CONSUMER AGENTS

RORY VAN LOO*

ABSTRACT

In the twenty-first-century economy, individuals need market help that they are not getting. The technology has long existed for a browser plug-in that would filter out toxic social media content or an AI shopping assistant that would find and even purchase the best deals online without having to go to many different websites and product pages. Yet businesses have long used lawsuits and technical barriers to stifle such tools—tactics that Amazon and other companies are now successfully deploying against consumers using ChatGPT and other AI agents to shop. The insufficiency of digital help has potentially profound consequences for mental health, economic inequality, and democracy. At a deeper level, the absence of sophisticated third-party digital tools reflects a gaping hole in the federal regulatory framework dating back almost a century. In the throes of the Great Depression, lawmakers enacted powerful regulatory statutes for the economy's three most important individual actors—workers, investors, and consumers. That legislation, however, strengthened third-party help only for workers and investors—via labor unions and stockbrokers. In contrast, New Deal consumer protection legislation paid no attention to how third-party market actors might assist consumers. This Article shows how that omission cemented the federal core of consumer law in a dyadic, buyer-seller framework inapt for the modern networked economy. It also describes a new polyadic consumer law regime emerging at the state and sectoral level. The new consumer law regime moves beyond directly policing the consumer-business dyad to also cultivating an ecosystem of helpful private

* Associate Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania; Affiliated Fellow, Yale Information Society Project; Faculty Associate, Berkman Klein at Harvard University. For valuable input, I am grateful to Yochai Benkler, Molly Brady, Daniela Caruso, Alma Cohen, Glenn Cohen, Christine Desan, Ben Eidelson, John Goldberg, Jonathan Gould, Claudia Haupt, Howell Jackson, Daniel Markovits, Patricia McCoy, Martha Minow, Aileen Nielsen, Michael Ohlrogge, Nicholas Parrillo, Frank Pasquale, Elizabeth Kamali, Anna Lvovsky, Mark Ramseyer, Christopher Robertson, Rachel Sachs, Larry Schwartztol, Andy Sellars, Andrew Selbst, Amanda Shanor, Jed Shugerman, Henry Smith, Holger Spamann, Kathryn Spier, Roberto Tallarita, Susannah Tobin, David Walker, Laura Weinrib, Mark Wu, Yesha Yadav, David Zaring, Jonathan Zittrain, and to participants in workshops at Berkeley Law School, Berkman Klein Center, Boston College, Boston University, Cornell Law School, Harvard Law School, The Wharton School, and the Yale Information Society Project. For excellent research assistance, I am grateful to Alysha Agarwal, Eric Connolly, Preetham Chippada, Ethan Fitzgerald, Brian Flaherty, Kate McLeod, Kaley Rohlinger, and Cameron Tong.

market actors. Some laws have begun to mandate that dominant incumbent businesses give data access to third-party digital helpers. Others have conscripted the world's largest companies, such as Facebook and Citibank, to protect consumers from other harmful actors. These laws have the potential to thrive in deregulatory times because they are conservative—in the sense that they primarily rely on markets rather than government actors. But they also have the potential to upend an industry's power structure. At its most ambitious, the emerging framework amounts to a digital-age consumer industrial policy with the potential to construct more efficient, equitable, and ethical markets.

TABLE OF CONTENTS

INTRODUCTION

Consumer markets have the potential to cause great societal harm. For instance, over the same period when social media use became widespread, extreme depression increased 83% among those between eighteen and

twenty-three years of age, and suicides—which had been declining for years—began steadily rising, becoming the second most common cause of death for those between fifteen and twenty-four years of age.[1] Although the causality is still debated, a growing body of research has linked excess time spent on social media to heightened depression, anxiety, and other concerning mental health indicators.[2] Yet because Instagram, Facebook, and other social media platforms can monetize user activity through consumer advertising, they have incentives to design addictive products so that people spend more time online, not less.[3]

As another example of consumer markets' potential for great societal harm, a large body of literature has shown that businesses can manipulate people into paying more for various goods and services.[4] Since consumer spending is on average two-thirds of GDP and consumers earn significantly less than the owners of corporations,[5] manipulating consumers to pay more has the potential to contribute to economic inequality on a large scale.[6] Moreover, there is some correlational evidence that social media misinformation and rising economic inequality may increase polarization, elevate democracy-eroding leaders, and overall pose "serious threats to

1. Luca Braghieri, Ro'ee Levy & Alexey Makarin, *Social Media and Mental Health*, 112 AM. ECON. REV. 3660, 3661, 3666, 3676 (2022).

2. *See* Holly Shannon, Katie Bush, Paul J. Villeneuve, Kim G.C. Hellemans & Synthia Guimond, *Problematic Social Media Use in Adolescents and Young Adults: Systematic Review and Meta-Analysis*, JMIR MENTAL HEALTH, issue no. 4, Apr. 2022, art. no. e33450, at 2 (conducting a meta-analysis of 18 studies of young adults and adolescents and finding "statistically significant correlations between problematic social media use and depression," noting also that when not at higher levels or problematic, some reports link social media use to "higher quality of life, social support, well-being, and reduced stress"); Jeffrey Lambert, George Barnstable, Eleanor Minter, Jemima Cooper & Desmond McEwan, *Taking a One-Week Break from Social Media Improves Well-Being, Depression, and Anxiety: A Randomized Controlled Trial*, 25 CYBERPSYCHOLOGY, BEHAV., & SOC. NETWORKING 287, 287 (2022) (running a randomized controlled trial of adults and finding that "asking people to stop using [social media] for 1 week leads to significant improvements in well-being, depression, and anxiety"); Jean M. Twenge, Jonathan Haidt, Jimmy Lozano & Kevin M. Cummins, *Specification Curve Analysis Shows that Social Media Use Is Linked to Poor Mental Health, Especially Among Girls*, 224 ACTA PSYCHOLOGICA, Apr. 2022, art no. 103512, at 5 (estimating that among girls, the association between poor mental health and social media is stronger than that for binge drinking, sexual assault, and drug use); Braghieri et al., *supra* note 1, at 3675 n.22 (concluding that "the introduction of Facebook at a college increased the share of students who reported suffering from severe depression"). On the limits of these studies, see *infra* Section I.A.1.

3. *See* Cristina Voinea, Lavinia Marin & Constantin Vică, *Digital Slot Machines: Social Media Platforms as Attentional Scaffolds*, 43 TOPOI 685, 686–87 (2024).

4. *Infra* Section I.A.2.

5. This includes interest payments but excludes household payments spent on government services and transfers abroad. *See National Data: National Income and Product Accounts*, BUREAU OF ECON. ANALYSIS (Aug. 28, 2025), https://apps.bea.gov/iTable/?reqid=19&step=3&isuri=1&nipa_table_list=65&categories=survey [https://perma.cc/DNU8-B3BF].

6. *See* Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211, 229–31 (2019).

democracy."[7] Although more study is needed of consumer market harms, there is good reason to think that shielding more consumers from harm could yield tremendous gains for society.

Entrepreneurs like software engineer Tracy Chou have tried to help. After being harassed online, Chou released an app, Block Party, that allowed Twitter users to press a single button to block all those who liked or reposted a derogatory tweet.[8] But after Block Party had taken off in popularity, Twitter said it would no longer allow the app to have free access, leading to the demise of the startup.[9] Many other efforts to provide consumers with AI agents, ranging from a bargain-hunting digital shopping assistant to a social media content filter, have met similar fates through legal or technical barriers erected by incumbent businesses.[10]

This Article shows how the core consumer law framework is antiquated because it focuses on directly policing an adversarial relationship between a business and a consumer.[11] In social media, that dyadic model runs up against the First Amendment. As a matter of constitutional law, regulators cannot, for instance, make platforms take down derogatory speech or videos that cause teenage body-shaming.[12] In consumer spending, the problem is more about pragmatism and norms. In theory, the Federal Trade Commission (FTC) could devise rules to prevent any single manipulative practice, but there are countless practices that cause consumers to pay more. For instance, businesses from Airbnb to United Airlines to Ticketmaster use "drip-pricing" fees that appear later in the checkout process after much time

7. Philipp Lorenz-Spreen, Lisa Oswald, Stephan Lewandowsky & Ralph Hertwig, *A Systematic Review of Worldwide Causal and Correlational Evidence on Digital Media and Democracy*, 7 NATURE HUM. BEHAV. 74, 83 (2023) (reviewing 496 articles on the link between social media and misinformation); *see also* CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2017) (describing how social media contributes to polarization, extremism, and political fragmentation); Eli G. Rau & Susan Stokes, *Income Inequality and the Erosion of Democracy in the Twenty-First Century*, 122 PROC. NAT'L ACAD. SCIS., issue no. 1, Jan. 2025, art. no. e2422543121, at 1 ("The more unequal income distribution is in a democracy, the more at risk it is of electing a power-aggrandizing and norm-shredding head of government."). Empirical study of the connection between social media and political outcomes is methodologically limited and has large gaps even for what could be done. *See* Lorenz-Spreen et al., *supra*, at 83; *infra* Section I.A.1.

8. Billy Perrigo, *She Built an App to Block Harassment on Twitter. Elon Musk Killed It*, TIME (June 2, 2023, 11:01 AM), https://time.com/6284494/block-party-twitter-tracy-chou-elon-musk/ [https://perma.cc/9NHE-HD72].

9. Block Party ceased its operations after Twitter decided to no longer allow Block Party free access. *See id.*

10. *See infra* Part II (summarizing how Facebook, banks and other businesses have neutralized consumer agents, such as Amazon blocking AI agents offered by Perplexity and ChatGPT).

11. For instance, two of the leading consumer law textbooks summarize the field of consumer law through a dyadic lens. *See* KATHERINE PORTER, MODERN CONSUMER LAW 1–10 (2016) (providing an overview of consumer law without mentioning third-party help); DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON CONSUMER LAW, at xxiii (7th ed. 2013) (same).

12. This is not to say that consumer law can do nothing. *See infra* Section I.B.

has already been spent on the purchase.[13] As another example, many companies make it difficult to find the cancellation link for a subscription or the "opt-out" button for personal data collection.[14] Directly policing these and myriad other related practices can sometimes work. But if used as the only solution, direct regulation would fall short or require extreme government intervention, treating much of the private sector like heavily regulated utilities. That level of regulation would likely face broad opposition and, even if implemented, might in some markets harm consumers by holding back innovation or raising costs.[15]

A more promising approach lies in consumer law moving from a dyadic to a polyadic model. Under this approach, when seeking to address a consumer harm, policymakers do not default to directly regulating the business-consumer relationship causing the harm. Instead, they first take a step back and ask what array of market actors—whether existing or new—might improve consumer markets. They then choose the best among the many options, including direct regulation.

When a policymaker chooses to intervene through consumer agents, there are two main steps. The first is ensuring that some market actor provides consumers with help. This actor is hereinafter referred to as a "consumer agent." To set consumer agents up for success, the law may need to remove legal or technical obstacles, like the access barriers faced by Block Party.[16] The second step is ensuring that consumer agents are trustworthy or loyal. This is a shift from the traditional consumer law model, which does not distinguish between consumer agents and end sellers in terms of expectations for conduct.[17] Yet, people may trust agents too much or be incapable of assessing their performance.[18] Thus, the law may want to impose a higher standard of dealing, such as a fiduciary duty, on some

13. *See, e.g.*, Tom Blake, Sarah Moshary, Kane Sweeney & Steve Tadelis, *Price Salience and Product Choice*, 40 MKTG. SCI. 619, 619 (2021) (describing drip pricing strategies as "common").

14. *See, e.g.*, Carter McCants, Note, *Canceling Difficult Cancellation: An Analysis of Recent Regulatory Efforts to Make Canceling Subscriptions Easier*, 14 WM. & MARY BUS. L. REV. 463, 477 (2023) ("The company may have required that you call a toll-free hotline and wait on hold to speak with a representative, or they may have deliberately buried their cancellation link somewhere on their website.").

15. This is not to say that consumer law can do nothing. *See infra* Section I.B.

16. Protecting third-party digital tools has a rich history in legal scholarship. *See, e.g.*, Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135, 136–37 (2007); Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES L. 487 (2016).

17. *See infra* Section I.B.

18. *Infra* Section II.D.

consumer agents.[19] Such heightened duties are not part of the traditional consumer law framework.

The disconnect between what the traditional consumer law framework does and what consumers increasingly need traces back to Depression-era legislation. The core of consumer law is the authority to prohibit unfair and deceptive acts and practices, granted to the FTC in 1938.[20] It is understandable why lawmakers at the time paid no attention to third-party help, because in the 1930s it was virtually nonexistent even for large consumer transactions, such as purchasing a home or taking out a loan.[21] Now, however, buyers' real estate agents, online search engines, and mortgage brokers are widespread.[22] Such third-party help is more necessary today in light of how sophisticated businesses leverage artificial intelligence, greater market complexity, and the harvesting of personal data to harm consumers in new ways.[23] Consumer agents are also now more viable as a mass business model in the era of agentic commerce because consumers can leverage agentic AI or compound AI systems to save a few dollars on groceries or avoid a single toxic post in a social media feed—situations that would not justify the cost or inconvenience of a human agent.[24] One delegated AI agent might visit all websites and product pages to compare final prices—after all the fees are added for cleaning, shipping, checked baggage, and so on—and even execute the transaction for the consumer. Another AI agent could edit someone's social media feed by removing content that harms mental health or that prompts dangerous behavior, such as the viral "blackout challenge" videos encouraging kids to self-asphyxiate, sometimes fatally.[25] Instead of setting up these consumer agents for success, however, the law has too often allowed incumbents to obstruct them.[26]

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19. In particular industries, scholars have recognized the need for greater regulatory requirements for intermediaries, especially disclosures. *See, e.g.*, Howell E. Jackson, *The Trilateral Dilemma in Financial Regulation*, *in* OVERCOMING THE SAVING SLUMP: HOW TO INCREASE THE EFFECTIVENESS OF FINANCIAL EDUCATION AND SAVING PROGRAMS 82, 82–83 (Annamaria Lusardi ed., 2008) (identifying aggregate compensation disclosures as a promising approach to consumer financial intermediaries' potential to abuse consumers).

20. Wheeler-Lea Act, ch. 49, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. §§ 41, 44, 45, 52–58).

21. *Infra* Section I.C.3.

22. *Infra* Section I.E.

23. *See, e.g.*, FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 163–64 (2015) (outlining the opaqueness of harms in the digital era).

24. *Infra* Section I.D.

25. David French, Opinion, *The Viral Blackout Challenge Is Killing Young People. Courts Are Finally Taking It Seriously.*, N.Y. TIMES (Sept. 5, 2024), https://www.nytimes.com/2024/09/05/opinion/tiktok-blackout-challenge-anderson.html [https://perma.cc/6T99-MR3X].

26. *Infra* Section II.A.

In the absence of broad-based federal action, signs of an alternative framework have emerged at the state and sectoral level. One approach is to empower inherently helpful tools by ensuring that incumbents cannot starve them of the data they need to function. For instance, the 2018 California Consumer Privacy Act required businesses to allow consumers to obtain their data in machine-readable form that could then be shared with third parties.[27] Another approach within the emerging framework is to conscript existing companies to play a consumer law enforcement role that they would not necessarily otherwise assume. An example of this is federal law requiring credit card companies to give consumers a process for disputing charges if, for instance, the goods are defective.[28] The credit card issuer must then investigate and may withhold payment from the merchant in the meantime, giving consumers more power in asserting their legal rights against merchants.[29]

These and other developments have begun to offer consumers the kind of multiparty help that the law long ago offered the economy's other two main individual economic actors, investors and workers. In the Depression era, lawmakers passed federal statutes mandating that unions have access to workers and imposed heightened duties on investment advisers.[30]

This Article sketches and theorizes that emerging framework, which is marked by two main conceptual shifts.[31] The most straightforward, which has been the focus of the discussion so far, requires moving beyond the buyer-seller dyad to think about the multiparty relationships among consumers, their chosen agents, and the web of commercial actors surrounding the seller. The second conceptual shift is moving from mostly just policing business harm to also cultivating business help.

At its most ambitious, this new framework calls on policy makers to create new institutional blueprints for a more collaborative commercial

27. California Consumer Privacy Act of 2018, sec. 3, § 1798.100(d), 2018 Cal. Legis. Serv. Ch. 55 (West) (codified with some differences in language at CAL. CIV. CODE § 1798.130(a)(3)(B)(iii) (West 2025)).

28. 15 U.S.C. §§ 1666–66j.

29. *Id.* § 1666.

30. *See infra* Section I.C.

31. In sketching this new paradigm, the Article draws on a broad range of scholarship that has filled in some of the crucial pieces, especially in subareas of consumer law such as consumer finance, health care, retail goods, and privacy. That literature provides valuable foundations for understanding intermediaries and agents but had different points of focus than this Article and thus did not (1) sketch the broader paradigm shift needed for consumer law, (2) trace the field's gap to an idiosyncratic, hollowed out core dating back to the New Deal, or (3) identify a broad alternative regime for consumer markets emerging at the state and sectoral level. For examples, see Rory Van Loo, *Digital Market Perfection*, 117 MICH. L. REV. 815, 838–39 (2019); Chris Brummer & Yesha Yadav, *Fintech and the Innovation Trilemma*, 107 GEO. L.J. 235, 245 (2019); Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 583–88 (2015); Amanda B. Gottlieb, Note, *Reevaluating the Computer Fraud and Abuse Act: Amending the Statute to Explicitly Address the Cloud*, 86 FORDHAM L. REV. 767, 770–71 (2017).

landscape. A foundational part of the vision is building a digital infrastructure that enables consumer agents to thrive. Another way of framing this is as a consumer market industrial policy. The strategic goal here, however, is not international competitiveness—although that goal could be indirectly advanced. Instead, the immediate policy goal is to fulfill the age-old promise of dynamic markets that create opportunity, community, and prosperity for all.

