RESPONSE

THE NEW LAW AND INEQUALITY SCHOLARSHIP[†]

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ABSTRACT

An emerging body of scholarship is challenging the orthodoxy that the tax system rather than the legal system should be used to address inequality. This "New Law and Inequality Scholarship" argues for using law to address inequality for both practical and theoretical reasons and, notably, is grounded in the same kind of rigorous and evidence-based analysis relied on by an earlier generation of law and economics scholars to argue against using legal rules to address inequality.

Two of the most exciting thinkers in this new area of research are Ofer Eldar and Rory Van Loo. Their article, Unequal Ownership*, identifies several ways in which making stock ownership more equitable can help to both address inequality and, surprisingly, improve economic efficiency.*

This Response outlines the contours of this "New Law and Inequality Scholarship," highlights some of the key contributions made by Eldar and Van Loo in Unequal Ownership*, and offers one friendly amendment. In future research, Eldar and Van Loo could show in more detail how preventing corporations from extracting surplus from consumers and workers also reduces wasteful competition.*

[†] An invited response to Ofer Eldar & Rory Van Loo, *Unequal Ownership*, 105 B.U. L. REV. 851 (2025).

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INTRODUCTION

How can we ensure that the benefits of economic development flow to all citizens and not just those at the very top of the socioeconomic structure?

In the 1970s and 1980s, scholars such as William Ackerman and Duncan Kennedy suggested legal rules be designed in ways that could help to address inequality.[1] This scholarship hearkened back to work done by Robert Hale almost a century ago that also explored ways to use legal rules to achieve redistributive ends.[2]

The proposals by Ackerman, Kennedy, and other like-minded scholars were met with sharp criticism by proponents of what at the time was a new law and economics approach to legal analysis. The law and economics critique of using law to achieve redistributive goals coalesced around a simple and elegant argument that came to be known as the double-distortion argument.[3] The claim of the double-distortion argument was that designing legal rules for the express purpose of addressing inequality would distort incentives in two undesirable ways. First, legal rules designed to address inequality would be less efficient than rules designed for the sole purpose of maximizing efficiency.[4] Second, legal rules designed to address income inequality would create a disincentive to earn income, because the wealthier you were the greater your liability would be.[5] The better approach, according to this line of argument, would be to combine a slightly higher redistributive tax with a more efficient law. The canonical statement of this claim appeared in the aptly titled 1994 article by Louis Kaplow and Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*.[6]

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[1] *See, e.g.*, Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1098 (1971) (suggesting housing code enforcement can help to prevent slum housing); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 624-26 (1982) (explaining why paternalistic contract terms are desirable).

[2] *See, e.g.*, Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); *see also* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 108 (1998).

[3] The term "double-distortion argument" was coined in Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797, 799 (2000).

[4] *Id.*

[5] *Id.* ("[W]hen damages paid in court vary with the parties' incomes, agents will take this into account just as much as they do marginal income tax rates in choosing how much to work.").

[6] Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 677 (1994) [hereinafter Kaplow & Shavell, *Less Efficient*] ("[I]t is appropriate for economic analysis of legal rules to focus on efficiency and to ignore the distribution of income in offering normative judgments."); *accord*

The argument that legal rules should be designed without considering the laws' effects on inequality became the accepted orthodoxy among law and economics scholars. Lee Fennell and Richard McAdams observed a decade ago: "Our sense today is that both the [double-distortion] result and the policy advice have become the conventional wisdom, at least among many law professors who employ economic analysis."[7]

However, this double-distortion orthodoxy is increasingly under attack. Challenges to the double-distortion orthodoxy based on practical considerations arise from a simple observation: look at where we are. The problem of inequality is even worse than it was thirty years ago when Kaplow and Shavell wrote their canonical article endorsing tax policy as the preferred way address inequality.[8] Relying on tax policy to redistribute wealth has not led to a more equitable society. Challenges to the double-distortion argument based on critiques of the logic of the argument are more varied but not less important.[9]

Together these challenges to both the practical and theoretical claims of the double-distortion argument bring us to a crossroads. Ideas for using legal reforms to address inequality are emerging in a variety of contexts, including

Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 821 (2000) (affirming prior conclusion that "legal rules should not be adjusted to favor the poor in order to further redistributive objectives").

