
SYMPOSIUM

LAW, MARKETS, AND DISTRIBUTION

**CONSUMER LAW AS AN AXIS OF ECONOMIC
INEQUALITY**

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ABSTRACT

This is an edited transcript of a conversation held to introduce the Symposium that this special issue now publishes. The editing aims to promote clarity without abandoning the informal, free-flowing, and speculative quality of the original conversation. The published re-creation also seeks to preserve the full set of observations made in the original conversation rather than to filter or shape them to accommodate all the authors' views. We aspire, throughout our remarks, to raise questions and identify possibilities for further research rather than to report confident conclusions.

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INTRODUCTION

In the standard paradigm of consumer law, a voluntary transaction is supposed to be welfare enhancing for each of the parties involved. We challenge this foundational presumption and ask to what extent many common consumer contracts are in fact extractive despite resulting from voluntary exchanges. With inequality growing throughout the world, to a degree that threatens the stability of both the economies and governments of even the wealthiest nations, we ask this fundamental question in an effort to identify root causes of inequality and to mark some guideposts for the articles that follow. Taken together, our speculations suggest that the seller-buyer relationship is a site of inequality and domination worth freestanding attention from equality's champions.¹

I. THEORETICAL FOUNDATIONS OF INEQUALITY: PROBLEMS WITH THE STANDARD PARADIGM

A voluntary purchase can become a site of extraction, in which buyers lose and sellers win, through a number of mechanisms. It makes sense to try to create a taxonomy of how this might happen. One obvious and familiar possibility is that sellers can manipulate buyer preferences. A well-known and long-standing critique of advertising raises just this possibility, accusing advertisers of either manipulating choices or manufacturing demand rather than simply disseminating information.² Insofar as advertisers succeed at these manipulations, buyers' purchasing behavior may cease to track what economists call their normative preferences, which are preferences whose satisfaction improves buyers' well-being.³ This is not a new problem, and consumer

¹ For some of the key empirics informing these theoretical observations, see OREN BARGILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* 26 (2012), providing evidence of supracompetitive pricing in mortgages, cellphones, and credit cards and noting that these practices will sometimes result in "regressive distributional effect"; and Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211, 260 (2019) [hereinafter Van Loo, *Broadening Consumer Law*], contending that "[t]he preliminary data suggest that overcharge is in the trillions and its elimination would have a meaningful progressive impact, possibly bringing income inequality close to its lowest level over the past hundred years."

² See, e.g., Ramsi A. Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 YALE L.J. 2270, 2272 (2018) (noting "the power of advertising to create an illegitimate competitive advantage through the manipulation of consumer preferences").

³ *Id.* at 2288.

protection laws emerged long ago⁴ to mitigate the worst abuses in advertising.⁵ However, new marketing technologies now appear to exacerbate the problem not just incrementally but in a way that changes the nature of consumption.⁶ When so much of our economy rests on digital platforms, we may have to rethink whether our baseline consumer protections are still adequately serving consumer interests today.

A second mechanism is that the seller can manipulate the contracting process itself such that the buyer is unaware of important features of the contract she signs.⁷ This has been a frequent occurrence ever since simple word printing presses enabled the creation of form contracts.⁸ Today, such manipulations are perhaps more the norm than the exception.⁹

The internet economy has once again exacerbated these practices. Research shows, for example, that buyers exhibit term optimism in contracts and that

⁴ THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, PRIOR TO THE UNION WITH NEW HAVEN COLONY, MAY, 1665, at 16 (J. Hammond Trumbull ed., Hartford, Brown & Parsons 1850) (“It is ordered that there . . . wilbe a settled Course for an measure [of marketplace weights] in each plantacon.”). This rule established one of earliest consumer protection laws in America.

⁵ Cf. Erin Fuse Brown, Loren Adler, Karan Chhabra, Barak Richman & Erin Trish, *The Unfinished Business of Air Ambulance Bills*, UNIV. S. CAL. LEONARD D. SCHAFER CTR. FOR HEALTH POL’Y & ECON. (Mar. 26, 2021), <https://healthpolicy.usc.edu/article/the-unfinished-business-of-air-ambulance-bills/> [<https://perma.cc/CA7X-U2P8>] (“In the absence of a functioning market, we rely on consumer protection laws . . . to address the market manipulation and consumer exploitation . . .”).

⁶ For early observations related to this dynamic, see Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1419 (2000), describing “commercial panopticon whose goal is the precisely calibrated extraction of consumer surplus”; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1422 (1999), showing “evidence of market manipulation by reviewing common practices in everyday market settings”; Tal Z. Zarsky, “*Mine Your Own Business!*”: *Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion*, 5 YALE J.L. & TECH. 1, 34-41 (2003), demonstrating widespread use of data-based technologies to manipulate consumer decisions; and Eric Goldman, *A Coasean Analysis of Marketing*, 2006 WIS. L. REV. 1151, 1214 (footnote omitted), arguing that “marketers can use consumer data in ways that may be adverse to the consumer, such as price discriminating to convert consumer surplus into producer surplus or manipulatively increasing the consumer’s demand for the marketer’s product.” For a more recent treatment of the topic, see Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1003-07 (2014), arguing that computer-mediated technologies broadly enable firms to manipulate interactions.