Part I traces the roots of the traditional consumer law model, contrasting its omission of third-party help to the multiparty models of labor law and securities regulation. It also shows how the dyadic consumer law model faces considerable shortcomings, particularly in the digital era. Part II summarizes the legal, technical, and business obstacles that consumer agents face without a legal framework that supports them. Part III sketches the emerging alternative framework at the state and sectoral level. Part IV considers critiques, offers a reframing of consumer law, and explores paths toward developing this emerging framework by both strengthening it at the periphery of consumer law, where it already exists, as well as at the core of consumer law, especially the FTC's Bureau of Consumer Protection.

Before turning to the main discussion, a note is in order about terminology. *Consumer agent* below refers generally to a private third party working actively on the consumer's behalf with respect to the consumer's transaction with some other business. For this Article's main thesis, however, striving for a precise definition of a consumer agent would be distracting and potentially counterproductive. The main goal is to think about whether and how the legal framework should pay closer attention to third-party consumer help. Devoting space below to establishing a precise definition, like most line-drawing exercises, would risk directing attention to difficult calls as to what is in and what is out. That exercise may later be necessary in designing specific policies, but for now risks obscuring the broader conceptual shift that is needed.

To take one potentially confusing case, Amazon, for some portion of the goods it sells, is linking a buyer to a third-party seller, suggesting it acts in some ways consistent with a consumer agent.[32] Yet it is also a direct seller of its own goods.[33] Thus, Amazon has arguably an inherently arm's-length relationship with consumers, in which its main focus is getting the consumer to do business with itself rather than with a third party. For present purposes, one way to think about this distinction is to say that when a business owns

32. *See, e.g.*, Edward J. Janger & Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller Not a Neutral Platform*, 14 BROOK. J. CORP. FIN. & COM. L. 259, 262–67 (2020) (summarizing Amazon's business model).

33. *Id.* at 262.

the end product, it is no longer inherently a consumer agent. The law may nonetheless conscript that business to act, at times, as a consumer agent. Rather than getting lost in debates implying a binary taxonomy, the threshold institutional question in the context of Amazon is whether consumers in the e-commerce marketplace have adequate third-party help. There is reason to think that in important ways they do not—and that Amazon cannot provide all the help consumers would want even solely on its marketplace because Amazon has an interest in selling the products it owns at as high of a price as possible.[34] Thus, attention to consumer agent help is important regardless of how Amazon is classified.[35]

Many different types of consumer agents currently exist and could be imagined—some serving businesses and some serving consumers, some giving advice and some executing the transaction, some owing no duties and some owing fiduciary duties.[36] The key policy question is whether the law has a role to play in moving some of these actors further along the spectrum toward providing more consumer help in whatever form. The answer requires a pluralistic sense of the institutional forms that contribute to a healthier ecosystem of third-party relationships.

In practical terms, although reinforcing the emerging consumer law framework is in some ways quite ambitious, it may nonetheless at some point offer a politically feasible set of policy options. As a matter of process, its solutions are functionally rooted in private industry and autonomy—thus potentially appealing to those wary of bureaucratic paternalism.[37] In terms of substance, investing in consumer agents can advance a broad range of goals. By fixing traditional market shortcomings such as information asymmetries and externalities, it would appeal to economics-minded observers. By reducing the power gap between consumers and large corporations, it can appeal to those looking for more systemic change and

34. This means both that Amazon may have incentives to direct consumers to the products it owns and that it may want to maintain a higher price equilibrium in the categories in which it sells its own products, since doing so will bring it higher profit margins on sales of its own items. Many factors will influence this analysis, such as whether Amazon believes it can earn more profits by taking a smaller percentage of third-party sales or a higher percentage of its own sales. *See generally* Rory Van Loo & Nikita Aggarwal, *Amazon's Pricing Paradox*, 37 HARV. J.L. & TECH. 1 (2023) (analyzing Amazon's pricing strategies and dynamics).

35. Furthermore, there is a question as to what duties Amazon should owe to consumers given its hybrid role as both intermediary and direct counterparty. The discussion below sheds some light on that question, but it is not the direct focus.

36. *Infra* Part III.

37. Many of the new consumer law policies might be called "regulation for conservatives," in that they help some consumers while allowing other consumers to continue unimpeded if they choose to do so. *See* Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1232–36 (2003).

equality. By drawing on common law doctrines, it can appeal to those seeking to preserve fundamental rights and duties. And by promising a more effective means of enforcing the law, it can appeal to those wanting justice to be served. Thus, what amounts to a new consumer law offers a potentially consensus-building path forward for a more normatively inclusive twenty-first-century economy.

I. THE ROOTS OF CONSUMER AGENTS

A. Consumer Markets Are Failing

Spending money and using social media are two of the most important ways that individuals act as consumers, implicating the state of the economy, mental health, and even democracy. They are also activities squarely within the domain of consumer law.[38] This Section briefly summarizes the evidence suggesting that consumer markets are failing to prevent significant harms in both of these areas.

1. Social Media

A large body of research has linked the use of social media to a substantial deterioration in mental health.[39] Much of this data is correlational and requires further analysis. For instance, it is hard to know what to make of the data showing suicide rates among teens were declining until 2007, around the time when teens began to widely use Facebook, after which their suicide rates steadily increased.[40] Somewhat stronger evidence comes from Facebook's staggered arrival to college campuses, because it allows researchers to compare students on campuses with access to similar students on campuses without access during the same period.[41] This data indicates that the availability of Facebook on campus led to an increase in depression and anxiety.[42] Additionally, in several randomized controlled

38. On social media use sitting at the core of consumer law, see *infra* Section I.B.

39. *See* sources cited *supra* note 2.

40. Dave E. Marcotte & Benjamin Hansen, *The Re-Emerging Suicide Crisis in the U.S.: Patterns, Causes and Solutions* 24–26 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31242, 2023), https://www.nber.org/system/files/working_papers/w31242/w31242.pdf [https://perma.cc/A8PW-P4W6].

41. Braghieri et al., *supra* note 1, at 3661.

42. *Id.* at 3674.

experiments of adults, halting social media led to improvements in self-assessments of depression, anxiety, and overall wellbeing.[43]

Correlational evidence also links social media use to disinformation and polarization.[44] However, the concrete implications for elections and democracy are difficult to study directly, because it is hard to know the counterfactual, and impractical to run a controlled experiment on, say, a major election. Nonetheless, in one controlled experiment, researchers found that subjects who stopped using social media had reduced political polarization on policy issues.[45]

Complicating matters, social media platforms design their algorithms and interfaces to maximize engagement, adopting techniques deployed by casinos to hook gamblers.[46] For instance, platforms supply dopamine-triggering alerts for likes, shares, and comments delivered on unpredictable reward schedules akin to slot machines.[47] Platforms have strong incentives to get users to spend more time online because time can be monetized as advertising revenue.[48] Yet more time spent on social media is linked to worse mental health.[49] Thus, if the existing literature is correct about adverse mental health effects, platforms have market incentives to drive people toward harmful behavior.

This array of evidence and theory will be persuasive to some but not others. Part of this difference is because people might look at the same evidence and reasonably attribute different levels of probability to social media causing harms. Furthermore, whatever that confidence level may be, there is considerably more evidence that some causal relationship exists

43. *See, e.g.*, Hunt Allcott, Luca Braghieri, Sarah Eichmeyer & Matthew Gentzkow, *The Welfare Effects of Social Media*, 110 AM. ECON. REV. 629, 630–31 (2020) (studying a four-week deactivation of Facebook); Lambert et al., *supra* note 2, at 287 (studying the effects of a one-week break from social media).

44. *See* Lorenz-Spreen et al., *supra* note 7, at 78–79 (reviewing various empirical studies suggesting social media's amplification of disinformation can increase vaccine refusal rate and manipulate election outcomes); Nir Grinberg, Kenneth Joseph, Lisa Friedland, Briony Swire-Thompson & David Lazer, *Fake News on Twitter During the 2016 U.S. Presidential Election*, 363 SCIENCE 374, 377 (2019) ("[T]he vast majority of fake news shares and exposures were attributable to tiny fractions of the population."). In this sense, social media is not necessarily different from traditional media and appears to play a smaller role in disinformation overall. YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 309–10 (2018) (finding that traditional media outlets such as Fox News played a larger role in disinformation than social media).

45. Allcott et al., *supra* note 43, at 631.

46. *See* Voinea et al., *supra* note 3, at 688 ("Social media platforms work as digital slot machines, instrumentalizing users' attention through a sophisticated system of intermittent rewards.").

47. *Id.* at 688–89.

48. *See* Kathryn E. Spier & Rory Van Loo, *Foundations for Platform Liability*, 100 NOTRE DAME L. REV. 1137, 1162–63 (2025).

49. *See* Rosemary Sedgwick, Sophie Epstein, Rina Dutta & Dennis Ougrin, *Social Media, Internet Use and Suicide Attempts in Adolescents*, 32 CURRENT OP. PSYCHIATRY 534, 540 (2019).

than there is on the particular mechanism driving that relationship—making it difficult to know whether any effect on mental health is due to exposure to more reference groups, observation of negative videos, a lack of sleep from increased evening screen time, or something else. Even those agreeing on the probability of causality being around 80%, for example, may come to differing conclusions about whether that level is sufficient for the law to intervene—or whether something much higher is needed to justify the risks of going too far with policy interventions.[50]

It is worth noting, however, that there are risks in both underestimating and overestimating the value of correlational data. Indeed, the link between smoking and cancer was downplayed for decades because it relied on correlational data, even long after strong epidemiological evidence had emerged.[51] That delay caused untold health consequences on an unwarned population.[52] Complexifying the problem is the reality that policymakers must weigh not only the probability that the harms are real but also the likelihood of successful intervention.[53]

A growing number of authorities are finding the evidence convincing enough to act.[54] For instance, motivated in part by concerns about mental health effects, U.K. lawmakers enacted legislation to protect people from cyberbullying, material that encourages suicide, and other potentially harmful social media content.[55] After reviewing the literature, the U.S. Surgeon General called for responding to the mental health crisis by limiting access to social media for children and issuing a warning analogous to those

50. *See generally* PAUL WEIRICH, RATIONAL RESPONSES TO RISK 204–10 (2020) (framing regulatory issues as "coalitional games" wherein citizens who assign the same probability to a risk may assign different utility values to a given regulatory intervention).

51. Robert N. Proctor, *The History of the Discovery of the Cigarette—Lung Cancer Link: Evidentiary Traditions, Corporate Denial, Global Toll*, 21 TOBACCO CONTROL 87, 87–89 (2012) (explaining that, despite numerous population studies demonstrating a strong correlation between cigarette smoking and lung cancer, in 1960, "only a third of all US doctors agreed that cigarette smoking should be considered 'a major cause of lung cancer'").

52. *Id.* at 89–90.

53. On the likelihood of successful intervention, see *infra* Section IV.A.3.

54. *What Countries Do to Regulate Children's Social Media Access*, REUTERS (Nov. 26, 2025, 7:47 AM), https://www.reuters.com/technology/what-countries-do-regulate-childrens-social-media-access-2024-11-28/ [https://perma.cc/DA64-3Z3H].

55. *See Online Safety Act: Explainer*, U.K. DEP'T FOR SCI., INNOVATION & TECH (Apr. 24, 2024), https://www.gov.uk/government/publications/online-safety-act-explainer/online-safety-act-explainer [https://perma.cc/Q44B-4XK7] (summarizing the legislation passed to protect users from some of the harms thought to contribute to worse mental health online, such as bullying).

on cigarette packages.[56] Some of these proposals appear to have bipartisan support.[57]

For purposes of this Article's main focus, one need not have any particular degree of confidence about the specific harms caused by social media. But the standard for adopting a legal framework has never been causal certainty, and those wanting to retain the status quo framework would not be able to meet an evidentiary bar of certainty either.[58] At a minimum, it helps to recognize that many policymakers are proceeding under the assumption that social media is imposing significant costs on society, and there is some empirical support for adopting policies to lessen those harms.[59]

2. Consumer Spending

Consumer spending accounts for roughly $19 trillion annually.[60] Given this economic magnitude, it is unsurprising that businesses engage in myriad tactics to charge consumers more, even if the strategies individually seem insignificant. The research on how much more consumers pay due to consumer manipulation is too large to succinctly summarize here, but to provide a few examples: minor changes to eBay's search algorithms can save consumers up to 15%;[61] health insurance search frictions were estimated to transfer $66 billion from consumers to businesses annually;[62] consumers trying to select the best cell phone plan among even a single carrier's options were found to overpay by 8% on average by making the

56. U.S. PUB. HEALTH SERV., SOCIAL MEDIA AND YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL'S ADVISORY 15 (2023), https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf [https://perma.cc/G3AE-SWXZ]; Vivek H. Murthy, Opinion, *Surgeon General: Why I'm Calling for a Warning Label on Social Media Platforms*, N.Y. TIMES (June 17, 2024), https://www.nytimes.com/2024/06/17/opinion/social-media-health-warning.html [https://perma.cc/AXR3-B8QJ].

57. *See, e.g.*, Murthy, *supra* note 56.

58. Stated otherwise, the evidence does not support a conclusion that social media makes no contribution to mental health and disinformation. For more on translating evidence into the choice of the consumer law framework, see *infra* Section IV.A.3.

59. One of the open questions is about the precise causal mechanism for mental health harms with potential contributors including disrupted sleep, cyberbullying, and expanded social comparison. *See* Marcotte & Hansen, *supra* note 40, at 23–26 (reviewing the literature).

60. This includes interest payments but excludes household payments spent on government services and transfers abroad. *See National Data: National Income and Product Accounts*, *supra* note 5.

61. *See* Michael Dinerstein, Liran Einav, Johnathan Levin & Neel Sundaresan, *Consumer Price Search and Platform Design in Internet Commerce*, 108 AM. ECON. REV. 1820, 1821 (2018) (reviewing internal data to conclude that re-organizing eBay search processes could lower consumer prices by up to 15% by exposing consumers to different sellers).

62. Randall D. Cebul, James B. Rebitzer, Lowell J. Taylor & Mark E. Votruba, *Unhealthy Insurance Markets: Search Frictions and the Cost and Quality of Health Insurance*, 101 AM. ECON. REV. 1842, 1842–44, 1868 (2011) (adjusting from $34 billion for inflation).

wrong choice in terms of the ultimate costs for data usage and fees;[63] drip pricing practices increased spending on StubHub by 21%;[64] for online computer accessories, the obfuscation of shipping fees and other information allowed sellers to charge approximately 6% above the competitive price;[65] and Medicare recipients paid roughly 30% more for prescriptions solely by choosing the wrong plan.[66] Price increases due to these and related forms of manipulation are hereinafter referred to as overcharge.

In addition to that bottom-up evidence from individual markets, a top-level perspective on consumer prices comes from data about markups—or the amount that firms charge consumers above how much it costs to produce the products. Economists have found that businesses have increased their profitability and markups significantly in recent decades, with the leading study estimating that markups rose from 21% above costs in 1980 to 61% in 2016.[67] The debate about the causes of this rise in profitability and markups is ongoing and such broad-based economic data does not definitively establish that competition has declined, but it does add further weight to arguments that targeted competition policy could do more.[68] The

63. Oren Bar-Gill & Rebecca Stone, *Pricing Misperceptions: Explaining Pricing Structure in the Cell Phone Service Market*, 9 J. EMPIRICAL LEGAL STUD. 430, 453–54 (2012).

64. *See* Blake et al., *supra* note 13, at 625. Note that unlike the other examples provided here, this study was inconclusive as to whether the higher prices were anticompetitive but rather demonstrated an ability for drip pricing to steer consumers to higher-priced tickets.

65. Glenn Ellison & Sara Fisher Ellison, *Search, Obfuscation, and Price Elasticities on the Internet*, 77 ECONOMETRICA 427, 428–29 (2009).

66. *See* Jason Abaluck & Jonathan Gruber, *Choice Inconsistencies Among the Elderly: Evidence from Plan Choice in the Medicare Part D Program*, 101 AM. ECON. REV. 1180, 1190–92 (2011); Jeffrey R. Kling, Sendhil Mullainathan, Eldar Shafir, Lee C. Vermeulen & Marian V. Wrobel, *Comparison Friction: Experimental Evidence from Medicare Drug Plans*, 127 Q.J. ECON. 199, 215 (2012).

67. Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561, 562 (2020). A later study deploying an alternative methodology found substantial markups but of a lower magnitude. Hendrik Döpper, Alexander MacKay, Nathan H. Miller & Joel Stiebale, *Rising Markups and the Role of Consumer Preferences* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32739, 2024), https://www.nber.org/system/files/working_papers/w32739/w32739.pdf [https: //perma.cc/F92Z-VYZE] ("[W]e estimate that average product-level markups increase by about 30 percent between 2006 and 2019."). These studies face limitations in not having access to actual cost and other internal firm data. A survey of studies of specific industries found that markups increased in consumer-packaged goods and airline travel, and decreased in automobiles. Nathan H. Miller, *Industrial Organization and the Rise of Market Power* 13, 18, 19, (Nat'l Bureau of Econ. Rsch., Working Paper No. 32627, 2024), https://doi.org/10.3386/w32627 [https://perma.cc/63WB-9C8M].