[7] Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1062 (2016).

[8] GLORIA GUZMAN & MELISSA KOLLAR, U.S. CENSUS BUREAU, NO. P60-282, INCOME IN THE UNITED STATES: 2023, at 32 tbl.A-4a (2024), https://www2.census.gov/library/publications/2024/demo/p60-282.pdf [https://perma.cc/LXX9-6WDT] (click on excel document link titled: "Table A-4a. Selected Measures of Household Income Dispersion: 1967 to 2023") (showing proportion of U.S. household income of 90th/10th percentile increased from 10.57 in 1994 to 12.38 in 2023, meaning the 90th percentile of Americans earned 12.38 times more than the 10th percentile Americans in 2023, instead of 10.57 times more in 1994).

[9] *See infra* notes 21-24 and accompanying text.

antitrust,[10] consumer law,[11] contract law,[12] and price regulation.[13] The time appears to be right to explore new ways to use law to address inequality.[14]

Unequal Ownership makes several notable contributions to this renaissance in scholarship about how policy choices outside the tax system might be used to address inequality. First, Eldar and Van Loo show how more equitable stock ownership would provide a way for those from whom corporations are profiting to also benefit from this same exploitation.[15] Second, Eldar and Van Loo provide surprising new evidence that, contrary to the conventional wisdom, the share of stock ownership by all but the top 10% has decreased substantially over just the past few decades.[16] Third, Eldar and Van Loo show how more equitable stock ownership could lead corporate decision-makers to implement policies that not only benefit those who have fewer assets but also reduce deadweight loss.[17] Finally, Eldar and Van Loo explore policy choices that could be helpful in

[10] *See, e.g.*, Ariel Ezrachi, Amit Zac & Christopher Decker, *The Effects of Competition Law on Inequality—an Incidental By-Product or a Path for Societal Change?*, 11 J. ANTITRUST ENF'T 51, 67-70 (2023) (arguing stronger enforcement of pro-competition antitrust laws will help to alleviate inequality); Eric A. Posner & Cass R. Sunstein, *Antitrust and Inequality*, 2 AM. J.L. & EQUAL. 190, 191 (2022) (arguing some sacrifice of efficiency goals in favor of explicit equality-focused approach in antitrust enforcement could have large effect in terms of equality).

[11] *See, e.g.*, Daniel Markovits, Barak D. Richman & Rory Van Loo, *Consumer Law as an Axis of Economic Inequality*, 102 B.U. L. REV. 1169, 1171 (2022) (arguing some consumer contracts are extractive rather than mutually beneficial thus increasing inequality) (citing OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 26 (2012)).

[12] *See, e.g.*, Michael D. Guttentag, *An Inframarginalist Argument for Mandating the Use of Pro-Consumer Boilerplate*, *in* TOWARD AN INFRAMARGINAL REVOLUTION: REDISTRIBUTING THE GAINS FROM TRADE 100, 100-05 (Ramsi A. Woodcock ed., forthcoming 2025) (on file with the Boston University Law Review) (discussing use of contract law reforms to promote equality); Kevin E. Davis & Mariana Pargendler, *Contract Law and Inequality*, 107 IOWA L. REV. 1485, 1487 (2022) (documenting use of heterodox contract law in South Africa, Brazil, and Colombia to reduce inequality).