⁷ Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003) (explaining that buyers ignore non-salient purchase information, including terms of form contracts, which sellers can make self-favorable).

⁸ Cf. *id.* at 1203 (noting development of form contracts).

⁹ *Id.* at 1203 (noting that by 1970s, roughly 99% of all contracts were form contracts).

sellers take advantage of buyers' term optimism.¹⁰ Moreover, these consumer harms grow when sellers deploy algorithmic manipulations that are tailored to vulnerabilities identified at the level of the individual consumer.¹¹ In a similar pattern, also enabled by internet shopping, sellers deploy drip pricing in which they announce an up-front price and add additional fees at checkout, to drive consumers to buy more expensive goods and to increase the revenues that they capture by selling.¹² We do not know nearly enough about term optimism, drip pricing, and other process manipulations that are common in internet commerce. For example, we don't know how big term optimism is, how much more drip pricing induces buyers to pay, and how much (and whether) these and related practices convert welfare-enhancing transactions into extractive ones. But because sellers know so much about internet shopping behaviors, we should be wary that consumers are systematically vulnerable to exploitation that, en masse, could contribute to inequality.¹³

Sellers can extract surplus from consumers in a third way, by controlling buyers' narrow choice environments, either by manipulating buyers' attention or filtering the offers that buyers see.¹⁴ This kind of conduct might not transform a Pareto-improving transaction into an extraction, compared to the baseline of no purchase, but it does imply that buyers would have been better off had they spent their money in other ways. This possibility raises an important, general question about what counts as extraction—whether the baseline of consumer welfare against which a particular purchase is measured should be no purchase, the consumer's welfare-maximizing purchase, or something in between.

¹⁰ See Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 571-73 (2014); see also Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 6 (2014).

¹¹ Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1318, 1322 (2015) [hereinafter Van Loo, *Helping Buyers Beware*] (“Mass retailers continually fine-tune their pricing algorithms through advanced behavioral data-mining operations” and “capitalize on decisionmaking complexity . . . [which] causes consumers to pay less attention . . . [and] makes consumers vulnerable.”).

¹² See, e.g., Tom Blake, Sarah Moshary, Kane Sweeney & Steve Tadelis, *Price Salience and Product Choice*, 40 MKTG. SCI. 619, 619 (2021) (“A common pricing strategy used by online vendors—most notably for event ticket sales—is ‘drip pricing,’ where mandatory fees are disclosed at a later stage in the consumer’s purchasing process than the base price of a good.”); Shelle Santana, Steven K. Dallas & Vicki G. Morwitz, *Consumer Reactions to Drip Pricing*, 39 MKTG. SCI. 188, 188 (2020) (describing use of drip pricing in advertising).

¹³ See, e.g., Van Loo, *Helping Buyers Beware*, *supra* note 11, at 1331, 1357-58 (discussing how sellers’ “behavioral modeling algorithms from their troves of data” can contribute to inequality at minimum because business ownership is concentrated in top 10% of households).

¹⁴ See, e.g., Hanson & Kysar, *supra* note 6, at 1451-55 (surveying practices in physical retail settings); Zarsky, *supra* note 6, at 22-24 (surveying practices in online settings); Van Loo, *Helping Buyers Beware*, *supra* note 11, at 1345 (“Amazon can strategically determine the mix and order of search results for . . . anchoring.”).

This problem has precedents. Conventional thinking, for example, views monopoly as extractive even though buyers prefer to trade at monopoly prices over not buying at all; and the extraction is identified compared to the baseline of consumer welfare in a competitive market.¹⁵ The problem becomes especially pressing, and reaches far beyond monopoly as traditionally understood, in an internet economy. Today, micro-level price discrimination and other digital manipulations enable sellers to target individual consumers, even as big data allows sellers to know more than consumers do about what lies behind the screens that consumers face and even about how consumers will react to the choices that they are given.¹⁶ When sellers can control the buying environment and manipulate it at the level of individual consumers, this destabilizes the baseline against which traditional measures identify Pareto improvements.¹⁷ A new measure of mutually beneficial exchanges is required, and policymakers and even theorists haven't yet gotten their heads around this basic problem.

The final, and perhaps the most powerful, mechanism through which sellers can make transactions extractive is when sellers control not just the choice environment but the entire framework within which the buyer is choosing. In these circumstances, sellers manipulate not just consumer preferences, nor just the contractual setting and information available to the buyer, but the entirety of options available to the buyer, such that the options that would be most in consumers' interests do not exist.¹⁸ If we want to be serious about understanding consumer law as a source of inequality, and to employ consumer law as a remedy for inequality, then this deeply embedded source of control—control of the entire market—especially needs to be confronted.