68. De Loecker et al., *supra* note 67, at 562 (explaining the markups largely in terms of market power); Döpper et al., *supra* note 67, at 3 (finding lowered costs that were not passed on to consumers and changes in consumer price sensitivity had the greatest explanatory value); Carl Shapiro & Ali Yurukoglu, *Trends in Competition in the United States: What Does the Evidence Show?*, at 34 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32762, 2024), https://doi.org/10.3386/w32762 [https://perma.cc/9TTQ-EAM7]. The macroeconomic methodology deployed by De Loecker et al. does not

surrounding policy debates focus on antitrust policy, not competition.[69] As a matter of economic theory, however, consumer manipulation can contribute to higher markups and higher profitability.[70] Moreover, one supported causal explanation for rising markups, decreased price sensitivity,[71] can result from consumer manipulation.[72] Although these connections require further study to draw any firm conclusions, the data on markups and the evidence of manipulation in many industries is consistent with the possibility that reducing consumer manipulation could amount to large-scale economic shifts.[73]

There are many reasons why large-scale consumer manipulation would matter for society. At a minimum, consumer overcharge is overall inefficient, in the sense that it would be expected to harm the economy overall by lowering productivity.[74] Preventing such overcharge also advances social norms of treating others with civility and respecting private autonomy, rooted in common law principles that many believe are important for society to preserve.[75] Moreover, given the magnitude of

depend on directly observing marginal costs and prices, unlike that by Döpper et al., *supra* note 67, at 6. *See also* Miller, *supra* note 67, at 5.

69. *See, e.g.*, sources cited supra note 68.

70. *See* Ellison & Ellison, *supra* note 65, at 428–29; Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505, 526–27 (2006). Many further issues would need to be worked out to make this connection. For instance, De Loecker et al. found that much of the higher markups go to about 10% of firms. De Loecker et al., *supra* note 67, at 580. *But see* Döpper et al., *supra* note 67, at 15 ("[T]he aggregate trends in markups in our sample are not isolated to a subset of products or firms . . . ."). If correct, one possible explanation rooted in consumer manipulation is that the general difficulty consumers face in comparing obfuscated prices may disincentivize firms with lower cost structures from lowering prices to attract market share. As a result, firms with higher cost structures might not face the same competitive pressures to lower their cost structures that they would otherwise.

71. Döpper et al., *supra* note 67, at 21 ("[D]eclines in price sensitivity alone can explain 48 percent of the within-product variation in markups . . . .").

72. The studies on consumer manipulation show how consumers are overall less sensitive to prices when those prices are obfuscated, such as when more of the price is shifted toward add-on fees. *Supra* notes 61–66 and accompanying text; *see also* Raj Chetty, Adam Looney & Kory Kroft, *Salience and Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145 (2009) (finding that consumers are more price sensitive in beer purchases when tax is included on the shelf than when added at the cash register).

73. *Supra* notes 61–66 and accompanying text (summarizing the microeconomic empirical literature showing markups); Van Loo, *supra* note 6, at 229–32.

74. *See, e.g.*, OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 26 (2012) (analyzing behavioral pricing practices from an economic standpoint); Gabaix & Laibson, *supra* note 70, at 526–27 (demonstrating connection between poorly informed consumers and less competitive markets); Ellison & Ellison, *supra* note 65, at 427–29.

75. *Cf.* Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1363–65 (2015) (summarizing the common law tort and contract roots of reducing consumer overcharge); Hanoch Dagan & Avihay Dorfman, *Just Relationships,* 116 COLUM. L. REV. 1395, 1397 (2016) ("The intrinsic value of private law lies in its construction of frameworks of respectful interaction—of just relationships—among genuinely free and equal individuals."); JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 350 (2020) ("[T]ort law stands both to

consumer spending, overcharge of even a few percentage points across all of consumer spending can cause macroeconomic shifts with potentially significant implications for financial stability, inflation, and economic inequality.[76] Economic inequality may be the most concerning of these implications, especially in light of preliminary evidence that "economic inequality is one of the strongest predictors of where and when democracy erodes."[77] If that research is correct—and it must be viewed cautiously in light of the inherent difficulties of studying changes in democracy—it could have implications for recent political developments in the United States.[78] The top 1% of households earned about 10% of all income in 1980, but by 2010, they earned close to 20%.[79] The potential causal link between income inequality and democratic erosion, the subject of much debate, is that inequality is believed to contribute to polarization, which in turn contributes to democratic erosion.[80]

The link between consumer overcharge and economic inequality stems from the heavily skewed ownership of businesses. To illustrate, the top 20% of households own more than 85% of all corporate equity, and the top 1% of households alone own more than half of all public and private business equity.[81] Yet most consumer spending comes from the bottom 80% of

reinforce and revise an important moral dimension of social life—the dimension sometimes expressed through the idiom of civil society.").

76. *See* Rory Van Loo, *Inflation, Market Failures, and Algorithms*, 96 S. CAL. L. REV. 825 (2023) [hereinafter Van Loo, *Market Failures*] (showing that addressing consumer manipulation can help to lower inflation in ways that are preferable to increasing interest rates, which destroy jobs, harm economic productivity, and risk financial crises); Yair Listokin & Rory Van Loo, *Against Monetary Primacy*, 119 NW. U. L. REV. 1483 (2025) (expanding on the need for addressing inflation through tools other than interest rates, including consumer law); Van Loo*, supra* note 6, at 229–32 (linking consumer overcharge to economic inequality and productivity); Rory Van Loo, *Digital Market Perfection*, 117 MICH. L. REV. 815, 835–36 (2019) (discussing the financial stability implications of digital agents).

77. *See generally* Rau & Stokes, *supra* note 7, at 1 (reviewing the literature and conducting "a large cross-national statistical study of risk factors for democratic erosion").

78. *Id.*

79. Facundo Alvaredo, Anthony B. Atkinson, Thomas Piketty & Emmanuel Saez, *The Top 1 Percent in International and Historical Perspective*, 27 J. ECON. PERSPS., Summer 2013, at 3, 4. Note that once Social Security benefits are considered, inequality is considerably less extreme. *See* Sylvain Catherine, Max Miller & Natasha Sarin, *Social Security and Trends in Wealth Inequality*, 80 J. FIN. 1497, 1500 (2025).

80. Rau & Stokes, *supra* note 7, at 1–2; Jennifer McCoy, Tahmina Rahman & Murat Somer, *Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Polities*, 62 AM. BEHAV. SCIENTIST 16, 25–26 (2018).

81. *See* Joshua Gans, Andrew Leigh, Martin Schmalz & Adam Triggs, *Inequality and Market Concentration, When Shareholding Is More Skewed Than Consumption* 9 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25395, 2018), https://www.nber.org/system/files/working_papers/w25395/w25395.pdf [https://perma.cc/6B65-BWEY]; Arthur B. Kennickell, *Ponds and Streams: Wealth and Income in the U.S., 1989 to 2007*, at 1–2, 78 fig.A5a (Fed. Reserve Bd., Working Paper No. 2009-13, 2009), https://www.federalreserve.gov/pubs/feds/2009/200913/200913pap.pdf [https://perma.cc/7RFE-Z9CX] (analyzing federal data showing that top 1% of earners own between 55% and 60% of all public and private businesses).

families.[82] Since low- and middle-income families account for most of consumer spending but most of business equity belongs to high-income families, when businesses overall charge higher consumer prices it potentially transfers wealth from a lower-income to a higher-income group.[83]

Another perspective on this connection comes from the dramatic increase in U.S. inequality between 1980 and 2010, which amounted to about a trillion dollars more in income earned by the top 1%.[84] To reach a trillion dollars in total consumer overcharge in 2010, there would have (hypothetically) needed to have been about 10% overcharge across all of consumer spending.[85] Since markups overall rose 40 percentage points between 1980 and 2016,[86] it is at least plausible that greater manipulation of consumer prices could have been a significant factor in rising inequality.[87] More importantly for present purposes and regardless of the historical relationship, these figures demonstrate that if consumer law can lower overcharge by even a few percentage points, it offers a potentially significant mechanism for lessening inequality while improving efficiency.

As with the social media evidence, the link between consumer overcharge and societal consequences faces empirical limits in terms of what is known and knowable.[88] Of course, rigorous empirical evidence should drive policy analysis whenever possible, and improving that evidence should be a scholarly priority moving forward. As with social media, however, many scholars have previously looked at the preliminary evidence and concluded that it establishes a link between overcharge and economic inequality.[89] Regardless, since there are independent and

82. Gans et al., *supra* note 81, at 7

83. More precisely, consumer spending is significantly more evenly spread out across socioeconomic groups than business ownership. Gans et al., *supra* note 81, at 3 ("[T]he distribution of corporate equity is skewed towards the top of the distribution, more so than the skewness of consumption."). This assumes that a substantial portion of the overcharge goes to investors, although another possible mechanism is disproportionately higher incomes within corporations. For a more extended analysis of these connections, see Van Loo, *supra* note 6, at 231–42.

84. *See* Michael Parisi, *Individual Income Tax Returns, Preliminary Data, 2016*, STAT. INCOME BULL., Spring 2018, at 2 (putting national income at $10.2 trillion); *supra* note 79 and accompanying text.

85. Calculated by taking 10% of total income at the time. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., Harv. Univ. Press 2014) (2013) (putting total income at about $10 trillion in 2010).

86. De Loecker et al., *supra* note 67, at 562.

87. One study estimates that removing market power would "cause the top 20 percent income share to fall from 64 percent to 61 percent. Gans et al., *supra* note 81, at 10.

88. *See, e.g.*, Van Loo, *supra* note 6, at 231–39.

89. Space constraints do not allow for an in-depth summary of the many empirical nuances in these literatures, but for a review of those literatures and a conclusion that overcharge contributes to

bipartisan societal interests in addressing the manipulative practices causing overcharge rooted in economic efficiency and social norms, one need not come to any particular empirical conclusion on inequality, inflation, and other macroeconomic implications to see the potential harms from consumer market failures as significant.[90] For now, the epistemic bar is simply that there is enough evidence for a working hypothesis that the connection between consumer market failures and some important societal interest is potentially significant. The rest of this Article proceeds under that assumption, which raises the question of whether the law might intervene in a manner that mitigates some of these harms.

B. The Traditional Consumer Framework Is Inadequate

Protecting individuals from harms related to their spending and social media is at the core of consumer law. In particular, both of these spheres of activity fit squarely within the mandate of the primary consumer law regulator, the FTC's Bureau of Consumer Protection.[91] The Bureau has used its unfair and deceptive acts authority aggressively against social media platforms, leading, for example, to the $5 billion fine that Facebook paid for privacy violations related to the Cambridge Analytica scandal.[92] Interestingly, nowhere in the 1938 statute granting that unfairness and

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inequality, see, for example, Van Loo, *supra* note 6, at 231–42, reviewing the evidence on overcharge related to consumer manipulation; Gans et al., *supra* note 81, at 10, estimating that removing market power would significantly lower income inequality; Einer Elhauge, Essay, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1293 (2016), summarizing the literature and concluding that antitrust-related overcharge contributes to economic inequality, in explicit disagreement with Daniel Crane. *But see* Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1171, 1183 (2016).

90. On the bipartisan nature of addressing market failures, see, for example, Press Release, U.S. Dep't of Agric., USDA Launches Historic Partnership with Bipartisan State Attorneys General to Help Reduce Anticompetitive Barriers Across Food, Agriculture Supply Chains (July 19, 2023), https://www.usda.gov/about-usda/news/press-releases/2023/07/19/usda-launches-historic-partnership-bipartisan-state-attorneys-general-help-reduce-anticompetitive [https://perma.cc/XM8X-MWDZ] (describing a bipartisan legal agreement among attorneys general with consumer law elements); Richard Schmalensee & Robert N. Stavins, *Policy Evolution Under the Clean Air Act*, J. ECON. PERSPS., Fall 2019, at 27, 27–31 (describing overwhelming support for environmental regulation where market pressures were incapable of causing companies to internalize the cost of pollution).

91. On applying this authority to social media websites' disinformation, see Mark MacCarthy, *A Consumer Protection Approach to Platform Content Moderation in the United States*, *in* FUNDAMENTAL RIGHTS PROTECTION ONLINE: THE FUTURE REGULATION OF INTERMEDIARIES 115, 118 (Bilyana Petkova & Tuomas Ojanen eds., 2020).

92. *See* Press Release, Fed. Trade Comm'n, FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (July 24, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook [https://perma.cc/CLU3-SKGT] (justifying the "unprecedented" fine as an impetus to change Facebook's privacy violations); *see also* Final Order at 2–4, *In re* Cambridge Analytica, LLC, F.T.C. No. 9383 (Nov. 25, 2019), 2019 WL 6724447 (ordering Cambridge Analytica to delete consumer information, and enjoining the company from selling or using the consumer data).

deception authority is privacy mentioned, making this authority quite general.[93] The FTC also actively regulates social media advertisement, as well as the use of consumer devices, such as phones and computers, on which users access social media.[94] More broadly, the FTC has long used its authority to mitigate the health effects of various consumer products, such as cigarettes.[95] That mandate puts the mental health effects of social media use squarely within the consumer law framework. The FTC has gone even further against overcharge, not only bringing enforcement actions but also writing a rule in 2024 prohibiting drip pricing.[96]

Despite overcharge and social media harms residing within the domain of consumer law, the traditional framework is limited in what it can do. To clarify, direct regulation still has much to offer and must remain a meaningful part of consumer law.[97] Some of the most important harms cannot, however, be directly regulated. That limitation is especially problematic for social media, where the Supreme Court views content feeds in some contexts as expressive activity warranting heightened protections under the First Amendment.[98] Consequently, directly regulating social media platforms in a significant way faces difficult constitutional challenges. Section 230 provides further limits because it shields platforms from liability for hosting third-party content.[99]

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93. Wheeler-Lea Act, ch. 49, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. §§ 41, 44, 45, 52–58).

94. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Issues Orders to Social Media and Video Streaming Platforms Regarding Efforts to Address Surge in Advertising for Fraudulent Products and Scams (Mar. 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-issues-orders-social-media-video-streaming-platforms-regarding-efforts-address-surge-advertising [https://perma.cc/R2KN-9AMH]; FTC v. AT&T Mobility LLC, 883 F.3d 848 (9th Cir. 2018) (en banc) (upholding FTC authorization to bring enforcement actions concerning cell phone data services); *In re* Lenovo (United States) Inc., F.T.C. No. 152-3134 (Dec. 20, 2017), 2017 WL 6885837 (prohibiting computer manufacturer from preinstalling software on its devices that compromises the security or confidentiality of user data).

95. *See* Press Release, Fed. Trade Comm'n, FTC to Study E-Cigarette Manufacturers' Sales, Advertising, and Promotional Methods (Oct. 3, 2019), https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-e-cigarette-manufacturers-sales-advertising-promotional [https://perma.cc/ZMW3-ARQJ].

96. Complaint for Permanent Injunction, Monetary Judgment, Civil Penalty Judgment, and Other Relief, Fed. Trade Comm'n v. ACIA17 Auto. Inc., No. 24-CV-13047 (N.D. Ill. Dec. 19, 2024), 2025 WL 1348565; Trade Regulation Rule on Unfair or Deceptive Fees, 16 C.F.R. pt. 464 (2025).

97. For instance, some of the most problematic practices, such as hidden fees, can be banned without raising First Amendment concerns. Moreover, doing so has been shown to transfer wealth back to consumers from businesses. *See, e.g.*, Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The Card Act and Beyond*, 97 CORNELL L. REV. 967, 999–1000 (2012) (concluding the Credit CARD Act of 2009 dramatically reduced overall fee revenue, redistributing this wealth to consumers).

98. *See* Moody v. NetChoice, LLC, 603 U.S. 707, 716 (2024) ("To the extent that social-media platforms create expressive products, they receive the First Amendment's protection.").

99. 47 U.S.C. § 230. Section 230 does not provide full immunity against the platform's direct harms, only against lawsuits for content posted by third parties. *Id.* § 230(c)(1).

For overcharge, the limitations are more practical than constitutional.[100] A substantial portion of overcharge practices result from—or at least are enhanced by—search frictions arising from product and price complexity.[101] It is unclear how to directly regulate complexity in a comprehensive manner. One unappealing direct response would be for Congress or an administrative agency to mandate that manufacturers or e-commerce sites such as Amazon offer fewer product listings or standardized pricing features (such as subscription, shipping, clothing size, or color discounts).[102] Yet those restrictions would risk harming consumers by reducing choice and innovation. At the extreme, this level of direct intervention would mean moving large swaths of the economy toward government price control.

Another limitation to directly regulating overcharge is the large number of different practices. To illustrate, consider how the FTC did not pass a rule to address drip pricing until 2024, at least fifteen years after good evidence began to emerge that such practices harm consumers.[103] But drip pricing is one of many different manipulative practices, which change regularly.[104] Moreover, directly regulating some practices will require monitoring companies' pricing algorithms, which the FTC has not historically done for any industry, and would require a substantial increase in personnel.[105] More broadly, policing all transactions for violations of many different consumer protection laws would be extremely costly at scale, especially considering that consumers make tens of billions of transactions annually, about half of which are under $25.[106]

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100. The First Amendment issue is not irrelevant and is unsettled especially in the context of e-commerce platforms, most of which host consumer product reviews and other forms of speech. Some Supreme Court Justices expressed uncertainty about how to handle the application of state content moderation laws to e-commerce platforms like Etsy. *See Moody*, 603 U.S. at 786–87 (Alito, J., concurring). On the First Amendment's broader deregulatory potential, see generally Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 206–08.

101. *See, e.g.*, BAR-GILL, *supra* note 74.

102. Such heavy regulation essentially requires an administrative agency to take over core business decisions to an extent not seen even in heavily regulated areas, such as consumer finance and pharmaceuticals.

103. *See* Ellison & Ellison, *supra* note 65, at 428–29 (empirically showing harms from drip pricing in 2009); *supra* note 96 and accompanying text (discussing the drip-pricing rule); *see also* David Adam Friedman, *Regulating Drip Pricing*, 31 STAN. L & POL'Y REV. 51, 56–58 (2020) (describing hotel, rental car, and restaurant drip pricing that captures a higher total price).