[13] *See, e.g.*, Ramsi Woodcock, *After Antitrust*, PHENOMENAL WORLD (Jan. 30, 2025), https://www.phenomenalworld.org/analysis/after-the-antitrust-revival/ [https://perma.cc/H72U-M56D]; Rodney J. Andrews & Kevin M. Stange, *Price Regulation, Price Discrimination, and Equality of Opportunity in Higher Education: Evidence from Texas*, 11 AM. ECON. J. 31, 31 (2019) (applying price regulation theory to inequality in access to higher education).

[14] *See, e.g.*, Illan Barriola, Bruno Deffains & Olivier Musy, *Law and Inequality: A Comparative Approach to the Distributive Implications of Legal Systems*, INT'L REV. L. & ECON., May 2023, at 1, 2.

[15] *See generally* Ofer Eldar & Rory Van Loo, *Unequal Ownership*, 105 B.U. L. REV. 851 (2025) (arguing in favor of increased stock ownership for households in bottom 90% of earnings to address growing inequality).

[16] *Id.* at 854-55.

[17] *Id.* at 872-76.

realizing the benefits they identify from more equitable stock ownership in practice.[18]

To Eldar and Van Loo's important contributions in *Unequal Ownership* I offer one suggestion on how to expand the analysis in future work. In discussing how firms extract surplus from consumers and workers, Eldar and Van Loo focus primarily on two market failures: (1) suboptimal production levels caused by firms using their market power to increase profits, and (2) behavioral exploitation.[19] It would be informative to provide more detail on a third market failure, one involving surplus extraction and the exploitation of market power. Efforts to capture surplus from consumers and workers invite competition between buyers and sellers that is both wasteful and regressive.

This invited Response begins with an outline of the contours of the "New Law and Inequality Scholarship," then highlights four contributions from *Unequal Ownership*, and finishes with information about how detailing the problem of wasteful competition for surplus could further enrich the Eldar and Van Loo analysis.

I. THE NEW LAW AND INEQUALITY SCHOLARSHIP

For many years designing legal rules to address inequality was viewed by law and economics scholars as a naïve and counterproductive exercise. More recently, the orthodox rationale for ignoring the impact of law on wealth distribution, the double-distortion argument, has come under sustained attack. A brief review of these critiques of the double-distortion orthodoxy follows.[20]

A. *Cracks in the Orthodoxy*

It is helpful to separate critiques of the double-distortion orthodoxy into two broad categories. First, there are critiques that challenge the theoretical underpinnings of the claim that tax policy is always superior to legal rules as a way to redistribute wealth. Second, there are critiques that challenge the validity of this claim in practice.

Three critiques of the theoretical foundations of the double-distortion orthodoxy are particularly noteworthy. One critique of the double-distortion orthodoxy was raised early on and pointed to the possibility that the analytic model that Kaplow and Shavell relied on to reach their conclusion was too

[18] *Id.* at 877-99.

[19] *Id.* at 860-61.

[20] For past surveys of the debate, see Matthew Dimick, *The Law and Economics of Redistribution*, 15 ANN. REV. L. & SOC. SCI. 559, 559-60 (2019) (debating benefits of using legal rules or income tax to address income inequality); Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211, 217 (2019) ("[C]onsumer law offers a potentially appealing alternative to taxes."); and Ramsi A. Woodcock, *The Progressive Case Against Progressive Antimonopolism* 37-48 (Aug. 12, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3864585.

simplistic.[21] A second critique is that the double-distortion argument takes as a given the assignment of property rights, but property rights are both a creation of the legal system and a significant factor in determining the distribution of wealth.[22] A third and more recent critique is that the double-distortion argument is inapposite when used to evaluate laws designed to regulate efforts to extract surplus from transactions.[23] According to this critique, the sweeping nature of the double-distortion argument is based on the mistaken assumption that the only function of private law is to encourage parties to act in an efficient manner.[24] However, the goal of much law is to avoid wasteful competition and maximize distributional equity in allocating a surplus, and there is no reason to expect that the tax system would be the more efficient or equitable approach when legal rules are used for this purpose.