One stark example of a market under total seller control is the healthcare market. American patients, through insurance, can purchase surgical interventions and an assortment of sophisticated medical interventions.¹⁹ But what is not available are more modest, attentive, sensitive, and effective

¹⁵ Cf. Clark C. Havighurst & Barak D. Richman, *The Provider Monopoly Problem in Health Care*, 89 OR. L. REV. 847, 861 (2011) ("In economic theory, monopoly is objectionable because the higher prices it enables a seller to charge cause some consumers who would happily pay the competitive price to forgo enjoyment of the monopolized good or service, thus . . . reducing aggregate welfare.").

¹⁶ Van Loo, *Broadening Consumer Law*, *supra* note 1, at 225-26, 245, 258 n.268; Ramsi A. Woodcock, *Big Data, Price Discrimination, and Antitrust*, 68 HASTINGS L.J. 1371, 1377 (2017).

¹⁷ Steven L. Schwarcz, *Collapsing Corporate Structures: Resolving the Tension Between Form and Substance*, 60 BUS. LAW. 109, 123, 127 n.123 (2004) (discussing benefits and limitations of traditional Pareto analysis).

¹⁸ See, e.g., Clark C. Havighurst & Barak D. Richman, *Distributive Injustice(s) in American Health Care*, 69 LAW & CONTEMP. PROBS. 7, 59-64 (2006) (discussing large amount of control that providers and health plans have in controlling healthcare industry).

¹⁹ *Id.* at 63.

interventions into daily routines that can prevent serious illness.²⁰ The medical complex offers little help in improving diet, stress levels, toxin exposure, daily pain, inactivity, and social isolation.²¹ In this particular market, the services and products that would generate optimal health—and would be of highest value to consumers—are simply not available to any meaningful degree, even though the nation devotes one-sixth of its economy to healthcare.²² Thus, the market for health services is not designed in any systematic way to provide optimal health.²³ And while healthcare is perhaps extreme in its scale, opacity, and inflexibility, other markets reprise the basic pattern in more modest ways.²⁴

This is not just an instance of market power in which a monopolist forecloses market entry to all potential competitors. Rather, the healthcare market itself is an expression of societal inequality.²⁵ Healthcare delivery in the United States reflects the values and economic priorities of the elites that control the industry, and thus the dominant question in both law and policy is whether healthcare services are deemed to be valuable by the people who provide them.²⁶ Healthcare financing and medical protocols are controlled by providers, and the codes of ethics—and the conduct that the industry and the law demands—are drafted by providers.²⁷ So the kind of distributional injustices that we see in the healthcare sector are largely consequences of where power lies inside that sector.²⁸ It therefore is difficult to develop a market with more just and equitable offerings without addressing the inherent power imbalances between providers and patients.

²⁰ See Barak D. Richman, *Behavioral Economics and Health Policy: Understanding Medicaid's Failure*, 90 CORNELL L. REV. 705, 717-18 (2005) (explaining that healthcare, unlike such interventions, has minimal impact on health outcomes).

²¹ See *id.* at 718 (“[T]he marginal benefits from improvements in health care . . . are far below those from improvements in individuals’ decisions about diet, exercise, and risky behaviors.”).

²² See *id.* (“Other scholars have similarly observed that . . . the United States spends more per capita (and more as a percentage of its GDP) on health care than any other industrialized nation . . .”).

²³ See *id.* at 717-18.

²⁴ See Calo, *supra* note 6, at 1004 (discussing how Apple designs “every aspect of the interaction” with consumers).

²⁵ Havighurst & Richman, *supra* note 18, at 10-11, 37.

²⁶ Clark C. Havighurst & Barak D. Richman, *Who Pays? Who Benefits? Unfairness in American Health Care*, 25 NOTRE DAME J.L. ETHICS & PUB. POL’Y 493, 493 (2011) (“[E]mployer-sponsored coverage . . . [is] designed principally to accommodate the values and economic interests of the health care industry and other elites.”).

²⁷ David A. Hyman, *Getting the Haves to Come out Behind: Fixing the Distributive Injustices of American Health Care*, 69 LAW & CONTEMP. PROBS. 265, 268 (2006) (“Havighurst and Richman have performed an important service by exhaustively cataloging the regressive consequences of the current financing, regulatory, and legal framework, and by showing how the system has been rigged to serve the interests of providers . . .”).