104. For a summary of these practices, see Van Loo, *supra* note 75, at 1340–47 (describing methods of creating price misperception such as packaging adjustment, rebates, "framing" prices by implying they are discounted even though they are not, and differential labeling to obfuscate product information).

105. Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 VAND. L. REV. 1563, 1619–20 (2019) (noting monitoring requires personnel).

106. *See* Raynil Kumar & Shaun O'Brien, *2019 Findings from the Diary of Consumer Payment Choice*, FED. RESERVE BANK OF S.F.: FEDNOTES (June 26, 2019), https://www.frbsf.org/research-and-

Besides the execution challenges, a broad increase in regulation across the economy could be viewed as overly intrusive. Many of the questionable overcharge manipulation practices are central marketing decisions—how to arrange the products sold (such as in search results), how to communicate the pricing options to consumers, and how to consider a consumer's personal data in tailoring an offering.[107] Many would view the regulation of these kinds of decisions as excessive infringements on private autonomy.

Thus, despite potentially substantial harms in consumer markets, the core consumer law emphasis on regulating a dyadic relationship between the consumer and a business faces significant limits in today's economy. The result is that online platforms have extensive control over the content they show users and considerable freedom to manipulate consumers into paying higher prices.

C. The Statutory Exceptionalism of Consumer Law

Given the political and practical limits to directly regulating the dyadic consumer-business relationship, one potential alternative is to rely on third parties to help consumers navigate the marketplace. The focus of this discussion, for now, is on a third party that advises or acts on a consumer's behalf with respect to the business selling the main product or service—though the concept will be expanded to other third-party institutional help later.[108] With the advent of the internet, in particular, many hoped that a variety of digital tools would help consumers to find the best deals and gain control over the content they saw on social media.[109] A browser plug-in or app might be imagined that would compare prices among Amazon and other retailers, saving households thousands of dollars annually, and even perhaps execute the sale.[110] A social media agent could enable users to filter feeds in ways that Facebook and "X" (formerly Twitter) do not, offering new avenues for avoiding addiction or conspiracy theories. Some of these tools are in development.[111] Yet it is puzzling that they do not yet exist in a powerful manner, even decades after the technology became available to provide them.

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insights/publications/fed-notes/2019/06/2019-findings-from-the-diary-of-consumer-payment-choice [https://perma.cc/2WL5-YVU4] (finding 43 payments per month per person).

107. *Supra* Section I.A.2.

108. *Infra* Part III.

109. Glenn Ellison & Sara Fisher Ellison, *Lessons About Markets from the Internet*, J. ECON. PERSPS., Spring 2005, at 139, 148–51.

110. *See* Michal S. Gal & Niva Elkin-Koren, *Algorithmic Consumers*, 30 HARV. J.L. & TECH. 309, 318 (2017).

111. *Infra* Section II.B.

The lack of powerful consumer agents in the digital era would at first glance seem to be a market problem. Yet the law has long played a role in facilitating third-party help for individual economic actors. A sensible starting point for understanding the connection between law and market agents is the 1930s, when lawmakers passed landmark legislation for the economy's three main individual market actors: investors, workers, and consumers.[112] The main purposes of juxtaposing these regimes are to generate ideas that could be imported into consumer law from other fields, to consider the larger body of evidence on individuals' market agents, and to illustrate the idiosyncrasy of the law ignoring third-party market help only for consumers.

1. Investor Agents

In 1792, twenty-four established stockbrokers formed the New York Stock Exchange when they agreed to deal exclusively with one another.[113] Over time, they sought in various ways to use the law to block other agents from trading, including by claiming a property interest in the exchanges' prices.[114] The Securities Exchange Act of 1934 sought to ensure that exchanges were "public institutions" rather than "private clubs to be conducted only in accordance with the interests of their members."[115] These goals meant ensuring that investors' agents could access the exchanges.[116] The Act also imposed a duty on stockbrokers to only make suitable recommendations.[117] Although this turned out to be a weak standard,[118] it recognized that something more than an arm's-length transaction was necessary for investor intermediaries.

112. This legislation is summarized *infra* Sections I.C.1 to I.C.3.

113. Stuart Banner, *The Origin of the New York Stock Exchange, 1791–1860*, 27 J. LEGAL STUD. 113, 114–15 (1998) (discussing formation of the New York Stock Exchange and adherence rules including prohibiting "participants from doing business with any auctioneer who had not signed the agreement" adopted by twenty-four New York brokers in 1792).

114. *See, e.g.*, Hunt v. N.Y. Cotton Exch., 205 U.S. 322, 323 (1907) ("[T]he knowledge of the prices thus made has become a species of property . . . .").

115. H.R. REP. NO. 73-1383, at 15 (1934).

116. *Id.*; SEC, INSTITUTIONAL INVESTOR STUDY REPORT OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. DOC. NO. 92-64, pt. 8, at XXV (1971) (articulating agency objective of creating stock exchanges in which "all qualified broker-dealers and existing market institutions may participate").

117. *See* FIN. INDUS. REGUL. AUTH., RULE 2111 (2020), https://www.finra.org/rules-guidance/rulebooks/finra-rules/2111 [https//perma.cc/LTB6-VQN2].

118. *See, e.g.*, Steven A. Ramirez, *The Professional Obligations of Securities Brokers Under Federal Law: An Antidote for Bubbles?*, 70 U. CIN. L. REV. 527, 554 (2002) (lamenting the Act's failure to impose "a broad new federal fiduciary duty" on stockbrokers and characterizing broker duties under the Act as little more than "high commercial standards").

Lawmakers soon followed up with two further major statutes, each focused on a different type of intermediary help: the Investment Company Act of 1940 to regulate mutual funds and other companies that invested in securities;[119] and the Investment Advisers Act of 1940, which established a fiduciary duty for investment advisers.[120]

These laws have overall succeeded in safeguarding widespread access to securities markets for financial intermediaries. As of 2023, there were 15,396 SEC-registered investment advisers in the U.S., 92.7% of which were small businesses.[121] Financial intermediaries are not, of course, universally helpful. In a field experiment, investment advisers failed to overall de-bias investors away from riskier and higher fee investment strategies, and may even contribute to such biases.[122] That study is, however, still consistent with advisers overall helping investors through other advantages, such as reducing transaction costs or avoiding fraud.[123] Indeed, research suggests that securities intermediaries create value by producing information, executing transactions at lower cost, and improving price efficiency.[124] Thus, despite flaws, securities intermediaries thereby help investors directly, including through reduced exposure to manipulation, more accurate pricing, and ease of selling securities.[125] They also create broader benefits for society, including improved resource allocation, fairer competition, greater market stability, and more innovation-based economic growth.[126]

Although it is difficult to know the causal relationship between securities laws and subsequent market performance, the 1930s statutes reflected a regulatory paradigm for investors that recognized the importance of the law

119. 15 U.S.C. §§ 80a-1 to 80a-64.

120. 15 U.S.C. §§ 80b-1 to -21.

121. INV. ADVISOR ASS'N & COMPLY, INVESTMENT ADVISOR INDUSTRY: SNAPSHOT 2024, at 2 (2024), https://www.investmentadviser.org/wp-content/uploads/2024/06/Snapshot2024_FINAL.pdf [https://perma.cc/3A6F-C2CS].

122. Sendhil Mullainathan, Markus Noeth & Antoinette Schoar, *The Market for Financial Advice: An Audit Study* 18–19 (Nat'l Bureau of Econ. Rsch., Working Paper No. 17929, 2012), https://www.nber.org/system/files/working_papers/w17929/w17929.pdf [https://perma.cc/FWR3-RHNF].

123. *Id.* at 4.

124. Marco Di Maggio, Mark Egan & Francesco Franzoni, *The Value of Intermediation in the Stock Market*, 145 J. FIN. ECON. 208 (2022); Andrea Barbon, Marco Di Maggio, Francesco Franzoni & Augustin Landier, *Brokers and Order Flow Leakage: Evidence from Fire Sales*, 74 J. FIN. 2707, 2745–46 (2019); Russ Wermers, *Active Investing and the Efficiency of Security Markets*, 19 J. INV. MGMT. 5, 8 (2021).

125. *See, e.g.*, Stephen J. Choi, *A Framework for the Regulation of Securities Market Intermediaries*, 1 BERKELEY BUS. L.J. 45, 46–47 (2004).

126. For a broad summary of challenges and upsides of securities markets, see generally SECURITIES MARKET ISSUES FOR THE 21ST CENTURY (Merritt B. Fox, Lawrence R. Glosten, Edward F. Greene & Menesh S. Patel eds., 2018) (reviewing existing literature and identifying areas for new thinking or empirical research with respect to regulation and economics of primary markets, trading markets, and securities intermediaries).

intervening to ensure that investors had helpful agents. To elaborate conceptually, ensuring helpful agents involved two main policy steps. The first is ensuring the agents can help, most importantly by providing the sustained means for investor agents' access to stock exchanges. The second is heightened protections from harms by the agent, in this case by imposing duties beyond what would be expected in the typical dyadic marketplace transaction. The evidence indicates the intermediaries governed by that two-step structure subsequently provided considerable value to investors and society.

2. Worker Agents

Like stockbrokers, worker collectives date back centuries before Congress passed relevant legislation.[127] Workers' guilds were in some respects early predecessors to unions, in that guilds sometimes advocated for members' interests with respect to the broader marketplace.[128] They were also long met with heavy resistance from businesses. For instance, the Federal Society of Journeymen Cordwainers, founded in 1794, sought to advocate for higher wages for leatherworkers and cobblers.[129] But employers successfully sued the association as a criminal conspiracy, bankrupting the organization and leaving its members vulnerable to criminal charges for decades.[130] Nonetheless, unions soon proliferated throughout the country and were often met with stiff resistance. Indeed, businesses and governments regularly engaged in deadly violence to break union-organized strikes by railroad, mine, and other workers.

Against this backdrop, lawmakers enacted legislation to offer workers market help in the National Labor Relations Act of 1935.[131] The Act sought to give workers more power to negotiate better terms of employment by granting workers the right to organize and designate a representative to

127. Derek C. Jones, *American Producer Cooperatives and Employee-Owned Firms: A Historical Perspective*, *in* WORKER COOPERATIVES IN AMERICA 37, 38 (Robert Jackall & Henry M. Levin eds., 1984).

128. *Id.* at 47–48.

129. Brian Greenberg, *Class Conflict and the Demise of the Artisan Order: The Cordwainers' 1805 Strike and 1806 Conspiracy Trial*, PA. LEGACIES, Spring 2014, at 7, 8.

130. This court precedent changed in 1842. *See* Commonwealth v. Hunt, 45 Mass. (4 Met.) 111, 129 (1842) (abrogating the rule that workers' guilds are per se unlawful).

131. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169). This was not the first statute seeking to strengthen unions. Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 599–600 (2007).

negotiate on their behalf.[132] To enforce those rights, it created a new independent federal agency, the National Labor Relations Board.[133]

Within five years of the Act, the number of unionized workers had doubled.[134] Whereas in 1935, only 14% of private sector workers were unionized, that figure jumped to 34% by 1945.[135] A large literature links unionization to higher wages, greater job satisfaction, and more equal pay,[136] but causality has proved difficult to establish.[137] In the past few years, however, a small number of studies have begun to suggest a causal link between unions and higher wages.[138] The relationship between unionization and both employment and productivity has less consistently established a positive impact, but overall, unions are associated with higher employment and productivity.[139] At a minimum, the wage improvements for workers do not necessarily come at the expense of higher unemployment or lower productivity.

Thus, like with securities statutes of 1934 to 1940, intermediaries were already a prominent part of the institutional landscape by the time lawmakers began to pass major worker legislation in the New Deal era.

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132. JON O. SHIMABUKURO, CONG. RSCH. SERV., RL32930, THE NATIONAL LABOR RELATIONS ACT (NLRA): UNION REPRESENTATION PROCEDURES AND DISPUTE RESOLUTION 7 (2013).

133. *Id.* at 2.

134. *US Private Sector Trade Union Membership*, PUB. PURPOSE (Feb. 2015), http://www.publicpurpose.com/lm-unn2003.htm [https://perma.cc/M726-WU5P].

135. *Id.*

136. *See, e.g.*, Nicole Fortin, Thomas Lemieux & Neil Lloyd, *Right-to-Work Laws, Unionization, and Wage Setting* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30098, 2022), https://www.nber.org/system/files/working_papers/w30098/w30098.pdf [https://perma.cc/29LT-RN65] ("A vast literature has documented large differences between the wages of union and non-union workers in different countries and time periods."); Benjamin Artz, David G. Blanchflower & Alex Bryson, *Unions Increase Job Satisfaction in the United States*, 203 J. ECON. BEHAV. & ORG. 173, 185 (2022) (analyzing longitudinal data from 1979 to 1997 and finding that "unionized workers tend to have higher job satisfaction throughout, but the differential has risen over time").

137. Fortin et al., *supra* note 136, at 1; John S. Ahlquist, *Labor Unions, Political Representation, and Economic Inequality*, 20 ANN. REV. POL. SCI. 409, 410 (2017) (reviewing a vast literature showing a wage premium for unionized workers and acknowledging that it is difficult "to disentangle cause from effect").

138. *See, e.g.*, Fortin et al., *supra* note 136, at 31 (using both a differential exposure design and an event study design and concluding that "the evidence is consistent with RTW having a causal effect on unionization and wages"); Erling Barth, Alex Bryson & Harald Dale-Olsen, *Union Density Effects on Productivity and Wages*, 130 ECON. J. 1898, 1924 (2020) (reviewing Norwegian labor statistics and observing "a strong positive relationship between firm level wages and union density"); Michael Baker, Yosh Halberstam, Kory Kroft, Alexandre Mas & Derek Messacar, *The Impact of Unions on Wages in the Public Sector: Evidence from Higher Education* 19 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32277, 2025), https://www.nber.org/system/files/working_papers/w32277/w32277.pdf [https://perma.cc/LMU2-85L4] (using an event study design to estimate a salary increase of 4% within six years of faculty unionization).

139. Alquist, *supra* note 137, at 417–18 (reviewing studies showing little or no effect on productivity, while overall showing a positive impact on employment); Barth et al., *supra* note 138, at 1899 (finding a substantial increase in productivity resulting from increasing union density at the firm level).

Lawmakers at the time paid less attention to regulating unions than they did to regulating investors' agents.[140] These statutes would, however, converge to both empower and constrain agents. In 1947, Congress amended the National Labor Relations Act to prohibit unfair labor practices by unions.[141] Both regimes also safeguard access for the agents—with stockbrokers able to trade on the exchanges and labor unions able to obtain contact information for employees.[142] Thus, despite some differences in emphasis, the key 1930s statutory frameworks for both investors and workers devoted significant state power to supporting helpful market agents.

3. Consumer Agent Origins

Like investors and workers, consumers also gained major legislation constructing a broad-based federal regulatory framework in the New Deal era.[143] Unlike for investors and workers, however, New Deal-era consumer legislation makes no mention of intermediaries. Instead, it focuses on a dyadic transaction between a consumer and a "person, partnership, or corporation."[144]

A likely explanation for this omission is that consumer agents were far more limited and less prominent than labor unions, stockbrokers, and investment advisers. Three main types of consumer third-party market help existed: agents, cooperatives, and publications.

Third-party sales agents already offered services in the New Deal era—most notably in real estate, insurance, and travel. However, these agents mostly did not work for or directly represent consumers in the same way stockbrokers did.[145] Whereas investors paid stockbrokers' commission, real estate and travel agents in the 1930s worked for and received their commissions from the seller or business.[146] Moreover, even for a major

140. *Supra* Section I.C.1. (summarizing the regime for investors); 29 U.S.C. § 151.

141. Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–197).

142. *See* Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1239–40 (1966).

143. Until this time, the FTC's jurisdiction was only for harms to competition. *See, e.g.*, FTC v. Raladam Co., 283 U.S. 643 (1931) (finding that the FTC only had jurisdiction over deceptive advertising if it was a harm to competition).

144. Wheeler-Lea Act, ch. 49, 52 Stat. 111, 112 (1938) (codified as amended at 15 U.S.C. §§ 41, 44, 45, 52–58).

145. *See* CALEY HORAN, INSURANCE ERA: RISK, GOVERNANCE, AND THE PRIVATIZATION OF SECURITY IN POSTWAR AMERICA 20–33 (2021).

146. *See, e.g.*, Victor S. Netterville, *The Regulation of Irregular Air Carriers: A History*, 16 J. AIR L. & COM. 414, 424 (1949) (describing ticket agents as representing "air carriers on a commission basis"). Some ticket brokers at the time were considered independent brokers in the sense of not being subjected to agency law, and by working for multiple air carriers or other travel providers. *Id.* at 425–26.

transaction such as purchasing a home or taking out a loan, for most market transactions there simply were no intermediaries—the party offering the good tended to own it, while services were direct.[147] Even in finance, borrowers went directly to the bank or other financial institution for loans, rather than to an independent mortgage broker.[148] Thus, even for the most important purchases most people made, they had no consumer agent.

Consumer cooperatives were well established by the 1930s, allowing consumers to directly own enterprises selling everything from insurance to housing, milk, and laundry.[149] Cooperative membership quadrupled between 1933 and 1940.[150] Yet, they never commanded substantial portions of consumer markets.[151]

The most generally available consumer intermediaries provided general information rather than any tailored advice or services. In the 1930s, several consumer publications appeared, most notably *Consumer Reports*.[152] These entities invested in labs to test products and informed consumers about physical safety, inflated prices, and problematic marketing practices.[153] These publications were, however, run by nonprofits that had a vision for the broader societal importance of informed consumers.[154] Moreover, they did not act on behalf of consumers vis-à-vis a counterparty in the same way that stockbrokers and labor unions did for investors and workers.