Another line of critique focuses on practical challenges to effective redistribution through the tax system, challenges that the double-distortion orthodoxy largely ignores. A number of scholars, including Lee Fennell, Richard McAdams, Christine Jolls, and Zachary Liscow, have homed in on Kaplow and Shavell's failure to take into account administrative and other transaction costs.[25] According to these scholars, once transaction costs, political action

[21] *See* Sanchirico, *supra* note 3, at 814-15; *see also* Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1008-09 (2001) (summarizing critiques of double-distortion model). Kaplow and Shavell responded that the policy implications of introducing more heterogeneity and complexity into their model are of minimal importance. Kaplow & Shavell, *Less Efficient*, *supra* note 6, at 679.

[22] *See generally* David Blankfein-Tabachnick & Kevin A. Kordana, *Kaplow and Shavell and the Priority of Income Taxation and Transfer*, 69 HASTINGS L.J. 1 (2017) (arguing Kaplow and Shavell failed to consider property entitlements when drawing their conclusion that tax will always be more efficient route to achieving egalitarian goals). Their argument hearkens back to the observation by Stewart Schwab that if there were no transaction costs then legal rules could focus exclusively on distributive concerns because private ordering would eliminate inefficiencies. Stewart Schwab, *Coase Defends Coase: Why Lawyers Listen and Economists Do Not*, 87 MICH. L. REV. 1171, 1173 (1989) (reviewing R.H. COASE, THE FIRM, THE MARKET, AND THE LAW (1988)).

[23] *See, e.g.*, Michael D. Guttentag, *Law, Taxes, Inequality, and Surplus*, 102 B.U. L. REV. 1329, 1331-32 (2022) (arguing laws addressing surplus-seeking behaviors not presumptively inferior to tax transfer strategy).

[24] For example, tort damage rules are viewed as a tool to encourage parties to adopt efficient dimensions of care. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 178-82 (2004).

[25] *See, e.g.*, Fennell & McAdams, *supra* note 7, at 1061-63; *see also* Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV 1653, 1656-57 (1998) (noting behavioral economics may suggest people react differently to guaranteed tax outcomes versus nebulous tort expenditures); Zachary Liscow, Note, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478, 2502-04 (2014) (noting non-income redistribution not captured by Kaplow and Shavell); Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495, 497, 500-

costs, behavioral biases, and other real-world considerations are included, the unabashed superiority of the tax-and-transfer system over the legal system as a way to address inequality disappears.

B. *Building a New Law and Inequality Scholarship*

An exciting "New Law and Inequality Scholarship" is emerging in the midst of these growing challenges to the double-distortion orthodoxy and its claim that the tax system is always superior to law as a way to achieve redistributive goals. This "New Law and Inequality Scholarship" challenges the conclusions of the double-distortion orthodoxy but importantly does not reject the methods used by Kaplow and Shavell to justify their claim. Instead, this scholarship remains committed to applying an analytically rigorous and evidence-based toolset familiar from law and economics scholarship more generally.[26]

There are already many important contributions to this burgeoning area of research. Both Eldar[27] and Van Loo[28] are leaders in this area of research. With

02 (2022) (advocating for many-fronts approach to redistribution to accommodate voters and politicians' shifting policy preferences).

[26] What I coin here as the "New Law and Inequality Scholarship" is thus analytically distinct from those who espouse a law-and-political-economy approach to policy analysis. *See, e.g.*, 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, 1788-92 (2020) (criticizing efficiency approach to economics and lack of focus on economic inequality in constitutional law in legal profession and academia). Eldar and Van Loo make a similar observation when distinguishing their approach in *Unequal Ownership* from the law-and-political-economy approach, which they characterize as constituting a "move beyond the economic dimensions of market power that are the focus of this paper." Eldar & Van Loo, *supra* note 15, at 853 n.4.