²⁸ See *id.*

This phenomenon can be seen in some of the markets explored by the contributors to this Symposium. Some of the Essays that follow explore markets in which sellers of goods and services also possess social and economic influence to shape the entirety of what a market offers and what society values, with the consequence that these “captive” markets do the opposite of what free markets should do.²⁹ Instead of providing welfare to consumers, captive markets constrain resources and manipulate behaviors in ways that serve those who control them.³⁰ Essays in this vein might emphasize economic inequality between labor and capital,³¹ historical contexts in which a colonial ruler dominates colonized peoples and their territory,³² and the economic relationship between lenders and borrowers in credit markets.³³ Captive markets arguably also dominate the field that we have all chosen for ourselves: higher education.³⁴ We, the providers of higher education, are also the ones that define its value. The more pervasive the influence of providers in the valuation of the service they provide, the more we need to question the basic paradigm that insists that a voluntary transaction is welfare enhancing for both parties.

II. THE MECHANISMS THAT PROPAGATE INEQUALITY: AN INSTITUTIONAL PERSPECTIVE

We also observe that inequality is sustained within a variety of institutional frameworks: through a spectrum of government instruments, a range of public-private arrangements, and even in markets where the state is, at least immediately, largely absent.³⁵ This complicates any effort to formulate legal rules or policies to mitigate inequality.

²⁹ See, e.g., Ofer Eldar & Chelsea Garber, *Opportunity Zones: A Program in Search of a Purpose*, 102 B.U. L. REV. 1397, 1400-01 (2022) (showing how powerful interests often co-opted business lending programs aimed at low-income communities).

³⁰ See, e.g., Kim Oosterlinck, Ugo Panizza, W. Mark C. Weidemaier & Mitu Gulati, *A Debt of Dishonor*, 102 B.U. L. REV. 1247, 1249 (2022).

³¹ Aditi Bagchi, *Lowering the Stakes of the Employment Contract*, 102 B.U. L. REV. 1185, 1202 (2022) (explaining that goods like healthcare are allocated by employers instead of public authorities).

³² Oosterlinck et al., *supra* note 30, at 1249 (discussing French control of Haiti, including demand of payment in exchange for independence).

³³ Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1101-02 (2019) (“[H]igh-risk, low-income borrowers must provide for their own welfare in the credit marketplace, where lenders build their business models on the expected transfer of wealth out of economically vulnerable communities.” (footnote omitted)); Eldar & Garber, *supra* note 29, at 1400-01.

³⁴ Cf. DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA’S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE 133-44, 233-57 (2019).

³⁵ See, e.g., Havighurst & Richman, *supra* note 18, at 10-11, 37 (discussing pervasive injustice in U.S. healthcare system).

We note at the outset that there are two ways in which the state can intervene in a set of behaviors to try to regulate markets. One is the obvious and familiar one, which is to establish a system of guardrails, prohibitions, or requirements. These include rules that either prohibit certain transactions or elements within contracts, requirements to provide benefits or warranties, or procedural mandates for certain notifications. The legal academy has devoted considerable energy to developing these kinds of rules and assessing their effectiveness.³⁶

Far less examined is a second way government can intervene, which is to change the baseline structures of both ideological and material power within which markets emerge.³⁷ For example, the economic policies—embraced from the 1970s onwards by a wide range of governments in the wealthier nations of the world—that produced stagnant middle-class wages, also effectively required that the economies of these nations would become heavily financialized.³⁸ The dilemma produced by stagnant middle-class wages, the political imperative for rising middle-class consumption, and other political imperatives against direct income redistribution meant that policy would inevitably settle on “solutions” that involved massive public borrowing and massive private consumer debt.³⁹ When middle-class income lagged behind socially necessary consumption even as elite incomes exploded, this created groups who needed to borrow and groups who needed to lend. Financialization followed.⁴⁰

Financialization, in turn, transforms consumer choices and needs and restructures an economy. Borrowing becomes necessary to manage households, and necessities become more expensive because borrowing is presumptively available.⁴¹ Financialization also shapes how a society values goods and services, in part because those goods and services are intertwined with the

³⁶ See generally, e.g., Anne Fleming, *The Rise and Fall of Unconscionability as the “Law of the Poor,”* 102 GEO. L.J. 1383 (2014) (discussing legal rule of unconscionability and its effectiveness).

³⁷ Cf. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1820 (2020) (calling at broader level of abstraction for greater attention to intersection between power, economics, and law).

³⁸ See Daniel Markovits, *How Meritocracy Worsens Inequality—and Makes Even the Rich Miserable*, YALE INSIGHTS (Jan. 9, 2020), <https://insights.som.yale.edu/insights/how-meritocracy-worsens-inequality-and-makes-even-the-rich-miserable> [<https://perma.cc/35JD-AJYG>] (“[T]he middle class . . . is increasingly struggling economically and excluded . . . from income advantage status.”).

³⁹ Robert Hockett & Daniel Dillon, *Income Inequality and Market Fragility: Some Empirics in the Political Economy of Finance* 30-31 fig.22 (Oct. 15, 2013) (unpublished manuscript) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2204710 [<https://perma.cc/GDG3-CNME>]) (demonstrating increases in public borrowing and private consumer debt since 1970s).