Thus, one plausible reason why the presence of cooperatives and publications did not prompt 1930s lawmakers to focus on them in the same

147. MARC A. WEISS, THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING 20 (1987) ("Most people one hundred or more years ago bought and sold or leased real estate for speculation, investment, production, or consumption, directly on their 'own account.'").

148. *See* Daniel Fetter, Jonathan Rose & Kenneth Snowden, *Housing in Economic History*, *in* 2 THE OXFORD HANDBOOK OF AMERICAN ECONOMIC HISTORY 101, 105 (Louis P. Cain, Price V. Fishback & Paul W. Rhode eds., 2018).

149. *See, e.g.*, DOROTHY HOUSTON JACOBSON, THE AMERICAN WAY: OUR INTERESTS AS CONSUMERS 253 (1941) (reporting that, in 1936, over thirty cooperative wholesalers supplied consumer goods to member cooperatives across the country); *id.* at 255–56 (highlighting Amalgamated Housing Cooperative in New York City, which housed members in 635 apartment buildings); *id.* at 258–72 (discussing rise of homeowner's insurance, automobile insurance, and health insurance cooperatives); CHARLES S. WYAND, THE ECONOMICS OF CONSUMPTION 405–07 (1937) (reporting approximately 690,000 Americans were members of 1,806 consumer cooperatives in 1933, comprised of bakeries, creameries, retail stores, and associations offering services as varied as laundry, burial, and trucking).

150. LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 25 (2003) (reporting cooperative membership "more than doubled between 1933 and 1936, and again by 1940").

151. *See* John Pencavel, *The Performance of Consumers' Cooperatives in America*, 3 J. PARTICIPATION & EMP. OWNERSHIP 1, 5 (2020).

152. *See, e.g.*, INGER L. STOLE, ADVERTISING ON TRIAL: CONSUMER ACTIVISM AND CORPORATE RELATIONS IN THE 1930S, at 93 (2006).

153. *See id.* at 96 (describing Consumer's Union's establishment of various testing labs in 1939).

154. *See id.* at 93.

way as for other intermediaries is that these consumer helpers were not widespread. Almost all investors used intermediaries of some sort to trade stocks, and unionization had reached millions of workers and 19% of the private sector workforce, in the 1920s.[155] In contrast, consumer cooperatives never accounted for more than 1.5% of total retail sales,[156] and the leading consumer subscription services, like *Consumer Reports*, were in the tens of thousands.[157]

Another potential contributor is that consumer intermediaries were not seen as needing government oversight. The frequent stoppages of work by union strikes were a headache for political leaders, and part of the motivation of the National Labor Relations Act of 1935 was to reduce the number of strikes.[158] Stockbrokers' self-dealing was blamed in part for the stock market crash.[159] Consumers' helpers were far less troublesome for governmental leaders. Some consumer boycotts made headlines in the early 1900s, including by renters and customers of kosher butchers in New York City.[160] But those efforts were largely isolated and did not disrupt *other people's* lives on a mass scale in the same way as union strikes and the stock market crash. When some consumers boycott, if anything, the reduced demand may lower prices for the consumers who continue to shop.[161] Thus, policy makers presumably faced less pressure to oversee consumer intermediaries.

One obstacle to consumer agents being more widespread was their challenging business model. Marketplaces were relatively straightforward in the 1930s, with far fewer choices available, each of which was far less complex.[162] Most consumer markets lacked the same degree of opacity and

155. *US Private Sector Trade Union Membership*, *supra* note 134.

156. *See* WARREN C. WAITE & RALPH CASSADY, JR., THE CONSUMER AND THE ECONOMIC ORDER 381 (1939).

157. Inger L. Stole, *The Fight Against Critics and the Discovery of "Spin": American Advertising in the 1930s and 1940s*, *in* THE ROUTLEDGE COMPANION TO ADVERTISING AND PROMOTIONAL CULTURE 39, 47 (Matthew P. McAllister & Emily West eds., 2013) (reporting *Consumer Reports* circulation of around 55,000 during World War II compared to competitors with even smaller audiences).

158. *See* 29 U.S.C. § 151.

159. Gene Smiley & Richard H. Keehn, *Margin Purchases, Brokers' Loans and the Bull Market of the Twenties*, 17 BUS. & ECON. HIST. 129, 129 (1988).

160. *See* COHEN, *supra* note 150, at 22 (highlighting New York immigrant Jewish housewives' kosher meat boycotts in 1902 and rent strikes in 1904 as particularly well-documented examples of grassroots consumer movements).

161. Indeed, consumer boycotts were later regulated from a labor perspective by limiting workers' ability to punish businesses by organizing boycotts. *See* Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–197).

162. *See generally* COHEN, *supra* note 150 (summarizing the U.S. consumer landscape from a historical perspective). To be sure, some products, such as meat and medical products, posed hidden

complexity as stock investments, in the sense that understanding investment risks required overcoming information asymmetries and expertise gaps to understand the risks.[163] Thus, it is likely that few shoppers were willing to pay for help in the marketplace, creating limited demand.

The supply side contributed to further obstacles. Prior to the digital era, it was far more labor-intensive for people to physically visit stores, analyze the data and products, and communicate with individual consumers to understand their interests and budget. That process alone would have involved either an expensive phone call at the time, for those few who had phones, or a time-intensive in-person visit. If the agent were to execute a transaction on the consumer's behalf, that would have taken even more time and transportation, of course. Although these expenditures could have been justified if the demand was sufficiently high, the costs were presumably prohibitive for saving a small amount per purchase or avoiding an unknown danger that would be difficult even for the agent to identify.

Indeed, the one place where the 1930s regulatory legislation deployed consumer agents early on was a narrow context in which the benefits easily outweighed the costs: doctor prescriptions. The Food, Drug, and Cosmetics Act of 1938 mandated that certain drugs that were sufficiently dangerous would require a physician's prescription.[164] The Act had passed in the wake of a pharmaceutical company selling an elixir that killed over 100 people, including many children.[165] That statutory exception can be explained by the reality that physicians already acted as consumer agents. Physicians could easily add these third-party prescription services to their direct medical services to patients at low cost or for free.[166] Also, consumers had sufficient demand for those services because they knew they lacked the relevant expertise. Thus, the business model for physicians acting as consumer agents was already in place in the 1930s, but was idiosyncratic for consumer markets.

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dangers. Yet in those contexts, the solution was seen as direct regulation of the party causing the harm, rather than through some intermediary agent regime. *See, e.g.*, Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 384–95 (2019) (summarizing the history of increases in regulatory monitoring of businesses). Moreover, overall, the array of choices and most individual products were far simpler than in today's marketplace. *See, e.g.*, Van Loo, *supra* note 75, at 1317–18.

163. *See supra* Section I.C.1.

164. The Durham-Humphrey Amendment to the Federal Food, Drug, and Cosmetics Act of 1938 required that habit-forming or potentially harmful drugs be sold by prescription only. *See* Durham-Humphrey Amendment, ch. 578, 65 Stat. 648 (1951) (codified as amended in scattered sections of 21 U.S.C.).

165. *Laws Enforced by FDA*, U.S. FOOD & DRUG ADMIN. (Apr. 19, 2021), https://www.fda.gov/regulatory-information/laws-enforced-fda [https://perma.cc/PS9E-PKTK].

166. On the broader role that physicians can play in patients' lives, see William M. Sage, *Physicians as Advocates*, 35 HOUS. L. REV. 1529, 1540–55 (1999).

Whether due to supply or demand, the concept of an agent advising or working for consumers simply did not exist in the same way as it did for investors and workers. This institutional reality likely contributed to lawmakers not considering third-party helpers when constructing the consumer law regulatory architecture. Regardless, the different approaches to the economy's three main actors raise the question of whether failures of consumer law can be traced in part to the idiosyncrasy in its early design—inattention to agents.

D. The Growing Attractiveness of Consumer Agents

For individuals to seek to use agents, the benefits must overcome the costs. Consumer agents are now more attractive on both measures. Consumers face tougher challenges in navigating today's markets, which means they are in greater need of help. Additionally, consumer agents can now operate at a lower cost due to technological advances.

Several benefits might drive the use of agents, whether in isolation or together. These benefits lie in overcoming search frictions, connectivity barriers, and bargaining power asymmetries.

Search frictions. Search frictions may result from inadequate expertise or information.[167] Consumers who cannot easily understand a product may want expert help in assessing safety or performance, and thus product complexity contributes to search frictions. The agent may also have access to market or information the consumer does not. That access may be due to search costs, if it is too time-consuming or expensive for the individual to gather the information necessary to make decisions.[168] In such cases, the agent can spread the costs of information acquisition across many different customers, justifying the investment in information collection. When search friction is the problem being solved, something like advice is the most sensible service provided by the agent. Doctors providing advice about and prescriptions for drugs is an example. In these contexts, the opacity about the product (such as pharmaceutical risks) inherently means that the principal will face difficulties assessing the agent's work, and the law has a role to impose duties such as of loyalty or care. Search frictions can lead to considerable consumer losses. For instance, by one estimate, eliminating

167. *See, e.g.*, Cebul et al., *supra* note 62, at 1842–44 (summarizing search frictions).
168. Kling et al., *supra* note 66, at 200–01.

solely the search costs for automobile insurance would increase consumer welfare by $1,138 per insured driver annually.[169]

Connectivity barriers. The dispersed nature of some markets makes an agent valuable for linking buyers and sellers. Sometimes this can be handled without agents, such as when mass retail stores purchase goods and sell them marked up. In other cases, however, it may be impractical for a central entity to purchase and hold the product, perhaps most importantly because it would be too costly.[170] A broker would need large sums of money to buy stocks of all kinds ready to sell immediately, and would incur great risks of market downturns until those shares were purchased.[171] By being able instead to link the buyers who want stocks to the sellers who want to get rid of stocks, the broker can earn a commission without capital expenditures up front. In such instances, the agent will typically also provide services of executing the transaction. The problem of connectivity lends itself to the services of an agent who represents an individual.

Power asymmetries. Finally, agents may enable individuals to do collectively what they could not individually accomplish. The goal of increasing power lends itself to services of organizing the individuals into a collective, like a labor union, and then choosing someone to serve as the collective's representative.

The internet may have seemed at first glance to provide all of these benefits. The internet lowers some kinds of search costs significantly by enabling the consumer to easily collect information directly from the end business and to use online search engines. Technology platforms have helped significantly with connectivity, with eBay and Amazon linking buyers to sellers and Facebook, Instagram, and others connecting social relations. And early services such as Groupon promised to aggregate consumers to bargain for lower prices.

However, as an empirical matter, the internet turned out not to have as big of an impact on search frictions as originally expected.[172] Instead, over the course of the past century, online and offline businesses have increased

169. Elisabeth Honka, *Quantifying Search and Switching Costs in the US Auto Insurance Industry*, 45 RAND J. ECON. 847, 870 (2014) (calculating that eliminating auto-insurance search costs increases consumer welfare by $859 per person, adjusted for inflation to 2024 dollars).

170. Peter Kollock & E. Russell Braziel, *How Not to Build an Online Market: The Sociology of Market Microstructure*, *in* 23 ADVANCES IN GROUP PROCESSES: SOCIAL PSYCHOLOGY OF THE WORKPLACE 283, 283–89 (Shane R. Thye & Edward J. Lawler eds., 2006).

171. Some financial intermediaries both connect buyers to sellers and sell their own securities.

172. *See, e.g.*, Ellison & Ellison, *supra* note 109, at 139, 148–51 (discussing a widespread expectation that the internet would lead to the "Law of One Price" through intense competition and reduced consumer search costs, but the subsequent reality was of persistent price dispersion and online prices that are not much lower, if at all).

their sophistication at manipulating and extracting more from consumers.[173] Businesses can now leverage large data sets and machine learning to more scientifically test what marketing and pricing practices extract the most value from consumers. Field experiments show that platforms can use individuals' digital psychological profiles to manipulate their behavior, including what they purchase.[174]

Even if businesses had not changed their practices, product markets have simply become far more inherently complex. Many of the products available today simply did not exist a century ago—including credit cards, cell phones, and personal computers.[175] These and other individual products are more sophisticated, such as cars that now have electronics and hundreds of permutations to choose from in terms of add-ons like remote starting, multi-zone climate systems, and various types of sunroofs—panoramic, popup, folding, or moonroof.[176] There are thus far more products, of on average considerably greater complexity, for consumers to choose from. That greater complexity matters not only because it suggests greater need for agent help, but also because behavioral economics has shown that businesses can exploit complexity to increase the prices consumers pay.[177]

Consumer agents have also become more viable because the costs of offering their services at scale have lowered. Mass communications have made it more feasible for agents and consumers to interact remotely. Additionally, since consumer agents' main purpose is to collect and analyze information, an individual consumer agent could offer more powerful services with digital technologies than before. Most importantly, algorithmic agents are now possible, making the marginal costs of offering consumer agent services minimal.

E. The Rise of Consumer Agents

As would be expected from the growing challenges in consumer markets and decreasing costs, consumer agents have become more widespread than

173. Ellison & Ellison, *supra* note 65, at 428 (explaining how online environment provides businesses with novel and highly effective means of manipulating prices and warping consumer perception); *see also* Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1002 (2014) (conceptualizing consequences of market manipulation).

174. S.C. Matz, M. Kosinski, G. Nave & D.J. Stillwell, *Psychological Targeting as an Effective Approach to Digital Mass Persuasion*, 114 PROC. NAT'L ACAD. SCIS. 12714, 12715 (2017) (presenting results from experimental advertising campaign which demonstrate "[u]sers were more likely to purchase after viewing an ad that matched their personality").

175. *See generally* COHEN, *supra* note 150 (providing a summary of twentieth-century consumer markets).

176. *See infra* Section II.B.

177. *See* Ellison & Ellison, *supra* note 109, at 148–51 (using behavioral economics to explain market shifts).

they were in the 1930s. They follow different timelines in different industries, but they are mostly the product of the late twentieth and early twenty-first centuries. For instance, mortgage brokers were "virtually nonexistent" in 1980, but had captured 20% of the market by 1987 and had over 65% of the market by 2000.[178] Until the 1990s, real estate agents worked for home sellers rather than buyers, but by 2023, approximately 90% of buyers used a real estate agent to represent them against sellers' real estate agents.[179]

In the digital era, tools have begun to appear for various purposes. Web browser tools like Capital One Shopping alert users when a better deal is available on Amazon or at another online retailer.[180] When the consumer clicks on the alert, the tool shows the other closest deals located, even accounting for shipping costs.[181] Fintech tools like Credit Karma show the "best credit cards" available, with summary details about the APR, annual fees, and credit score needed.[182] Social media tools like Friendly have at various times allowed social media users, such as those on Facebook, to filter out unwanted posts using content keywords.[183] These digital tools have yet to take off in the same way that, say, buyers' real estate agents have, but they nonetheless show some of the potential that consumer agents may offer in the digital era.[184]

The growth of consumer agents over the past several decades serves to illustrate how consumer markets are now very different than those facing lawmakers in the 1930s when they built the core of modern consumer law. The growing presence of consumer agents does not, however, answer the key policy question of whether these agents are providing as much value as

178. *See* JAMES R. BARTH, TONG LI, TRIPHON PHUMIWASANA & GLENN YAGO, MILKEN INST., A SHORT HISTORY OF THE SUBPRIME MORTGAGE MARKET MELTDOWN 1 (2008); Howell E. Jackson & Laurie Burlingame, *Kickbacks or Compensation: The Case of Yield Spread Premiums*, 12 STAN. J.L. BUS. & FIN. 289, 291 n.5 (2007).

179. *See* Nicole Friedman & Laura Kusisto, *So Much About Real-Estate Commissions Just Changed. Here's What to Know.*, WALL ST. J. (Aug. 14, 2024, 5:30 AM), https://www.wsj.com/real-estate/real-estate-commission-changes-homebuying-cf5d2448 [https://perma.cc/P9VU-DZ4L]; Melissa Stewart, *Buyer Beware: Who Is Paying the Home Buyer's Real Estate Agent?*, 30 U. MIA. BUS. L. REV. 73, 77 (2021) (explaining that real estate transactions prior to the 1990s involved only seller-brokers and "subagent[s]" of the seller-brokers who worked solely with the buyers but "owed a fiduciary duty to the sellers and had to represent the sellers' best interests").

180. *Capital One Shopping: A Free Tool to Find Deals Online*, CAP. ONE (Oct. 7, 2025), https://www.capitalone.com/learn-grow/money-management/capital-one-shopping/ [https://perma.cc/2EBJ-59WY].

181. *Id.*

182. *Shop Credit Cards*, CREDIT KARMA (Aug. 29, 2025), https://www.creditkarma.com/credit-cards [https:// perma.cc/YRQ4-TU7H].

183. *Friendly Social Browser: Ratings and Reviews*, APPLE, https://apps.apple.com/us/app/friendly-social-browser/id400169658?see-all=reviews [https://perma.cc/9V8E-4AYY]; *Friendly Social Browser*, FRIENDLY https://friendly.io [https://perma.cc/2226-VA5G].

184. *See infra* Section II.B.

they could to society. After all, consumer agents that simply serve as an intermediary extracting rents can be harmful to society.[185] The stakes of that policy question become all the more important due to the evidence indicating high-stakes consumer market failures and the traditional consumer law framework's limitations in addressing those failures. To assess whether the law has a role to play in improving consumer agents' contributions to society, it is first necessary to understand the many barriers that incumbent businesses have erected, and how the removal of those barriers may unleash a new generation of more valuable consumer agents.