[27] *See, e.g.*, Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937, 940 (2020) (examining if for-profit social goals serve intended beneficiaries); Ofer Eldar & Chelsea Garber, *Does Government Play Favorites? Evidence from Opportunity Zones*, 66 J.L. & ECON. 111, 112 (2023) (observing great discretion among politicians to choose how Opportunity Zone money allocated to spur development); Ofer Eldar, *The Role of Social Enterprise and Hybrid Organizations*, 2017 COLUM. BUS. L. REV. 92, 95-97 (describing growth of, and legal issues associated with, hybrid business models focusing on both profits and societal benefits).

[28] Rory Van Loo & Nikita Aggarwal, *Amazon's Pricing Paradox*, 37 HARV. J.L. & TECH. 1, 4-5 (2023) (arguing Amazon's customers pay anticompetitively high prices); Markovits et al., *supra* note 11, at 1171 (observing price extraction even among voluntary transactions); Kathryn E. Spier & Rory Van Loo, *Foundations for Platform Liability*, 100 NOTRE DAME L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5015344; Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1315-16 (2015) (advocating consumer goods protection regulatory paradigm shift); Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1957-59 (2020) (examining administration of antitrust breakups); Rory Van Loo, *The Public Stakes of Consumer Law: The Environment, the Economy, Health, Disinformation, and Beyond*, 107 MINN. L. REV. 2039, 2041 (2023) (advocating consumer

Unequal Ownership, Eldar and Van Loo continue to make important contributions to the "New Law and Inequality Scholarship," as detailed next.

II. CONTRIBUTIONS FROM *UNEQUAL OWNERSHIP*

Four contributions from *Unequal Ownership* are particularly noteworthy. First, Eldar and Van Loo nicely observe that if corporations are profiting at the expense of those who have fewer assets then nothing would be more just than to provide these people stock in the firms that are benefitting at their expense. As Eldar and Van Loo explain:

> [I]f consumers, workers, and the public have a larger stake as owners, they will share in the economic gains made by corporations. Consequently, when corporations raise prices or decrease wages, consumers and workers would recover some of those losses through their ownership stake in the resulting increased profits.[29]

A second contribution from *Unequal Ownership* is that Eldar and Van Loo provide surprising new evidence that, contrary to the conventional wisdom, the share of ownership of public equities by all but the wealthiest has decreased over the past few decades. Their article contains graphic evidence showing that "[s]ince 2000, the bottom 90% of households—those with incomes below $180,000—have seen their share of ownership of public corporations decline from around 22% to 11%."[30] This is a dramatic and unexpected decline in the share of stock ownership by the "bottom" 90%.

A third important contribution from *Unequal Ownership* is that Eldar and Van Loo show how more equitable stock ownership could lead corporate decision-makers, motivated by a desire to address the concerns of their shareholders, to implement policies that not only benefit those who have fewer assets but also lead to more efficient levels of production.[31]

The pathway through which more equitable stock ownership could result in more efficient levels of production involves two steps. First, Eldar and Van Loo observe that it would be logical for firms to act in ways that address the needs and desires of their shareholders.[32] This suggestion builds on influential work by Oliver Hart and Luigi Zingales arguing that firms should aim to address the desires of the firms' shareholders even when those desires deviate from profit

law as "important for addressing large-scale societal threats"); Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1271-72 (2017) (examining "digital intermediaries as regulatory instruments" and finding implementation "far more challenging than assumed").

[29] Eldar & Van Loo, *supra* note 15, at 855. One topic that might be discussed further is how the price at which stock ownership would be granted should be determined. If we use a market price, there may be a limit on how much new owners can benefit from ongoing exploitation as the expected value of this exploitation may already be capitalized into the market price.

[30] *Id.* at 854.

[31] *Id*. at 854-55.