⁴⁰ See, e.g., MARKOVITS, *supra* note 34, at 306 fig.10.

⁴¹ See Robert Hockett & Daniel Dillon, *Income Inequality and Market Fragility: A Model and Some Empirics in the Political Economy of Finance* (pt. 2), 62 CHALLENGE 427, 433 (2019).

financing mechanisms that undergird the entire economy (we can borrow to finance higher education, for example, but we cannot borrow for daycare).⁴²

This raises the question: when is public intervention most important and most effective? A government can regulate consumer markets in traditional ways, but it can also support and even create a set of material needs and cultural expectations that seek directly to benefit consumers' interests. In this way, governments can sustain market structures that don't just leave a wide range of choices for consumers but also offer a structure in which most consumer choices will be good ones, rather than choices that reflect a set of values and interests that do not in fact promote consumers' well-being.

Constructing a market to serve consumers' true interests and to promote equality, as opposed to merely policing specific conduct within an already established market, is challenging. It is not even clear that increasing government control over the basic structure and imaginative ambitions of consumer markets deters rather than invites elite control.⁴³

To appreciate the difficulties, consider two industries that exhibit radically different reliances on public control: the diamond industry, which one author describes as "stateless" and which operates almost totally outside any kind of public regulatory framework;⁴⁴ and the healthcare industry, which is probably more regulated than any other sector.⁴⁵ Whether healthcare is more egalitarian than diamond sales is far from clear. This is partly because, in spite of the public-private differences between the sectors, many common dynamics are at work across both. Both markets coalesce professional power through organized professional associations (sometimes those associations are entirely private, and sometimes they are quasi-public and subject to regulatory capture).⁴⁶ Both

⁴² *Id.* at 449 n.10 ("Among lower income groups, education loans account for the largest percentage of installment borrowing . . .").

⁴³ *See, e.g.,* Eldar & Garber, *supra* note 29, at 1400-01.

⁴⁴ *See generally* BARAK D. RICHMAN, *STATELESS COMMERCE: THE DIAMOND NETWORK AND THE PERSISTENCE OF RELATIONAL EXCHANGE* (2017) [hereinafter RICHMAN, *STATELESS COMMERCE*] (exploring ways in which relational exchange based on familiarity, trust, and community enforcement has worked to limit modern state's governing of diamond network).

⁴⁵ Thomas Greaney & Barak Richman, *AAI Issues Part II in New White Paper Series on Competition in the Delivery and Payment of Healthcare Services—Experts Tim Greaney and Barak Richman Discuss Promoting Competition in Healthcare Enforcement and Policy: Framing an Active Competition Agenda*, AM. ANTITRUST INST. (June 18, 2018), <https://www.antitrustinstitute.org/work-product/aai-issues-part-ii-in-new-white-paper-series-on-competition-in-the-delivery-and-payment-of-healthcare-services-experts-tim-greaney-and-barak-richman-discuss-promoting-competition-in-healthca/> [<https://perma.cc/V7GN-M4H2>] ("[T]he healthcare sector[] [has a] long history of state and federal regulatory interventions.").

⁴⁶ *See, e.g., Other Health Care Associations (A-B)*, AM. HOSP. ASS'N, <https://www.aha.org/websites/2006-01-11-other-health-care-associations-b> [<https://perma.cc/3MA9-ESAT>] (last visited Apr. 25, 2022) (listing examples of organized professional associations in healthcare industry); *Jewelry Trade Associations*, GEMOLOGICAL INST. OF AM.,

include enormous informational inequalities that easily exploit consumers, either in the most explicit way, such as a bait-and-switch, or in more calculated and perhaps more pernicious ways, such as manufacturing demand.⁴⁷

These parallels are revealing. Although the same power dynamics are present in both a privately ordered and a publicly ordered marketplace, the lesson is not that the kind of regime selected by a particular industry does not matter. Instead, the comparison between diamond sales and healthcare suggests both that underlying sources of power dictate market operations, and perhaps also that these sources of power are intractable because they are inextricably intertwined with the products themselves. In most diamond capitals, there is one professional association that sets the rules for the entire marketplace.⁴⁸ And professional medical associations do not compete with each other but rather unite to set up common standards.⁴⁹ These underlying sources of power not only control the actual choices available to consumers but also, and more fundamentally, control the way we think about our consumer choices. To the degree that there is structural inequality in a society, that inequality will be reflected in very different markets.

These associations reveal one underappreciated source of power in markets—namely, the role played and control exerted by intermediaries. Whether they are realtors or art dealers, financial brokers or wholesalers, and whether they aid shoppers or resell products, intermediaries often do far more than facilitate

<https://www.gia.edu/jewelry-trade-associations> [<https://perma.cc/K4GC-KKRM>] (last visited Apr. 25, 2022) (listing examples of organized professional associations in diamond industry).