II. OBSTACLES TO CONSUMER AGENTS

This Part explores why, despite the rise of consumer agents overall, they have yet to provide powerful commercial and social media help. Part of the problem is that to provide the most valuable help, consumer agents need access to markets and, increasingly, customer-specific data, such as an individual's social media feed or shopping history. Yet incumbent businesses have often erected technological or legal barriers to third-party consumer agents accessing the data they need. A recent example comes from Amazon blocking ChatGPT's Shopping Research service and Perplexity's agentic shopping tool, using a combination of legal threats and updates to its technical code to block AI crawlers.[186] For decades, these types of barriers have even succeeded when the data is readily available on the web or when consumers want to provide access to their accounts. As a result of these legal and technical barriers, many businesses that would have otherwise helped consumers to save money or have more control over their social media are less effective, co-opted by incumbents, or put out of business. The consumer law framework is poorly suited to these challenges.

A. Legal and Normative Barriers

Incumbents have often used legal and normative arguments to block third-party automated help. One of the most common legal arguments made by e-commerce and social media companies is that the consumer agents are violating contract law by sending bots to collect information from their

185. *See* Judge, *supra* note 31, at 583–88.

186. Priyanca Rajput, *Amazon Blocks ChatGPT's New Research Feature Amid the Festive Season—Here's Why*, TOM'S GUIDE (Nov. 28, 2025), https://www.tomsguide.com/ai/amazon-blocks-chatgpts-new-research-feature-amid-the-festive-season-heres-why [https://perma.cc/KJ2F-QMN5].

platforms, which is prohibited in the platforms' terms of service.[187] Platforms also assert trademark violations, under the theory that the consumer could be confused into thinking that the third-party app was part of the platform rather than independent.[188] Additionally, platforms have sometimes successfully argued that third-party tools were trespassing by collecting website information.[189] As an example of a lawsuit combining these strategies, when the startup app AwardWallet sought to help passengers to see their frequent flier balances for all airlines in one app, American Airlines promptly filed a petition for a permanent injunction, arguing that the app's access of customer accounts—despite customer approval—violated contract law, trademark law, and trespass law, among others.[190] Thus, ironically, businesses have sought to weaponize laws dating back centuries to erect moats against automated digital tools.

The most powerful normative and legal arguments, however, are born of the digital era. One set of normative arguments relates to privacy and security. Incumbents have claimed, for instance, that by accessing consumers' accounts—even with permission—third parties are putting the consumers' data at risk.[191] Tech companies, such as Facebook, have made these pretextual privacy arguments in cease-and-desist letters ordering third-party tools to stop accessing platforms.[192] And businesses, such as Bank of America, make related arguments in emails directly to consumers, warning that they are taking security risks by using third-party tools.[193] Given the newness and broadness of many privacy laws, as well as the vagueness of the warnings—which do not cite specific laws—it is difficult to know whether the threats have any real legal basis. Nonetheless, they

187. *See* Benjamin L.W. Sobel, *A New Common Law of Web Scraping*, 25 LEWIS & CLARK L. REV. 147, 154–55 (2021) ("[W]ebsites . . . [bring] breach of contract actions against defendants who used automated technologies to crawl their sites.").

188. *See* Michael P. Goodyear, *Circumscribing the Spider: Trademark Law and the Edge of Data Scraping*, 70 KAN. L. REV. 295, 305–11 (2021) (explaining that "posting trademarked names and logos next to scraped data has led to actual consumer confusion" and gives rise to viable trademark violation claims).

189. eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1069–71 (N.D. Cal. 2000).

190. *See generally* First Amended Petition and Request for a Permanent Injunction, Am. Airlines, Inc. v. Milewise, Inc., No. 067-256404-11 (Tex. Dist. Ct. Feb. 17, 2012).

191. Van Loo, *supra* note 31, at 838–39. *See generally* Thomas E. Kadri, *Digital Gatekeepers*, 99 TEX. L. REV. 951, 973 (2021).

192. *See, e.g.*, Rory Van Loo, *Privacy Pretexts*, 108 CORNELL L. REV. 1, 22–23 (2022) (explaining how internal memos from Facebook revealed that Facebook was attempting to block competitive threats while justifying the moves as about protecting privacy); Louis Barclay, *Facebook Banned Me for Life Because I Help People Use It Less*, SLATE (Oct. 7, 2021, 9:38 AM), https://slate.com/technology/2021/10/facebook-unfollow-everything-cease-desist.html [https://perma.cc/39SW-BGVV] (sharing a Facebook cease-and-desist letter).

193. E-mail from Bank of America Customer Service to Celene Chen, Student, Boston Univ. Sch. of L. (Apr. 13, 2021, 10:10 AM) (on file with author).

weigh on the minds of entrepreneurs. For instance, privacy concerns made some early engineers that built Gobo, an app for managing social media accounts in one place, hesitant to access Facebook users' accounts to manage their feeds even with users' permission.[194]

Perhaps the most far-reaching legal shield used by tech platforms is the Computer Fraud and Abuse Act (CFAA) of 1986, which prohibits unauthorized access to computers.[195] Tech platforms have often argued that automated consumer agents collecting digital information were unauthorized, raising the specter of criminal penalties.[196] For example, one programmer sought to make Facebook less addictive through an Unfollow Everything tool that with one click would unfollow everyone, while staying friends with them.[197] Once everyone had been unfollowed, users could then choose which of their friends they wanted to follow closely, rather than being subject to whatever content the algorithm thought would hook the user into staying engaged.[198] As this simple app rapidly gained users, Facebook promptly sent the developer a cease-and-desist letter, claiming the app violated Facebook's terms of service and trademark law.[199]

The prevailing wisdom is that upon receipt of such a letter, it is worth pausing all services immediately.[200] The developer of Unfollow Everything, who has advised numerous other developers receiving cease-and-desist letters, concluded that to resist such an order "you'd need to risk your finances, mental health and years of your life to litigate against the Big Tech company. In other words, it's completely irrelevant that you're right and they're wrong."[201] Thus, the legal grounds for suing a digital assistant need not even be strong, or the likelihood of going to court high, for legal action to have a chilling effect.

194. Telephone Interview with Former MIT Media Lab Employee (Apr. 18, 2024). For more on Gobo, see *Gobo*, MIT MEDIA LAB, https://www.media.mit.edu/projects/gobo/overview/ [https://perma.cc/XP2S-HWQV].

195. 18 U.S.C. § 1030.

196. *See* Orin S. Kerr, Essay, *Norms of Computer Trespass*, 116 COLUM. L. REV. 1143, 1145–46 (2016) (treating automated collection by consumer agent as archetypal CFAA cause of action); Patricia L. Bellia, *A Code-Based Approach to Unauthorized Access Under the Computer Fraud and Abuse Act*, 84 GEO. WASH. L. REV. 1442, 1451 (2016) (explaining CFAA cases can be placed in two buckets, one of which involves "defendants using automated queries to extract information from a rival website"); Kadri, *supra* note 191, at 972 (describing use of CFAA to create "legally enforceable data silos" and "restrict the flow of market data" to third parties); Van Loo, *supra* note 31, at 837 (explaining online sellers' use of the CFAA to forbid third parties from digitally collecting Amazon's or airlines' prices).

197. Barclay, *supra* note 192.

198. *Id.*

199. Louis Barclay, *How to Deal with Receiving a Cease-and-Desist Letter from Big Tech*, DIRECTING ATTENTION (Jan. 30, 2024), https://12challenges.substack.com/p/how-to-deal-with-receiving-a-cease [https://perma.cc/37P7-PFE8].

200. *Id.*

201. *Id.*

It is difficult to know how many startups were affected by these legal threats, as no empirical study has been conducted. But accounts from within some of these startups and their organizational chronology indicate that these legal arguments have slowed down, altered, and shut down consumer tools in both the commercial and social media space.[202] Moreover, some of these cases produced court victories for incumbents. Most prominently, in 2008, the startup Power Ventures offered an app that would allow users to manage all of their social media accounts in one place.[203] The early functionality gave users more control over what they saw in their feeds.[204] Facebook won a CFAA lawsuit, however, thereby shutting Power Ventures down.[205]

It is further plausible that the risk of such costly lawsuits, some of which bring criminal prosecutions, would alter the incentives of investors and at least some entrepreneurs in their decision of whether to try to launch a consumer tool at all. What can be said with confidence is that legal threats by incumbents create barriers to third-party tools giving users greater control in their e-commerce and social media lives.

Of course, laws and normative arguments will not always work, especially if the third party is sufficiently resourced to litigate or consumers are sufficiently determined to seek third-party help. However, laws are not the only means available to incumbents for blocking third-party access.

B. Technical Barriers

Even if consumer agents can overcome legal barriers, companies often technologically impede information access. Digital consumer agents have two main options for obtaining data. The more expensive and slower data collection option is data scraping, in which the digital agent accesses either publicly available online information or any personal account provided by the consumer.[206] For instance, a shopping tool can send bots to visit various web pages from Walmart.com, Amazon.com, and eBay.com to collect price and product information.[207] Data scraping millions or billions of data points

202. *See, e.g.*, *id.* (providing an example of these effects); *supra* note 194 and accompanying text (providing an example from Gobo).

203. Facebook, Inc. v. Power Ventures, Inc., 844 F.3d 1058, 1062 (9th Cir. 2016).

204. *Id.* at 1063.

205. *Id.* at 1062.

206. SEPPE VANDEN BROUCKE & BART BAESENS, PRACTICAL WEB SCRAPING FOR DATA SCIENCE: BEST PRACTICES AND EXAMPLES WITH PYTHON 3 (2018).

207. *See, e.g.*, *Capital One Shopping*, *supra* note 180.

requires significant computing and data storage resources and thus raises the costs of offering such tools.[208]

The lower-cost and faster way to access the information is through an application programming interface (API), which is a data feed that most incumbents already provide voluntarily to various business partners.[209] Instead of needing to visit individual web pages or use the platform's search box, the consumer agent can access the platform's data directly, which is in one place and in a machine-readable form.[210]

Platforms do not typically offer such access unconditionally to consumer agents, of course. To illustrate the risks in these deals, consider the startup app PriceZombie, which helped consumers compare prices and advised them on whether they might save money by waiting to purchase.[211] The app obtained early access to Amazon's API and was growing its user base rapidly when Amazon suddenly withdrew access after realizing that PriceZombie provided a historical perspective on the price.[212] Amazon's move reportedly caused the startup to lose 90% of its revenue within days and to shut down soon thereafter.[213] In short, platforms wield tremendous authority to block or frustrate third parties even when the information is freely available on the web.

For some types of valuable consumer agent services, not all of the helpful information is publicly available on the web. Filtering content on a social media site typically requires logging in to the user's account to be able to view the social network. Shopping advisory tools would benefit from access to a consumer's Amazon or other e-commerce spending history to identify spending patterns and likely product preferences. Fintech tools would need access to personal credit card accounts, bank accounts, and perhaps other accounts to accurately analyze whether loans with lower interest rates or credit cards with better rewards are available.

In such circumstances, when the information needed requires first opening an account or accessing an existing one, incumbents gain even more ability to block third-party help. Incumbent businesses use automated

208. *See The New Guide to Web Scraping at Scale*, ZYTE, https://www.zyte.com/learn/new-guide-web-scraping-scale [https://perma.cc/4GE6-QGMB].

209. *Id.* at 4–5.

210. *Id.*

211. u/PriceZombie, *PriceZombie Shutting Down End of the Month Because of Amazon. You Might Be Able to Help.*, REDDIT: R/PRICEZOMBIE (Mar. 16, 2016, 9:58 PM), https://www.reddit.com/r/PriceZombie/comments/4ar70l/pricezombie_shutting_down_end_of_the_month [https://perma.cc/PGG2-7HR2].

212. *Id.*

213. *Id.*

algorithms to detect and block unauthorized users.[214] For example, rather than going to court, Southwest Airlines blocked third-party rewards program aggregators.[215] Leading rental car companies did the same by denying account access to AutoSlash, which helped travelers who had reserved car rentals to rebook automatically at a lower price if prices later went down significantly.[216] Consequently, AutoSlash was forced to halt offering its lower-price rebooking service.[217]

The Friendly app faced related obstacles in trying to help users to manage their social media feeds. Facebook used tools to detect when a Friendly app was present, and sent users warnings such as, "We suspect automated behavior on your account . . . . To prevent your account from being temporarily restricted or permanently disabled, ensure that no other users or tools have access to your account."[218] Facebook also changed its website in ways that blocked some of Friendly's services.[219] As one observer put it, the companies were engaged in an "arms race."[220] As of 2024, it appeared that Facebook was winning, as much of Friendly's original functionality had ceased.[221]

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214. *See, e.g.*, Ryanair DAC v. Booking Holdings Inc., 636 F. Supp. 3d 490, 496–97 (D. Del. 2022) (explaining Ryanair's use of its internally developed "machine learning blocking algorithm" against Kayak, Priceline, and other travel search websites).

215. Ron Lieber, *Swatting Down Start-Ups that Help Consumers*, N.Y. TIMES, Apr. 7, 2012, at B1.

216. *AutoSlash Loses Vehicle Rental Availability from Dollar, Thrifty, Hertz, and Advantage*, INACENTS (Apr. 3, 2012), https://inacents.com/2012/04/03/autoslash-loses-vehicle-rental-availability-from-dollar-thrifty-hertz-and-advantage/ [https://perma.cc/CE9T-RRLD].

217. *Id.*

218. u/A_n_n_i_e, Comment to *If You Must Use Facebook, Consider the Friendly App.*, REDDIT: R/DIGITALMINIMALISM (Nov. 22, 2023, 2:46 PM), https://www.reddit.com/r/digitalminimalism/comments/180xr8j/comment/kaazrmo/ [https://perma.cc/SXK6-9AET] (describing user's encounter with Instagram warning message).

219 *See* u/SecretiveDuckling, Comment to *If You Must Use Facebook, Consider the Friendly App.*, REDDIT: R/DIGITALMINIMALISM (Dec. 26, 2023, 10:12 PM), https://www.reddit.com/r/digitalminimalism/comments/180xr8j/comment/kf1jei4/ [https://perma.cc/B235-9VUP] (describing loss of features on Android version of Friendly app); u/robbadobba, Comment to *If You Must Use Facebook, Consider the Friendly App.*, REDDIT: R/DIGITALMINIMALISM (Feb. 7, 2024, 2:21 PM), https://www.reddit.com/r/digitalminimalism/comments/180xr8j/comment/kpc052e/ [https://perma.cc/B235-9VUP] (describing loss of features on iPhone version of Friendly app).

220. u/teh_201d, *If You Must Use Facebook, Consider the Friendly App.*, REDDIT: R/DIGITALMINIMALISM (Nov. 21, 2023, 7:48 PM), https://www.reddit.com/r/digitalminimalism/comments/180xr8j/if_you_must_use_facebook_consider_the_friendly_app/ [https://perma.cc/B235-9VUP].

221. u/Hannah_Lovely, Comment to *If You Must Use Facebook, Consider the Friendly App.*, REDDIT: R/DIGITALMINIMALISM (May 25, 2024, 3:49 AM), https://www.reddit.com/r/digitalminimalism/comments/180xr8j/comment/l5khyzk/ [https://perma.cc/B235-9VUP] ("[Friendly] no longer works.").

Incumbents typically justify the blocking of access through privacy or security arguments.[222] There is good reason to suspect these claims are pretextual, however, because the incumbents typically allow widespread third-party access yet block those tools that might, for example, help consumers to find better options elsewhere.[223]

Complicating all these matters, platforms have means to frustrate third-party access in subtle ways. An entrepreneur may devote considerable resources to building an interface with the platform only to have a minor change in the interface make the app nonfunctional.[224] These techniques can affect either data scraping or API access. A consumer agent entrepreneur thus incurs risks in investing in a product that the incumbent could make unworkable at any moment.

In addition to these business risks, entrepreneurs face personal repercussions. Most prominently, Facebook has punished entrepreneurs developing consumer tools—including the founder of Unfollow Everything—by deactivating the entrepreneurs' personal Instagram and Facebook accounts, in some cases permanently.[225] For some people, deactivation means being out of the loop on social events and greater difficulty keeping in touch with friends and professional contacts, giving platforms an awesome and in some ways unprecedented power of social sanction.[226]

Thus, incumbents can devote resources and sophisticated technological capabilities to make it expensive, difficult, or even impossible for the consumer agent to obtain the data it needs to offer the most powerful services without the cooperation of the incumbent. Offering a consumer agent service comes with significant risks beyond those facing traditional business startups.

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222. *See* Van Loo, *supra* note 192, at 129 (discussing Bank of America email suggesting third party apps compromise login information); Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 243 (2018) ("In order to access crucial data, fintechs may need to prioritize big banks' interests over helping consumers switch.").

223. Van Loo, *supra* note 192, at 128–29.

224. *See* DANIEL CASTRO & MICHAEL STEINBERG, CTR. FOR DATA INNOVATION, BLOCKED: WHY SOME COMPANIES RESTRICT DATA ACCESS TO REDUCE COMPETITION AND HOW OPEN APIS CAN HELP (2017), https://www2.datainnovation.org/2017-open-apis.pdf [https://perma.cc/4LE4-B6WX] (noting real estate business, financial institutions, and airlines limit third-party access to data by creating strict data use policies, denying access to non-brokers, or keeping data unfragmented and unstandardized).

225. Barclay, *supra* note 192; u/jcbsera, *Saying Goodbye to Swipe for Facebook*, REDDIT: R/SWIPEFORFACEBOOK (Apr. 3, 2021, 4:58 AM), https://www.reddit.com/r/swipeforfacebook/comments/mj5l64/saying_goodbye_to_swipe_for_facebook/ [https://perma.cc/W4JK-GHSU].