[32] *Id.* at 855-56.

maximization.[33] Working to satisfy shareholder preferences has the salutary benefit that firms following this policy would not need to deviate from the widely accepted norm of shareholder primacy.[34] As Eldar and Van Loo observe: "a key advantage of equal ownership is that it does not fight against the basic architecture of corporations, which is that managers have a duty to maximize shareholders' interests."[35]

The second step in the Eldar and Van Loo explanation as to how more equitable ownership could lead firms to adopt policies that both benefit those who have fewer assets and lead to more efficient levels of production is the observation that when firms use their market power to increase profits these actions often reduce production below optimal levels. To support this conclusion, Eldar and Van Loo provide an elegant analytic model set in the context of a well-studied oligopoly market structure, a Cournot oligopoly.[36] First, Eldar and Van Loo use this oligopoly model to show how a firm with market power can increase profits by reducing supply below an efficient level. Then, Eldar and Van Loo extend the standard model to include the assumption that one of the goals of the firm is to increase the welfare of the firm's shareholders who are also assumed to be the firm's customers. In this scenario, it no longer makes sense for the firm to reduce supply to maximize profits.[37] Using the rigorous tools of economic analysis, Eldar and Van Loo show how more equal stock ownership can lead to outcomes that are both more equitable and more efficient than when ownership is less equitably distributed.[38]

A fourth important contribution from *Unequal Ownership* comes toward the end of their article. Eldar and Van Loo go beyond the theoretical analysis linking more equitable stock ownership to more equitable and perhaps even more efficient firm behavior. Eldar and Van Loo consider several pathways by which the benefits of more equitable stock ownership might be realized in practice. For example, Eldar and Van Loo explore how "leverag[ing] existing sources of household wealth" could be used to increase ownership in stock by the "bottom" 90%.[39] Another path would be to take advantage of government largesse to

[33] Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 249 (2017) ("[S]hareholder welfare is not equivalent to market value.").

[34] STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION 13 (2023).

[35] Eldar & Van Loo, *supra* note 15, at 859.

[36] 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 177 (4th ed. 1998).

[37] Eldar and Van Loo describe their result as follows: "when the owners are also the consumers of the firm, the firm is likely to charge consumers the same price it would in a market with perfect competition (and the same applies to workers and wages)." Eldar & Van Loo, *supra* note 15, at 856.

[38] *Id.* at 867-72.

[39] *Id.* at 880. One concern is that Eldar and Van Loo may underestimate the potential harms of poor financial decision-making by individual investors. The emergence and continued

expand stock ownership by the "bottom" 90% when the opportunity presents itself.[40]

In summary, Eldar and Van Loo offer many reasons to prefer a world in which stock ownership is more equitably distributed among rich and poor, including, surprisingly, that more equitable ownership could improve productive efficiency.

III. ONE FRIENDLY AMENDMENT TO *UNEQUAL OWNERSHIP*

I might offer one hopefully friendly amendment to *Unequal Ownership* that could further clarify and strengthen the argument. In future research, Eldar and Van Loo might include a more detailed discussion of how corporations in their efforts to extract surplus from consumers and workers engage in wasteful competition. Such a discussion would show how more equitable stock ownership could help to address another important market failure, one that results from wasteful competition for surplus.

Eldar and Van Loo provide an excellent summary of two of the market failures caused by efforts to extract surplus from consumers. First, they show how excessive market power can lead firms to underproduce and overcharge consumers. As they explain, market power can lead to "higher prices for products, lower wages paid to workers, and lower prices paid to suppliers."[41] Second, Eldar and Van Loo show how firms profit by taking advantage of consumers' predictable decision-making shortcomings.[42] Some use the terms behavioral exploitation or behavioral contract theory to refer to the study of ways in which high prices can result from efforts to confuse or manipulate customers.[43]

Both of these market failures, those resulting from oligopoly pricing and those from behavioral exploitation, are important and worthy of study. However, there is a third, and potentially even more important, market failure related to the extraction of surplus from consumers that is not described as precisely by Eldar and Van Loo. This third market failure relates to what I have called the "surplus

sustenance of meme stocks can have damaging effects on not just individual investors but capital markets overall. For a description of meme-stocks and a framework for analyzing their impact, see Dhruv Aggarwal, Albert H. Choi & Yoon-Ho Alex Lee, *The Meme Stock Frenzy: Origins and Implications*, 96 S. CAL. L. REV. 1387 (2024).