⁴⁷ Barak D. Richman, *An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-Based Exchange*, 9 J. LEGAL ANALYSIS 247, 248-51 (2017) [hereinafter Richman, *An Autopsy of Cooperation*] (noting growing number of incidents of dishonest conduct in diamond industry over past twenty years); Barak Richman & Joost Pauwelyn, *Blood Diamonds' Many Facets*, NEWS & OBSERVER (Raleigh), Jan. 11, 2007, at A13 (discussing how “Blood Diamond” exposes diamond industry’s contradictory existence as industry that “promotes its product as a symbol of purity and everlasting love” while relying on forced child labor and funding brutal rebellions in African nations to support production); see also RICHMAN, STATELESS COMMERCE, *supra* note 44, at 24 (explaining how diamond industry marketing sustains lasting demand by convincing diamond recipients that “regifting or reselling their jewelry would amount to a betrayal of romance”); Thomas L. Greaney & Barak D. Richman, *Promoting Competition in Healthcare Enforcement and Policy: Framing an Active Competition Agenda 3* (Univ. of Cal. Hastings L. Legal Stud. Rsch. Paper Series, Research Paper No. 352, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3349391 [<https://perma.cc/D3BB-YA9Y>] (noting use of monopolized services by dominant hospitals to achieve supracompetitive prices).

⁴⁸ See, e.g., RICHMAN, STATELESS COMMERCE, *supra* note 44, at 42 (discussing how New York Diamond Dealers Club supplies legal infrastructure for diamond transactions).

⁴⁹ See Greaney & Richman, *supra* note 45.

transactions.⁵⁰ They often set the contours of a market and define the values that are reflected in the market.⁵¹

The power of intermediaries is reflected by several participants in this Symposium. Kate Judge, Mitu Gulati, and Dorothy Shapiro Lund describe intermediary structures in our economy that play active roles in creating markets and controlling consumer choice. For example, Professor Judge examines how the shift to the virtual world has not, in itself, increased competition. As Amazon's dominance shows, when the data available to the largest online intermediaries is coupled with physical infrastructure, such as extensive warehouse and vehicle networks, the move to a virtual environment can provide the largest intermediaries an even greater toolset in efforts to maintain their dominance.⁵² And Professor Gulati's paper on odious debt describes the market-organizing power of the assumption that a country's default will lead to higher borrowing costs in the future.⁵³ This common refrain is produced and repeated as a mantra by debt-rating agencies, the world's bankers, bond traders, and other players who structure financial markets, often to the immediate cost of developing debtor-nations.⁵⁴ But it is not clear how empirically supported the commonplace view actually is. Questioning that assumption means questioning the very structure of the sovereign debt markets and the narratives disseminated by those who profit in that market.

This is much more than a critique of regulatory capture—more than the simplistic observation that interest group power is exercised through policymaking. It is a suggestion that cultural trajectories and collective norms shape our markets and our economy. We are taught that education is good, healthcare is good, debt is a good, and that transitioning from an industrial economy to a white-collar economy is desirable. But a broader inquiry would address how the values and presumptions behind those markets constrain choice,

⁵⁰ See, e.g., Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 VAND. L. REV. 1563, 1590, 1593 (2019) (“[I]ntermediaries can skew information Internet intermediaries have great discretion as moderators”).

⁵¹ See generally Mukti Khaire, *The Importance of Being Independent: The Role of Intermediaries in Creating Market Categories*, in FROM CATEGORIES TO CATEGORIZATION: STUDIES IN SOCIOLOGY, ORGANIZATIONS AND STRATEGY AT THE CROSSROADS 259 (Rodolphe Durand, Nina Granqvist & Anna Tyllström eds., 2017) (exploring how intermediaries can contribute to creation of new market categories).

⁵² KATHRYN JUDGE, DIRECT: THE RISE OF THE MIDDLEMAN ECONOMY AND THE POWER OF GOING TO THE SOURCE (forthcoming June 2022) (manuscript at 58-59) (on file with author). Cf. Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 578 n.18, 641 (2015) (“Many intermediaries operate in industries dominated by relatively few market participants Technological advances like the Internet have simultaneously displaced previously powerful intermediaries and given rise to others.”).

⁵³ Oosterlinck et al., *supra* note 30, at 121 (noting that in Haiti's case, such costs included American occupation from 1915 until 1934 to ensure that repayment of foreign creditors remained primary objective of Haitian government).

⁵⁴ *Id.* at 118.

extract dollars from those with limited resources, and exacerbate inequality.⁵⁵ In short, we must examine not just the political and economic institutions that organize markets but the cultural and social institutions that tell us what we need markets to give us.