226. *See* Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. 829 *passim* (2021); Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 530 (2022). For a related argument in the context of government algorithms, see Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1305 (2008).

As a result of these legal and technological barriers, startup consumer agents have mostly depended on the cooperation of incumbent businesses for revenues or information access—such as Amazon in e-commerce, Facebook in social media, and Wells Fargo in finance.[227] With the incumbent holding so much power over information access, the consumer agent faces significant risks in offering the consumer any advice or service that might threaten the incumbent's profits. Thus, the data collection and revenue models for digital intermediaries can push digital agents away from putting consumers' interests first.

C. Business Model Barriers

A final obstacle comes in the form of the consumer agent's business model. On the revenue side, e-commerce and fintech agents tend to earn revenue through some combination of commissions and advertisement.[228] For social media agents, advertisements and sometimes subscriptions provide most of the revenue.[229] Commissions mean that the end sellers pay the agent for each sale facilitated. As a result, the agent is motivated not only to push sales, but to do so only for those sellers willing to pay commission. The two models are related, as businesses pay more for advertising if it leads to actual sales, which can be tracked. Also, advertisers sometimes have influence over the digital agent, since the advertiser is in a sense the agent's customer.

These for-profit business models are particularly complicated in the context of an agent because individuals are seeking help precisely due to their inability to perform the function themselves.[230] Yet this inability means that individuals will often be incapable of effectively monitoring the performance of the agent.[231] For instance, according to a recent lawsuit, one of the leading shopping apps, Honey, promised its millions of customers that it would "[gather] coupon codes on websites or through user submission that are potentially applicable to a user's purchase" but instead

227. In finance, this has happened through data aggregators—technology firms that develop the application programming interfaces that enable third parties to access the information of incumbent financial institutions. *See* Dan Awrey & Joshua Macey, *The Promise & Perils of Open Finance*, 40 YALE J. ON REGUL. 1, 14–15 (2023).

228. *See* Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1282–84 (2017) (summarizing agents' business models).

229. *See* Gil Appel, Barak Libai, Eitan Muller & Ron Shachar, *On the Monetization of Mobile Apps*, 37 INT'L J. RSCH. MKTG. 93, 93 (2020).

230. *Supra* Section I.D.

231. *See* Van Loo, *supra* note 228, at 1292–93 (describing how intermediaries' failure to disclose commissions tied to product recommendations creates risk of consumer deception).

automatically applies worse coupons for which it gets a kickback.[232] Moreover, the nature of the revenue sources and accompanying agreements—commissions paid to the agent by another business—are inherently opaque to the consumer. At the heart of a consumer agent's existence thus lies a great temptation to self-deal or manipulate the consumer.[233]

These business model dynamics may help to explain why some of the early digital agents, despite deploying altruistic pro-consumer rhetoric, have themselves been fined millions of dollars for deceptive practices, such as not making it clear when they are being compensated by the business whose product they are recommending.[234] In other cases in which digital search tools have obtained strong market positions, they have imposed considerable costs on incumbents.[235] For instance, Expedia and other travel search engines have charged a commission of 15% or more of the ticket price.[236] If a business fights the intermediary, it can prove costly, with one study estimating that American Airlines lost $35 to $40 million the three months it was delisted as the result of a fee dispute with Expedia and Orbitz.[237] Yet the balance of power can shift over time if incumbents succeed at growing their market power or offering new strategies, such as hotels offering free internet access to guests who book directly.[238]

These business model dynamics interact with the barriers erected by incumbents.[239] The more expensive it is to obtain data, whether due to data scraping or needing to pay the incumbent for access, the more the consumer agent will need to aggressively seek higher revenue for a service that could

232. First Amended and Substituted Class Action Complaint & Demand for Jury Trial at 9–10, Wendover Prods., LLC v. PayPal, Inc., No. 24-cv-9470 (N.D. Cal. Jan. 2, 2025).

233. Volumes have been written about this issue, known as the principal-agent tension, in other contexts such as corporate law. *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

234. *See In re* Flurish, Inc., CFPB No. 2016-CFPB-0023 (Sept. 27, 2016) (ordering LendUp to pay $3.63 million for failing to help consumers build credit or access cheaper loans by using banner ads on search results that included "slider bars" for viewing loan amounts without disclosing annual percentage rates).

235. *See* Volodymyr Bilotkach, Nicholas Rupp & Vivek Pai, Value of a Platform to a Seller: Case of American Airlines and Online Travel Agencies 35 (Mar. 22, 2024) (unpublished manuscript), https://ssrn.com/abstract=2321767 [https://perma.cc/R3LT-QWVG].

236. *See* Scott Mayerowitz, *Hotels Woo Guests to Book Directly Online with Discounts*, SEATTLE TIMES (Apr. 18, 2016, 11:36 AM), https://www.seattletimes.com/business/hotels-woo-guests-to-book-directly-online-with-discounts/ [https://perma.cc/8KKW-M35H].

237. *See* Bilotkach et al., *supra* note 235, at 4. The lower revenues were at least partly the result of American Airlines' decision to lower its prices during this period, which may have been a move to prevent the delisting from costing it passengers. *Id.*

238. *See* Sara Thomas, *How to Get Free Wi-Fi in Marriott Guest Rooms*, HOTEL CHANTELLE (Feb. 18, 2024), https://hotelchantelle.com/how-do-i-get-free-wi-fi-in-a-marriotts-guest-rooms/ [https://perma.cc/BJ7A-KNUX].

239. *Supra* Section II.C.

otherwise be profitably offered at a lower price. Those higher costs could, in theory, make it infeasible for the agent to rely solely on a subscription-based business model. Thus, the business model risks pushing digital agents to manipulate consumers or cater to incumbents' wishes.

D. How the Traditional Consumer Law Framework Falls Short

The dyadic consumer law framework was not built with these legal, technical, and business obstacles in mind because they did not exist in the 1930s—unlike more visible challenges related to unions and stockbrokers.[240] More specifically, the 1930s framework is a poor match for these new challenges posed by the intermediated economy for two main reasons. First, the focus in the traditional framework was on preventing a business harm, not on ensuring business help.[241] By default, the traditional bilateral framework thus viewed any consumer agent through a lens of preventing it from harming consumers rather than setting it up for success. While the legal frameworks ensured that unions could have access to workers and that stockbrokers could have access to the stock exchange, no such laws ensured that consumer agents could have access to the information they needed to help the consumer.

The second shortcoming of the traditional consumer law framework is that even in seeking to prevent harms, it fails to recognize that something more may be needed with consumer agents than with traditional end sellers.[242] That lack of distinction is problematic because consumers walking into a grocery store or car dealership understand that they are in an arm's-length relationship in which the business is trying to charge them as high a price as possible. In contrast, consumers are more likely to trust the real estate broker, search engine, or other consumer agent because the agent seems to be on the consumer's side battling against an adversarial marketplace.[243] Consequently, consumers are less likely to be on their guard with respect to the agent. The traditional model's risks were implicated in the mortgage crisis beginning in 2007, when millions of people lost their homes in part because too many trusted mortgage brokers in choosing

240. *Supra* Section I.C. (summarizing how employers sought to obstruct unions and how stock exchanges sought to exclude new brokers).

241. *Supra* Section I.B.

242. *Supra* Section I.B.

243. *See* 1 FED. TRADE COMM'N, THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY: LOS ANGELES REGIONAL OFFICE STAFF REPORT 65–69 (1983) (noting 72% of buyers in survey conducted from late 1979 to early 1980 incorrectly believed the seller's cooperating broker represented the buyer).

loans.[244] Yet brokers were compensated more for pushing buyers toward loans with higher interest rates and other predatory terms.[245] Consequently, the traditional framework leaves consumers more vulnerable to exploitation by agents whose business model creates motivation to manipulate.[246]

This traditional framework is not without relevance to the intermediated digital economy. When the FTC applies the primary consumer law authority—a prohibition of unfair and deceptive acts—to digital intermediaries, the expected behavior is typically some kind of disclosure by the party that did something deceptive or unfair.[247] For instance, when several popular Instagram dieticians promoted sugary products as healthy, the FTC sent a warning letter saying that the dieticians' disclosures of their connections to the sugar industry were insufficiently "clear and conspicuous."[248] Those disclosures may have some value in putting the consumer on guard. But sometimes they increase trust where unwarranted, when consumers interpret the disclosure as a sign that the party is honest—not knowing that the disclosure was mandated by law.[249] Moreover, knowing there is a commission paid does not tell the consumer what would be most valuable—whether the agent is making an earnest effort to give the consumer the best advice possible.

In sum, the traditional consumer law framework fails to remove significant legal, technological, and business barriers that are potentially preventing consumers from receiving powerful third-party assistance. It also fails to ask the bigger-picture question of whether the law has a role to play in unleashing the untapped potential of consumer agents.

III. AN EMERGING CONSUMER LAW FRAMEWORK

In the absence of a broad consumer statute adapted to the twenty-first-century economy, the contours of a new legal framework can be seen at the state and industry level. In recent decades especially, various statutes,

244. *See* Jackson & Burlingame, *supra* note 178, at 312–57 (identifying yield spread premiums as "allow[ing] mortgage brokers to extract materially higher payments from consumers, most likely from consumers who are less sophisticated and more vulnerable to abusive practices").

245. *Id.*

246. *See supra* Section II.C. (discussing the problem of agent manipulation).

247. *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (2025); *id.* § 255.5(a).

248. *See, e.g.*, Letter from Serena Viswanathan, Assoc. Dir., Div. of Advert. Pracs., Fed. Trade Comm'n, to Sandra Marsden, President, Canadian Sugar Inst. (Nov. 13, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/warning-letter-canadian-sugar.pdf [https://perma.cc/2F8F-SKAT] (warning that the disclosures were insufficient to be clear and conspicuous).

249. Sunita Sah, Prashant Malaviya & Debora Thompson, *Conflict of Interest Disclosure as an Expertise Cue: Differential Effects Due to Automatic Versus Deliberative Processing*, 147 ORG. BEHAV. & HUM. DECISION PROCESSES 127, 143 (2018).

regulations, and judicial opinions scattered across industries have begun to pay greater attention to third-party consumer help. These laws coincide with the rise of consumer agents' importance in the economy. Though inconsistent and dispersed, when viewed collectively, these laws begin to reveal a different side of consumer law, one that has the potential to be more relevant to a heavily intermediated economy.

This Part sketches the contours of that consumer agent framework. Some of these laws break from consumer law's past by imposing greater duties on existing consumer agents, such as mortgage brokers, above those expected traditionally of businesses in arms-length dealings. Where consumer agents instead need legal help to thrive, legal institutions have increasingly stepped in to remove some of the access and other barriers holding them back. For businesses that do not immediately appear to be consumer agents, such as social media platforms and banks, other laws push them to nonetheless act as allies, such as by requiring them to police third parties. Finally, when unsatisfied with private options, government entities have created market actors in the form of digital tools seeking to improve consumer decisions.

A. Advancing Agent Loyalty

Although most jurisdictions initially approached consumer intermediaries no differently than other business actors, over time the law has begun to increasingly impose greater duties.[250] For instance, as homeowners insurance policies became widespread in the mid-1900s, courts began to hold insurance brokers to a higher standard, which means that now most must act with "reasonable care, skill, and diligence."[251]

Another consumer agent subject to escalating court-imposed duties is the mortgage broker. Following the mortgage crisis of 2007 and the accompanying recession, more courts began viewing mortgage brokers as owing a fiduciary duty, duty of loyalty, or other heightened standards in

250. *See* TAMAR FRANKEL, FIDUCIARY LAW 45–50 (2011) (discussing evolution of duties of care imposed on brokers and dealers).

251. Douglas R. Richmond, *Insurance Agent and Broker Liability*, 40 TORT TRIAL & INS. PRAC. L.J. 1, 10 (2004); *see, e.g.*, Manzella v. Gilbert-Magill Co., 965 S.W.2d 221, 226 (Mo. Ct. App. 1998); Fry v. Walters & Peck Agency, Inc., 750 N.E.2d 1194, 1200 (Ohio Ct. App. 2001); Sadler v. Loomis Co., 776 A.2d 25, 37 (Md. Ct. Spec. App. 2001); John Paul Rossi, *Innovation, Imitation, and Entrepreneurship: The Introduction and Diffusion of the Homeowners Policy, 1944–1960*, 21 ESSAYS ECON. & BUS. HIST. 141, 141–42 (2003).

dealing with consumers.[252] Consequently, the law now expects most mortgage brokers to put consumers' interests above their own.[253]

Besides imposing general duties, the law may prohibit arrangements that potentially give agents a conflict of interest. In health care, pharmaceutical companies have long sought to influence doctors with lavish trips, lucrative consulting projects, speaking fees, and other financial opportunities.[254] Concerned that these kickbacks might coopt doctors,[255] some earlier statutes sought to ban kickbacks related to Medicare and Medicaid, and broader regulation of the physician-pharma relationship began in the 1990s and 2000s.[256] Over the past few years, a small number of states, led by Minnesota, also started prohibiting pharmaceutical companies from giving gifts to physicians above certain levels.[257]

Another example of prohibiting questionable payment arrangements comes from real estate. Widespread abuse of consumers in the 1970s led to the Real Estate Settlement Protection Act of 1974, which prohibited unearned kickbacks and required real estate agents and lawyers to disclose their compensation.[258] Overall, these statutes reflect a recognition that an agent's relationship with a consumer sometimes requires intervening to prevent the agent from being unduly influenced by the end business.

These loyalty laws have limits, of course. They only exist in certain markets or states, and duties are difficult to enforce. Loyalty laws nonetheless show an emerging recognition that the increasingly polyadic nature of consumer markets merits a different legal approach rather than treating consumer agents as a traditional arm's-length business with wide latitude to self-deal. A conceptual clarification is in order, however. Loyalty laws still focus on directly policing business conduct that harms a

252. *See, e.g.*, David Unseth, Note, *What Level of Fiduciary Duty Should Mortgage Brokers Owe Their Borrowers?*, 75 WASH. U. L.Q. 1737, 1741–45 (1997) (discussing cases where mortgage brokers were found liable for breaches of fiduciary duties through failure to disclose loan terms and fees and failure to provide the best terms).

253. For examples of these duties imposed on mortgage brokers, see CAL. CIV. CODE § 2923.1 (West 2025); COLO. REV. STAT. ANN. § 12-10-710 (West 2025); MD. CODE REGS. 09.03.06.20 (2025); NEV. REV. STAT. ANN. § 645B.0147 (West 2025); N.M. STAT. ANN. § 58-21B-20 (West 2025); N.C. GEN. STAT. ANN. § 53-244.110 (West 2025).

254. Aaron Mitchell, Ameet Sarpatwari & Peter B. Bach, *Industry Payments to Physicians Are Kickbacks. How Should Stakeholders Respond?*, 47 J. HEALTH POL., POL'Y & L. 815, 815–16 (2022).

255. For empirical data on this point, see Colleen Carey, Ethan M.J. Lieber & Sarah Miller, *Drug Firms' Payments and Physicians' Prescribing Behavior in Medicare Part D*, 197 J. PUB. ECON., May 2021, art. no. 104402, at 2.

256. For earlier Medicaid and Medicare statutes, see Social Security Amendments of 1972, Pub L. No. 92-603, sec. 242(b), § 1877(b)(1), 86 Stat. 1329, 1419 (codified as amended at 42 U.S.C. § 1320a–7b); 31 U.S.C. § 3729.

257. *See* MINN. STAT. ANN. § 151.461 (West 2025); VT. STAT. ANN. tit. 18, § 4631a(b) (West 2025); MASS. GEN. LAWS ANN. ch. 111N, § 2 (West 2025).

258. 12 U.S.C. § 2607.

consumer—and thus on a business-to-consumer relationship. The anti-kickback laws, in contrast, seek to change a business-to-business relationship on behalf of the consumer. The following sections explore other examples of that more ambitious vision for consumer law that aims to reshape an industry's private institutional relationships.

B. Empowering Consumer Agents

In the face of incumbents using laws and technologies to erect crushing barriers, the law has increasingly stepped in to fortify consumer agents. Most notably, legal authorities have begun to remove legal barriers and mandate third-party agent access to incumbents' information systems. By giving consumer agents access to the information that incumbents so fiercely guard, these laws have the potential to upend an industry's balance of power.

1. The Removal of Legal Barriers

Courts, legislatures, and administrative agencies have all shown signs of recognizing the importance of removing legal obstacles to third-party consumer help. Most importantly, in recent years, judges have begun to reverse the judicial rulings that allowed Facebook and other tech platforms to deploy the CFAA to block third parties.[259]

Another example of statutory awareness of third-party digital help can be found in Section 230, known as the internet's Magna Carta.[260] Passed in 1996, Section 230 is famous for the subsection that gives platforms immunity from liability for harms caused by third parties.[261] But it has another less well-known provision, Section 230(c), stating that anyone creating a tool for protecting users from online harms will also be shielded from liability.[262] Although this sub-section has not been fully tested, it has the potential to shield Gobo and other social media tools seeking to give users greater control over the content they see on Facebook, Instagram, and

259. *See, e.g.*, hiQ Labs, Inc. v. LinkedIn Corp., 31 F.4th 1180, 1201–03 (9th Cir. 2022) (upholding preliminary injunction forcing LinkedIn to allow third party to scrape publicly accessible data from its website); Ryanair DAC v. Booking Holdings Inc., No. 20-1191, 2024 WL 3732498, at *20 (D. Del. June 17, 2024) (granting summary judgment to defendant third party flight booking service on unauthorized access CFAA claim because "all the information that is obtained from the Ryanair website by screen scraping is obtained from the public portion of the website").