[40] Eldar & Van Loo, *supra* note 15, at 878.

[41] *Id.* at 860.

[42] *Id.* at 859-60.

[43] *See, e.g.*, Martin Brenncke, *The Legal Framework for Financial Advertising: Curbing Behavioural Exploitation*, 19 EUR. BUS. ORG. L. REV. 853, 855 (2018) (coining term "behavioural exploitation"); *see also* Botond Kőszegi, *Behavioral Contract Theory*, 52 J. ECON. LITERATURE 1075, 1075 (2014) (summarizing research on "contracts designed primarily to take advantage of agent mistakes").

problem."[44] The surplus problem arises whenever there is a surplus. Where there is a surplus, competition for that surplus is likely to ensue, and any such competition is problematic for two reasons. First, it is wasteful because nothing of value is likely to be produced when parties are competing over a fixed prize.[45] Second, any such competition for surplus is likely to work to the detriment of those who have fewer resources. As a result, the competition for surplus often benefits those who are already well off.

The practice of price discrimination provides an example of wasteful competition for surplus. Price discrimination involves identifying how much a customer is willing to pay and then finding ways to sell to that customer at or close to their willingness to pay.[46] Traditional economic analysis views price discrimination as a welfare-enhancing practice, but this traditional economic analysis relies on two faulty assumptions.[47] First, economists generally fail to include the costs of carrying out a strategy of price discrimination in their calculations of the costs and benefits of price discrimination. Second, economists, following Arthur Pigou, only compare price discrimination to situations where there is already a deadweight loss from efforts to profit from market power in other ways.[48] This approach creates a false benchmark. In fact, price discrimination is in practice both tremendously wasteful and regressive.[49]

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[44] *See* Michael D. Guttentag, *Law and Surplus: Opportunities Missed*, 2019 UTAH L. REV. 607, 610.

[45] More precisely, competition for a surplus is likely to be wasteful because competitors have little or no incentive to consider the negative impact their efforts will have on the fate of other competitors. *See* SHAVELL, *supra* note 24, at 138-50; Dale T. Mortensen, *Property Rights and Efficiency in Mating, Racing, and Related Games*, 72 AM. ECON. REV. 968, 969 (1982); *see also* Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561, 562 (1971) (describing wasteful nature of competition for foreknowledge).

[46] For textbook discussions of price discrimination, see generally ROBERT FRANK, MICROECONOMICS AND BEHAVIOR 389-98 (8th ed. 2009); ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 401-10 (8th ed. 2012); and HAL R. VARIAN, MICROECONOMICS ANALYSIS 241-53 (3d ed. 1992).

[47] *But see* Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063, 2072 (2000) ("Implementing price discrimination is costly."); Peter T. Leeson & Russell S. Sobel, *Costly Price Discrimination*, 99 ECON. LETTERS 206, 208 (2008) (noting how even "under plausible conditions price searchers are led to pursue 'too much' perfect price discrimination, generating welfare losses even when perfect price discrimination is used").

[48] *See, e.g.*, ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE 283 (Transaction Publishers 2002) (1952).

