its services, products, and operations, and because it affords the regulator a proactive role in securing market discipline. The G20's explicit addition of sanctioning and surveillance work to the regulator's core role of enabling and encouraging the watchful consumer recognizes that norms re-

106. BERLE & MEANS, *supra* note 10.

107. This tendency was analyzed by John Kenneth Galbraith in *The New Industrial State* (1967).

quiring more accountability of firms in their dealings with financial consumers are likely to be resisted.

Regulatory surveillance and sanctioning powers may help to expose significant problems in retail-finance markets, especially problems that may otherwise remain masked by the firm's capacity to set the terms of what constitutes routine business practice. But these powers may be insufficient to bring about systematic improvement in firms' treatment of their customers. This seems to have been the experience of the U.K. regulator's "Treating Customers Fairly" (TCF) initiative, a project that sought to alter the organizational "cultures" and business models of financial firms.[108] The goal of this initiative was for firms to incorporate within all aspects of their business and market practices the same kinds of customer-protection principles that the G20 leaders endorsed.[109] The FSA expected TCF to become embedded in the management of financial firms through leadership, strategic planning, decisionmaking, management controls, staff recruitment, training, and monitoring. A firm was regarded as having satisfied TCF standards only when it was able to demonstrate, not simply assert, that it had fully integrated the fair treatment of customers into its corporate culture.[110]

In practice, the FSA found that attempts to reform banks and other financial firms fell far short of its aspirations, even in relation to the

108. TCF requires firms to be able to demonstrate compliance with the conduct-of-business principles to "pay due regard to the interests of its customers and treat them fairly," "pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading," and "take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems." FIN. SERVS. AUTH., FSA HANDBOOK, at ch. 2, princ. 6, 7, 3 (2012), *available at* http://fsahandbook.info/FSA/html/handbook. The "Principles for Business" are characterized as "fundamental obligations of all firms under the regulatory system." *Id.* at ch. 1. The FSA published several documents on TCF, including *Treating Customers Fairly: Measuring Outcomes* (2007), *Treating Customers Fairly: Guide to Management Information* (2007), and *Treating Customers Fairly: Culture* (2007). The development of the TCF models is analyzed in more detail in Toni Williams, *Open the Box: An Exploration of the Financial Services Authority's Model of Fairness in Consumer Financial Transactions, in* UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS 227 (Mel Kenny et al. eds., 2010). *See also* Ramsay & Williams, *supra* note 12; Williams, *supra* note 9.

109. *G20 High-Level Principles*, *supra* note 1, at 5, 7, princ. 3, 6.

110. *See*, *e.g.*, FIN. SERVS. AUTH., TREATING CUSTOMERS FAIRLY—TOWARDS FAIR OUTCOMES FOR CONSUMERS 60 (2006), *available at* http://www.fsa.gov.uk/pubs/other/tcf_towards.pdf. In addition to this general outcome, a TCF-compliant firm was expected to be able to demonstrate five specific outcomes. First, the firm's products must be designed to meet consumer needs. Second, they must perform in accordance with any expectations that the firm had created. Third, the firm's marketing and selling practices must be targeted appropriately and must incorporate clear, suitable information disclosure "before, during and after the point of sale." Fourth, the firm must provide suitable advice tailored to a consumer's circumstances. Finally, the FSA expected a TCF-compliant firm to be able to demonstrate fair treatment beyond the point-of-sale and specifically to be able to show that it does not unreasonably impede consumer switching, claiming, or complaining. *Id.*

high-profile payment-protection insurance (PPI) markets, which the FSA and other U.K. regulators and consumer organizations targeted as a priority area.[111] Financial firms more or less ignored the regulatory strictures and TCF principles until U.K. regulators banned the most predatory—and lucrative—form of PPI, imposed extensive controls on sales, and forced the firms into a comprehensive and expensive redress scheme.[112]

In contrast to these mandatory measures that have produced results, the FSA's campaign to change how financial firms conducted their business in the lucrative PPI markets—based on principles that closely resemble the G20 model—did not cause these firms to improve their treatment of financial consumers or prevent the materialization of con-

111. The FSA's work on PPI included rules on the marketing of PPI and other insurance products, thematic review of PPI sales practices, mystery shopping exercises, incorporation of review of PPI sales files into FSA supervision of individual financial firms, and enforcement action against twenty-four firms for PPI sales misconduct, which resulted in fines ranging from £28,000 to £7 million. It also established the complaints-and-redress scheme that has required firms to pay more than £6.5 billion in compensation as of August 2012. *Monthly PPI Refunds and Compensation*, FIN. SERVS. AUTH., http://www.fsa.gov.uk/consumerinformation/product_news/insurance/payment_protection_insurance_/latest/monthly-ppi-payouts (last visited Nov. 4, 2012). The Financial Ombudsman Service also played an active part in the conflict over PPI. *See Online PPI Resource*, FIN. OMBUDSMAN SERV. http://www.financial-ombudsman.org.uk/publications/technical_notes/ppi-our-approach.html (last visited Nov. 4, 2012).