III. IMPLICATIONS FOR THE PLATFORM ECONOMY

The significance—and danger—of powerful intermediaries has never been more pronounced than in the digital economy. The rise of dominant digital platforms is significant not just because of the platforms' unprecedented scale in traditional economic terms.⁵⁶ Internet giants also require scrutiny because of their power in shaping choice environments that frame both individual decisions and collective movements.⁵⁷ Platforms are gatekeepers for information, the importance of which cannot be overstated. In important contexts, they control not just the availability of products and services but also the information about them.⁵⁸ They shape public discourse, affecting both voting behaviors and the policy agenda.⁵⁹ Platforms amass enormous amounts of information about our lives, attitudes, preferences, and whereabouts.⁶⁰ Their influence goes beyond threatening democracy and public health. As serious as these threats are, they are already well-known. But what might not be fully appreciated is that, by shaping what we see, discuss, and understand, platforms also influence our personal relationships, social life, and cultural environment.⁶¹ These digital behemoths can shape our cultural priorities and shared norms, which means they can shape any and every facet of our lives.

It seems that the public and policymakers are finally becoming aware of these threats, yet the path forward in curtailing digital platform power remains unclear.

⁵⁵ See Woodcock, *supra* note 2, at 2280-81 (describing this broader inquiry into how advertising has such effects).

⁵⁶ FRANCIS FUKUYAMA, BARAK RICHMAN, ASHISH GOEL, ROBERTA R. KATZ, A. DOUGLAS MELAMED & MARIETJE SCHAAKE, STAN. CTR. ON PHILANTHROPY & CIV. SOC'Y, REPORT OF THE WORKING GROUP ON PLATFORM SCALE 2 (2020), <https://paccenter.stanford.edu/publication/report-of-the-working-group-on-platform-scale/> [<https://perma.cc/UUS7-P3KA>] (“These [digital] platforms—specifically, Google, Facebook, Amazon, Twitter, and Apple—now play central roles in how millions of Americans obtain information, spend their money, communicate with fellow citizens, and earn their livelihoods.”).

⁵⁷ *Id.* at 2-3 (considering, for example, possibility of internet platforms swaying elections either deliberately or as result of manipulation by political actors).

⁵⁸ Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 477-81 (2020).

⁵⁹ See, e.g., Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335, 336-37 (2014) (discussing “research showing that [Facebook] feeds can directly impact voting”).

⁶⁰ See Przemysław Pałka, *Algorithmic Central Planning: Between Efficiency and Freedom*, 83 LAW & CONTEMP. PROBS. 125, 146 (2020) (noting how companies are allowed to use all information about people they can find).

⁶¹ Many authors cited throughout have touched on dimensions of this. See, e.g., sources cited *supra* note 6.

Even the foundational question of public action is fraught: Do we empower a government to contain this digital dominance, or ought we be more concerned about a government that might usurp that digital dominance?⁶²

There are, however, some concrete proposals that warrant consideration. One is to nurture a market for “middleware,” or software products that are integrated into a dominant digital algorithm and support alternative framings chosen by the user.⁶³ In this way, middleware and other mechanisms for interoperability can offer meaningful choices where there are none. Another proposal is to create plug-in AI offerings that arm consumers with more information and agency.⁶⁴ For example, one plug-in could digitally read contracts and inform consumers about the content, helping them make optimal decisions.⁶⁵ Other plug-ins might incorporate information sources such as Consumer Reports, which is also a private intermediary and provides information to consumers, alert users when Amazon is selling its own products, or assess the reliability of certain news sources. These proposals all have the common attribute of curbing the power that platforms have in shaping the behavior of millions of people. Although these products each offer concrete and individualized benefits, their real merit lies in countering the concentration of power in the digital world, which is per se problematic whether that power lies in private or in public hands.⁶⁶

Other participants in this conference have explored further ways to utilize intermediaries to solve the problem of platform power. For example, while Professor Judge sounds a warning about the concentrated online intermediary landscape, she also observes that some online intermediaries are enabling more connection and communication in ways that shift the locus of power back to the parties themselves.⁶⁷

Even though these concrete responses to platform power seem incremental at best, there are reasons to think that they might actually be preferable to systematic state intervention to regulate consumer markets. Encouraging new

⁶² See, e.g., Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1282, 1284-85 (2017) (showing how policymakers are increasingly relying on digital tools to improve consumer market decisions in consumer finance, health insurance, and dietary advice, but these efforts face great challenges); Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. 829, 861-65 (2021) [hereinafter Van Loo, *Federal Rules*] (exploring tradeoffs between government oversight of platforms and private ordering solutions for dispute resolution).

⁶³ FUKUYAMA ET AL., *supra* note 56, at 30 (defining “middleware” as “software and services that would add an editorial layer between the dominant internet platforms and consumers”).