[49] *See, e.g.*, Guttentag, *supra* note 44, at 612 ("[L]eaving the fight for surplus unregulated can . . . lead to a socially wasteful race to capture surplus."); Ramsi A. Woodcock, *Big Data, Price Discrimination, and Antitrust*, 68 HASTINGS L.J. 1371, 1390-91 (2017) [hereinafter Woodcock, *Big Data*] (arguing price discrimination results in benefits to wealthy producers at direct expense of consumers and therefore results in regressive redistribution of wealth); Ramsi A. Woodcock, *Personalized Pricing as Monopolization*, 51 CONN. L. REV. 311, 317-

Price discrimination is only one example of the many ways in which competition for surplus can waste resources. The surplus problem is surprisingly ubiquitous, because surplus itself is so ubiquitous.[50] There is, for example, a surplus whenever one party to a transaction is willing to pay more than the price at which the other party is willing to sell. Preliminary estimates suggest that the amount of surplus in the economy is easily in the range of trillions of dollars a year.[51]

There are, moreover, straightforward solutions to the surplus problem. When there is a surplus at stake, it is almost always better to cooperate rather than compete.[52] This cooperation can take many forms and can be supported by a wide variety of legal interventions. Examples of legal rules that address the surplus problem, include laws that place limits on price discrimination,[53] laws that either establish or put limits on private ownership,[54] measures that restrict the enforceability of consumer boilerplate,[55] and prohibitions on trading with inside information.[56] While Eldar and Van Loo do mention surplus, or its synonym rent, their discussion of the surplus problem is not as detailed as it could be.[57] A more thorough discussion of the surplus problem would add yet

21 (2019) [hereinafter Woodcock, *Personalized*] (discussing condemnation of personalized pricing and price arbitrage).

[50] For an analysis on why surplus is likely to be ubiquitous and persistent in a modern capitalist economy, see Woodcock, *supra* note 20, at 12-18.

[51] *See* Guttentag, *supra* note 44, at 629 & n.110.

[52] *See generally* Michael D. Guttentag, *Evolutionary Psychology and Resource-Sharing Laws*, 44 EVOLUTION & HUM. BEHAV. 264 (2023) (arguing legal system helps encourage cooperation through resource-sharing laws).

[53] Woodcock, *Big Data*, *supra* note 49, at 1415-16 (arguing for adoption of price regulation over deconcentration to achieve distribution of wealth between consumers and firms); Woodcock, *Personalized*, *supra* note 49, at 317-21; Guttentag, *supra* note 44, at 638-40.

[54] Well-defined property rights can help to protect resources from wasteful competition, a problem made emblematic by the so-called "tragedy of the commons." *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243 (1968) (discussing inescapable problem of growing population with goal of maximizing welfare for every individual in finite system). On the other hand, the existence of private property rights can act as a prize that attracts wasteful competition. This dynamic has been used to explain the benefits from the law of salvage which limits the degree to which a rescuer at sea can keep the full value of the rescued goods. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 46 (8th ed. 2011).

[55] Guttentag, *supra* note 12, at 103-04.

[56] Michael D. Guttentag, *What Inside Information Is Worth and Why It Matters*, *in* RESEARCH HANDBOOK ON INSIDER TRADING 100, 100 (Stephen M. Bainbridge ed., 2d ed. 2025).

[57] Some economists prefer to use the term "rent" to refer to surplus, following the pioneering work of David Ricardo. *See* DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 38-39 (Georgetown, D.C., Joseph Milligan 1819). For an explanation of my preference for the surplus terminology, see Guttentag, *supra* note 44, at 623 n.79.

another element to their insight about the benefits of more equitable stock ownership.

CONCLUSION

One of the reasons scholars largely ignored the effects on inequality of legal rules was the presumption that the tax-and-transfer system is an inherently superior way to address inequality. That presumption no longer appears to be justified. An emerging body of scholarship, the "New Law and Inequality Scholarship," has identified numerous situations where it does, in fact, make sense to use the law to address inequality. In *Unequal Ownership*, Eldar and Van Loo identify several ways in which making stock ownership more equitable can help to both address inequality and, surprisingly, improve economic efficiency. *Unequal Ownership* is an invaluable contribution to the burgeoning scholarship on using the law to address inequality.