112. In February of 2009, the FSA directed financial firms to withdraw from the market their single-premium PPI products, which were particularly lucrative for the firms but poor in value for consumers. *FSA Wants All Firms to Stop Selling Single Premium PPI*, FIN. SERVS. AUTH. (Feb. 24, 2009), http://www.fsa.gov.uk/library/communication/pr/2009/031.shtml. The Competition Commission recommended a ban on the selling of PPI at the point of sale for the credit product that it purportedly insured. *See Market Investigation into Payment Protection Insurance*, COMPETITION COMM'N (Jan. 29, 2009), http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2009/fulltext/542. Barclays Bank contested this recommendation to the Competition Appeal Tribunal with the support of Lloyds Bank and Shop Direct Group Financial Services. The tribunal upheld the complaint on a single procedural ground: that the commission had not taken sufficient account of a relevant consideration—customer inconvenience—when assessing the proportionality of the recommended point-of-sale ban and referred the matter back to the Competition Commission. *See* Barclays Bank PLC v. Competition Comm'n, [2009] CAT 27, *available at* http://www.catribunal.org.uk/238-4529/Judgment-.html. The Commission then conducted an extensive review of the likely effects of a point-of-sale prohibition before concluding once again that the ban was justified as part of a package of remedies that would make the PPI market more competitive. *See Payment Protection Insurance Market Investigation Order 2011*, COMPETITION COMM'N (Mar. 24, 2011), http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2010/ppi_remittal/pdf/notice_of_making_of_an_order_2011. The FSA developed the redress scheme. *See* FIN. SERVS. AUTH., POLICY STATEMENT 10/12: THE ASSESSMENT AND REDRESS OF PAYMENT PROTECTION INSURANCE COMPLAINTS (2010), *available at* http://www.fsa.gov.uk/pubs/policy/ps10_12.pdf. For critical assessments of the FSA's work on PPI, see Williams, *supra* note 9, and Eilis Ferran, *Regulatory Lessons from the Payment Protection Insurance Mis-selling Scandal in the UK*, 13 EUROPEAN BUS. ORG. L. REV. 247 (2012).

sumer detriment.[113] But it may be that the FSA's work in this market helped to expose the scale of the firms' exploitation of financial consumers. This work also may have contributed to an understanding of predatory marketing practices that were endemic to the market for PPI products as a systemic problem rather than an aberration attributable to rogue firms or the mistakes of financially illiterate consumers. These may be real achievements, but how much protection do they offer financial consumers? The experience of the FSA, a large, well-funded regulator, raises significant questions about the capacity of the Principles to reconfigure the economic relations of retail-finance markets and to make financial consumption safer.

IV. CONCLUSION

This Article has drawn attention to an emerging interest in the regulation of consumer-finance markets among international policymakers since the start of the twenty-first century. Under the neoliberal paradigm that dominated financial regulation until the 2007–2008 crash, this interest was manifested mostly in policies directed at the expansion of consumer-finance markets and a focus on the behavior of financial consumers. International policymakers paid little attention to how financial firms conducted their retail businesses. Instead, they promoted financial literacy education to make consumers wiser and more watchful, and information remedies and institutions to improve the quality of market decisionmaking.

The watchful consumer approach reflected heroic assumptions about relationships between financial firms and consumers. It assumed that capable and vigilant consumers would hold firms accountable to regulatory standards, reducing the scope for firms to benefit from exploitative conduct. It assumed also that financial consumers are similarly affected by the conduct of financial firms and thus share an interest in changing established business models and retail market practices. Studies discussed in this Article about expansion of consumer-finance markets and the distribution in household debt provide reasons to doubt this latter assumption.

Neoliberal expansion of consumer-finance markets led to a substantial increase in household debt across Western Europe and North America and allowed financial firms to target the incomes of financial consumers as a source of revenue. Evidence of inequality in the resulting distribu-

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113. The FSA recognized this in its discussion of the powers of its successor organization, the Financial Conduct Authority, and the approach that it should take. *See* FIN. SERVS. AUTH., THE FINANCIAL CONDUCT AUTHORITY: APPROACH TO REGULATION (2011), *available at* http://www.fsa.gov.uk/pubs/events/fca_approach.pdf. For more in-depth discussion, see Williams, *supra* note 9.

tion of debt suggests that, at least in the United Kingdom, large financial firms are able to segment markets for their consumer-finance products, using business models based on risk-based pricing and information resources such as credit bureaus. Consequently, financial consumers encounter different levels of exposure to the risks of predatory, exploitative practices depending on factors such as location and wealth and aspects of identity (such as race, gender, and age). The resulting fragmentation of the risks experienced by different groups of financial consumers militates against the notion of mass consumer vigilance influencing firms and performing an effective regulatory role.

Many of the principles of the international model of financial consumer protection recently adopted by G20 countries reproduce elements of the watchful consumer paradigm that so dismally failed to protect individuals and households before the crash occurred. But some G20 principles focus more explicitly on the responsibilities of financial firms and on strengthening the capacity of regulatory institutions to influence market relations between financial consumers and firms. Similar principles on the responsibilization and accountability of firms for their treatment of financial consumers were in operation in the United Kingdom for several years before the crash. The experience in that jurisdiction perhaps serves as a reminder of the scale of the problem that regulators face in attempting to responsibilize the retail market operations of financial firms. Although the FSA's responsibilization principles appeared to have little impact on how firms treated consumers, the regulators' work may have had the beneficial effects of exposing problems with the conduct of firms and changing the perception of these problems from episodic to systemic. Noting that these effects are real achievements, this Article nonetheless questioned their capacity to make financial consumption safer or to protect consumers in other ways.

There may be little in the new international model of financial consumer protection to render financial consumption safer or change the socioeconomic relations of consumer-finance markets. The challenge that remains is for policymakers and regulators to look beyond the watchful consumer as market disciplinarian and instead directly confront endemic misconduct and systemic corporate irresponsibility in consumer-finance markets.