⁶⁴ See generally Rory Van Loo, *Digital Market Perfection*, 117 MICH. L. REV. 815, 834-35 (2019) (exploring promise of digital intermediaries for helping consumers make better decisions).

⁶⁵ Daniel Markovits is currently working to build such a capability.

⁶⁶ For one example of the power platforms hold, see Van Loo, *Federal Rules*, *supra* note 62, at 831, noting the power of platforms in the dispute resolution process.

⁶⁷ See Judge, *Intermediary Influence*, *supra* note 52, at 585 (noting how internet and other developments have made it easier for buyers and sellers to connect directly).

products to disperse control of the dominant platforms—or, put another way, injecting competition into intermediary markets—might be preferable to relying on the state. First, where state regulations typically limit choice, middleware and similar products expand consumers’ choice, allowing individuals to opt into them or to opt out.⁶⁸ Second, middleware is tailored to the global nature of internet dominance since, by its nature, middleware (like platforms themselves) is capable of spanning multiple overlapping jurisdictions, whereas state regulators are inherently more constrained.⁶⁹ Third, middleware is more nimble than traditional regulation and can better meet new needs or address new technological challenges.⁷⁰ And fourth, because they do not operate with the authority of law, middleware providers will be harder to capture and, at the same time, remain free from due process requirements that can often cripple consumer agencies.⁷¹

Beyond theory, some empirical evidence suggests that intermediaries have the potential to reduce buyer-seller extraction. For instance, an Israeli law that forced retail stores to release product information in machine-readable form ultimately led to a 4-5% drop in prices paid overall.⁷² Thus, despite the risks associated with digital intermediaries, laws targeting them are worth further attention by those studying inequality.⁷³

CONCLUSION

Taken together, these observations suggest thinking of the buyer-seller relationship as a freestanding axis of inequality. Sellers extract from buyers through a wide assortment of mechanisms that warp the neoclassical economic vision for how markets should function to maximize societal benefits.⁷⁴ These extractions from buyers persist across diverse institutional contexts, ranging

⁶⁸ FUKUYAMA ET AL., *supra* note 56, at 32 (“We imagine a diversity of middleware products . . . with transparent offerings and technical features so that users can make informed choices.”).

⁶⁹ *Id.* (noting fluidity of middleware, which would be appended to major internet platforms, allowing for multijurisdictional reach).

⁷⁰ *Id.* at 35 (“Allowing users to choose from multiple middleware providers offers a blueprint for bringing . . . flexibility to privacy settings, terms of service, and other services that users care about.”).

⁷¹ *Cf. id.* at 34-36 (describing advantages of middleware).

⁷² Itai Ater & Oren Rigbi, *The Effects of Mandatory Disclosure of Supermarket Prices 1* (Maurice Falk Inst. for Econ. Rsch. in Isr., Discussion Paper No. 18.04, 2018).

⁷³ Van Loo, *Broadening Consumer Law*, *supra* note 1, at 231 (concluding that consumer law is worth examining as legal mechanism for potentially having significant impact on economic inequality).

⁷⁴ See DANIEL F. SPULBER, MARKET MICROSTRUCTURE: INTERMEDIARIES AND THE THEORY OF THE FIRM 4 (1999) (“[P]roblems of what to produce, how to produce, and for whom are solved directly by the actions of individual firms, through their production, technology, and marketing decisions.”).

from heavily regulated to privately ordered industries. Intermediaries often play central roles in extraction, and they may also be able to prevent it.

These dynamics are not unique to the buyer-seller relationship. Rather, they pervade social, legal, and economic life. This feature of contemporary consumer law demands sustained attention. Other axes of dominance and subordination, including race, gender, and the economic relationship between labor and capital, are much more deeply theorized and better understood than the buyer-seller relationship.⁷⁵ Taking these more familiar hierarchies as a model may be valuable for consumer law. More generally, mapping these various axes of inequality is an important project and one toward which legal scholars, including many involved in this Symposium, have already proven to have much to offer.⁷⁶

We face undeniable and gargantuan policy challenges. Nonetheless, our reflections overall strike an optimistic chord. Just as the individual contributors to inequality are numerous, so too are the mechanisms for addressing it. There is reason to believe that a series of market, technological, and normative adaptations could serve to protect the public from unprecedented concentrations of power.

⁷⁵ See, e.g., Linda X. Zou & Sapna Cheryan, *Two Axes of Subordination: A New Model of Racial Position*, 112 J. PERSONALITY & SOC. PSYCH. 696, 696 (2017) (discussing, for example, how racial and ethnic categories are used to subordinate different groups).

⁷⁶ As one of many examples that could be provided, years before the mortgage crisis became poignantly apparent in 2007, Kathleen Engel and Patricia McCoy diagnosed mortgage market dysfunctions that ultimately contributed significantly to economic inequality. See Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets Revisited*, 82 TEX. L. REV. 439, 443 (2003).