260. *See* 47 U.S.C. § 230.

261. *See id.* § 230(c)(1).

262. *See id.* § 230(c)(2)(B).

other social media websites.[263] Section 230 says, "It is the policy of the United States . . . to encourage the development of technologies which maximize user control over what information is received by individuals . . . ."[264] Together with the provision protecting safety tools, arguably the most important piece of legislation in the digital era evinces a recognition of the need for market actors that help consumers.

Finally, some agencies have begun to offer regulatory incubators for startups.[265] The idea behind these incubators is to allow businesses with valuable social innovations to develop their services in close dialogue with regulators and thereby gain assurance that what they are doing is legal.[266]

These various efforts to remove legal barriers illustrate a subtle shift from only viewing the law's role as constraining consumer harms within the existing industry structure. Instead, under this vision, legal institutions have a role in helping market actors to avoid legal obstacles and thereby facilitate the appearance of new and valuable consumer businesses.

2. Access Mandates

Perhaps the most important way that the law has begun to recognize the need to empower private consumer agents is through information access mandates. A small number of laws have begun to require that incumbents make data available for third-party access.

One of the most far-reaching of these is the open banking rule issued by the Consumer Financial Protection Bureau (CFPB).[267] Following the 2008 financial crisis, Congress created the CFPB and authorized it to write rules forcing financial institutions to share data with third parties chosen by consumers.[268] Yet after three years of study, in 2017 the CFPB declined to

263. A recent lawsuit sought to use Section 230 to clarify that Unfollow Everything 2.0, a social media tool giving users more control over their feeds, is immunized from legal liability by Section 230 and can't be blocked by Facebook. It was dismissed on procedural grounds because the tool had not yet launched, leaving open the merits of the case. *See* Zuckerman v. Meta Platforms, Inc., No. 24-CV-02596, 2024 WL 4876949, at *1, *5 (N.D. Cal. Nov. 22, 2024).

264. *See* 47 U.S.C. § 230(b).

265. *See* Van Loo, *supra* note 222, at 271–75 ("The [CFPB] has acted quickly to develop incubator policies supporting fintech innovation.").

266. *See, e.g.*, Hilary J. Allen, *Sandbox Boundaries*, 22 VAND. J. ENT. & TECH. L. 299, 305 (2020) (outlining purposes of regulatory sandboxes).

267. Even if the CFPB and other federal consumer agencies are weakened under any given president, the examples still illustrate the broader point of what those agencies may do under a president more favorable to regulation. They also illustrate how the law has in recent years fostered consumer agents and can do so again.

268. 12 U.S.C. § 5511.

write such a rule.[269] Instead, the CFPB issued guidance urging banks and other financial institutions to make consumers' data available.[270] One potential interpretation of this is that the CFPB had not completely integrated the new framework for consumer law. In its initial years, the CFPB passed a large number of rules closer to the old framework, such as disclosures and various restrictions on payday lenders' deception.[271] Yet when faced with the question of whether to force data sharing, it was convinced by banks' arguments that writing a rule would create privacy risks for consumers.[272]

That concern is consistent with the historic prioritization of directly preventing business harms rather than promoting business help.[273] Such emphasis is perhaps unsurprising. Congress mandated that third-party authority in the wake of the mortgage crisis and financial crisis of 2007 to 2008, which forced a rethinking of the old consumer financial law framework.[274] Yet the CFPB was built and led in those early years by staff from the FTC's Bureau of Consumer Protection and financial regulators, such as its first director Richard Cordray, who as Ohio's attorney general had brought important lawsuits on behalf of retirees, albeit grounded in the old consumer law framework.[275] Still, the fact that Congress granted such authority and the CFPB issued guidance was already a shift from the previous framework.

This changed following years of criticism about the CFBP's failure to write a data-sharing law[276] and with a new director, Rohit Chopra, who had

269. CFPB, CONSUMER PROTECTION PRINCIPLES: CONSUMER-AUTHORIZED FINANCIAL DATA SHARING AND AGGREGATION 1–2 (2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-protection-principles_data-aggregation.pdf [https://perma.cc/EX2N-ZK2Q].

270. *See id.* at 3.

271. *See, e.g.*, Consent Order at 5, *In re* Dwolla, Inc., CFPB No. 2016-CFPB-0007 (Mar. 2, 2016) (applying UDAP authority).

272. *See* CFPB, CONSUMER-AUTHORIZED FINANCIAL DATA SHARING AND AGGREGATION 7–8 (2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-protection-principles_data-aggregation_stakeholder-insights.pdf [https://perma.cc/8S6H-MEAF] (acknowledging banks' concerns.

273. *See supra* Section I.B.

274. *See supra* Section II.D.

275. *See, e.g.*, Biography of Richard Cordray, Director of the CFPB (2014), CONSUMER FIN. PROT. BUREAU, https://files.consumerfinance.gov/f/documents/201410_cfpb_bio_cordray.b0bac3ad3eb6.pdf [https://perma.cc/K8WC-QK97]; Press Release, U.S. Dep't of the Treasury, Treasury Department Announces Key Leadership Hires for CFPB Implementation Team (Nov. 16, 2010), https://home.treasury.gov/news/press-releases/tg955 [https://perma.cc/2Z8P-8RL5] (discussing the early hiring of two leaders to set up the CFPB from the FTC's Bureau of Consumer Protection and a financial regulator).

276. *See, e.g.*, Rory Van Loo, *Technology Regulation by Default: Platforms, Privacy, and the CFPB*, 2 GEO. L. TECH. REV. 531, 535 (2018) ("[T]he CFPB's approach increases the chances that fintechs must serve banks rather than only consumers."); Van Loo, *supra* note 31, at 839 (arguing that the CFPB's "guidelines could exert soft influence, but they leave banks with great leeway to thwart

no consumer law background before he first joined the CFPB.[277] In 2023, the agency began writing a rule requiring financial institutions to share data with third parties.[278] The final rule stated that if a consumer wanted a third-party fintech to obtain access to the consumer's data, the credit card company or bank must provide the fintech with secure API access to data, including account balances, transaction history, and payment information.[279] Thus, the CFPB mandated the most helpful kind of access, both in terms of the lowest cost to obtain the data and in terms of the most valuable type of data—that which would allow personalized services.[280]

Similar mandates can be found at the state level and abroad. California, the first state to pass a broad digital privacy law, included provisions to allow consumers to request data in machine-readable form that could be shared with third parties.[281] Eighteen states have subsequently followed California's lead with legislation granting similar access rights.[282] Europe's General Data Protection Regulation and AI Act, as well as Japan's Promotion of Competition for Specified Smartphone Software, include third-party access provisions.[283] Another example comes from Israel, where the legislature passed a law mandating that retail stores offer pricing and product information in machine-readable form.[284] The aim was to empower third parties to help consumers find the best deals, and there is some

intermediary access"); Van Loo, *supra* note 192, at 133 ("This outcome is unsatisfactory . . . because the absence of a clear legal obligation puts legacy financial institutions in a position of informational control over consumer tools.").

277. *Rohit Chopra, Director*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/about-director/ [https://perma.cc/7DMU-E4NF?type=image] (stating that before first joining the CFPB in 2010, Chopra worked at the management consulting firm McKinsey & Co. and had no legal background). Whether the difference between Chopra and Cordray is a matter of background or other factors, such as political inclination, is impossible to know with certainty.

278. *See* Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796 (proposed Oct. 31, 2023) (to be codified at 12 C.F.R. pts. 1001 & 1033).

279. 12 C.F.R. pt. 1033(B) (2025).

280. *See supra* Section II.B. (explaining the importance of such data).

281. California Consumer Privacy Act of 2018, sec. 3, § 1798.100(d), 2018 Cal. Legis. Serv. Ch. 55 (West) (codified with some differences in language at CAL. CIV. CODE § 1798.130(a)(3)(B)(iii) (West 2025)).

282. Brian Eckert, *Data Privacy Laws in the United States,* DIDOMI: BLOG (Nov. 2025), https://www. didomi.io/blog/us-data-privacy-laws [https://perma.cc/KH27-W63X].

283. For example, in Japan, regulators mandated that tech companies like Apple and Google give consumers the ability to access third-party applications and payment systems on their smartphones. The idea was that smartphone users should be able to change their default settings easily, and application developers should be able to process customer payments with third-party billing services. *See* Simon Sharwood, *Japan Forces Apple and Google to Allow Third-Party App Stores and Payments*, THE REGISTER (June 13, 2024, 5:33 AM), https://www.theregister.com/2024/06/13/japan_smartphone_software_law/ [https://perma.cc/M5M3-V3KC].

284. Itai Ater & Oren Rigbi, *Price Transparency, Media, and Informative Advertising*, 15 AM. ECON. J.: MICROECON. 1, 2 (2023).

evidence that goal was accomplished.[285] A study of the law's effects found that within two years, prices were lowered by 4 to 5%.[286]

In some sense, these laws are conservative, both ideologically and descriptively, in that they only require information sharing and preserve autonomy for existing market actors.[287] On the other hand, they have the potential to redistribute market power. The harder question is whether that redistribution will benefit consumers. Once the agent has access to data, it may itself gain significant leverage with incumbents,[288] as even happened in the airline industry despite only four airlines handling over 75% of all U.S. traffic.[289] Any such power obtained is not guaranteed to last, however, as incumbents will inevitably respond strategically.

How to address these concerns about shifting dynamics and abuse by intermediaries will be discussed below.[290] For now, the broader point here is that by empowering a third party with access or otherwise removing barriers, the law has the potential to significantly redistribute industry bargaining power.

C. Conscripting New Consumer Agents

Whereas access laws impose minor duties on the economy's core businesses—a duty to share information with consumer agents—another set of laws pushes those businesses even further in service of consumers. These laws conscript businesses to act as allies not in the dyadic sense of changing their own direct behavior toward the consumer. Instead, the law pushes them to act as third-party allies by intervening on the consumer's behalf with respect to some other business. That move, at least in part, transforms what was previously an arm's-length counterparty into a consumer agent.

1. Credit Card Chargebacks

One of the earliest and most significant conscriptions of businesses as consumer agents is the Fair Credit Billing Act of 1974.[291] The Act provides that if a consumer disputes a transaction, such as because a product delivered was not as advertised or never arrived, the credit card company

285. *Id.*
286. *Id.*
287. *See* Camerer et al., *supra* note 37 (explaining why information-forcing laws appeal to conservatives).
288. Van Loo, *supra* note 228, at 1278.
289. *Supra* Section II.C.
290. *Infra* Part IV.
291. Fair Credit Billing Act of 1974, Pub. L. No. 93-495, 88 Stat. 1511 (codified at 15 U.S.C. §§ 1666–66i).

must refund the purchase and conduct an investigation.[292] Despite this neutral-sounding official language, the Act transformed credit card companies into one of the most important courthouses for consumer markets.[293] In 2024, credit card companies handled about 109 million credit card chargebacks in North America, most of which were brought by consumers.[294] That figure is more than all federal and state courts combined, and consumers rarely bring cases in public courts.[295] Additionally, consumers reportedly win the vast majority of chargebacks.[296]

One of the reasons these chargeback processes are so important is that few consumer transactions are worth the time and expense even of going to small claims court, with the average chargeback amount under $100.[297] Since 82% of adults have credit cards, this statute means that most consumers can directly enlist the help of a consumer agent for dispute resolution.[298] Thus, as a descriptive matter, mandated consumer agent help is pervasive across the economy.

The chargeback mandate also illustrates three features of the emerging consumer law framework. First, it demonstrates a willingness to impose a significant duty on private parties to create consumer help. Second, it underscores how the economy's heavy financial and technological intermediation creates opportunities for enlisting consumer agents. Finally, the case of chargebacks illustrates how these mandates need not harm the businesses they are conscripting and may even help. In the case of credit cards, the mandates were followed by considerable market growth and indeed may have helped early on to build consumer trust that facilitated the

292. 15 U.S.C. § 1666(a).

293. Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REGUL. 547, 564–73 (2016).

294. MASTERCARD, THE CHARGEBACK WINDOW OF OPPORTUNITY 8 (2025), https://hs.ethoca.com/hubfs/2025%20state%20of%20chargebacks%20report.pdf [https://perma.cc/BJ7J-6VYP].

295. Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1707 (2022); *Judicial Business 2024*, U.S. COURTS (Sept. 30, 2024), https://www.uscourts.gov/data-news/reports/statistical-reports/judicial-business-united-states-courts/judicial-business-2024 [https://perma.cc/DS6V-RV4A].

296. Actual numbers are unknown, but see Maggie Davis & Dan Shepard, *Half of Credit Cardholders Have Disputed a Claim — 96% of Whom Were Successful*, LENDINGTREE (Aug. 19, 2024), https://www.lendingtree.com/credit-cards/study/disputes [https://perma.cc/3WXZ-VKCN] (reporting survey results in which 96% of consumers said they were successful); *Chargeback Stats and Insights from Mastercard's State of Chargebacks Report*, CHARGEBACK GURUS (June 10, 2025), https://www.chargebackgurus.com/blog/chargeback-stats-and-insights-from-mastercards-state-of-chargebacks-report [https://perma.cc/BU9N-QRN7] (reporting data suggesting that merchants win only 20% of chargebacks).

297. Van Loo, *supra* note 293, at 549–50.

298. Alicia Puente Cackley, *American Credit Card Debt Hits a New Record—What's Changed Post-Pandemic?*, U.S. GOV'T ACCOUNTABILITY OFF.: WATCHBLOG (Oct. 31, 2023), https://www.gao.gov/blog/american-credit-card-debt-hits-new-record-whats-changed-post-pandemic [https://perma.cc/789Y-N32X].

widespread use of credit cards.[299] Thus, the policy choice does not necessarily require a choice between market productivity and agent mandates.

2. Counterparty Regulators

A more recent wave of enlisting consumer agents involves imposing duties on many of the world's largest businesses to police other businesses with which they have contractual relations. The FDA issued rules requiring pharmaceutical companies to monitor any labs or other contractors used for safety violations that might threaten patients;[300] the CFPB, through guidance and enforcement actions, obligates banks to enforce consumer protection laws against software providers, sales representatives, mortgage brokers, and other third parties;[301] and the FTC has used settlement orders to compel tech platforms, such as Amazon and Facebook, to ensure third-party app developers do not violate privacy and manipulate consumers.[302]

Courts have also contributed to conscripting businesses in service of consumers by applying common law principles to the digital era.[303] For instance, courts have found that Uber had sufficient remote technological control tools to be held liable for drivers assaulting passengers,[304] even though taxi companies were historically absolved of liability for similar conduct by their drivers.[305]

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299. *See* Jan Logemann, *Different Paths to Mass Consumption: Consumer Credit in the United States and West Germany During the 1950s and '60s*, 41 J. SOC. HIST. 525, 528 (2008); Glenn B. Canner & Gregory Elliehausen, *Consumer Experiences with Credit Cards*, FED. RSRV. BULL., Dec. 2013, at 1, https://www.federalreserve.gov/pubs/bulletin/2013/pdf/consumer-experiences-with-credit-cards-201312.pdf [https://perma.cc/Z4XQ-QFR2] ("[S]ecurity protections on card transactions . . . . have been valuable to consumers and have helped promote the widespread holding and use of credit cards.").

300. 21 C.F.R. § 211.22(a) (2025).

301. *See, e.g.*, CONSUMER FIN. PROT. BUREAU, COMPLIANCE BULLETIN AND POLICY GUIDANCE 2016-02, SERVICE PROVIDERS (2016), https://files.consumerfinance.gov/f/documents/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf [https://perma.cc/D7HA-BR57] (expressing expectations for third-party oversight); Stipulation and Consent Order at 3–6, *In re* Capital One Bank, (USA) N.A., CFPB No. 2012-CFPB-0001 (July 16, 2012) (faulting Capital One for third-party call centers' sale representatives' improper deception of subprime credit card customers); Consent Order at 9–10, *In re* Dwolla, Inc., CFPB No. 2016-CFPB-0007 (Feb. 27, 2016).

302. *See, e.g.*, Decision and Order at 3–7, *In re* Facebook, Inc., F.T.C. No. C-4365 (July 27, 2012), 2012 WL 13293521 (decision and order); FTC v. Amazon.com, Inc., No. C14-1038, 2016 WL 10654030, at *8–11 (W.D. Wash. July 22, 2016) (requiring Amazon to prevent third-party apps from unfair and deceptive charges).

303. Rory Van Loo, *The Revival of Respondeat Superior and Evolution of Gatekeeper Liability*, 109 GEO. L.J. 141, 159–62 (2020).

304. *See, e.g.*, Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 782 (N.D. Cal. 2016); Search v. Uber Techs., Inc., 128 F. Supp. 3d 222, 232–34 (D.D.C. 2015).

305. *See, e.g.*, Yellow Taxi Co. v. NLRB, 721 F.2d 366, 381 (D.C. Cir. 1983) ("The freedom to conduct 95 percent of one's business independently dwarfs the significance of whatever control might inhere in the commercial contracts.").

These administrative and judicial efforts at imposing duties have significant limits. The agency test still sets a high bar that is not met in many contexts.[306] Importantly, the weakest administrative agency conscription of businesses is at the core of consumer law, the FTC's Bureau of Consumer Protection, because it relies on settlement orders.[307] In contrast, in securities regulation, this model is more formal and powerful because the SEC, for example, exercises explicit statutory authority from Congress in requiring the New York Stock Exchange and NASDAQ to regulate public companies through listing requirements.[308] The SEC's authority is more reflective of a regulatory framework that has normalized third-party help, rather than taking tentative steps or applying general authority in an ad hoc manner.

D. Creating Government Agents

A final category shifts the focus from the private to the public sector. Instead of asking how to improve, create, or empower private consumer agents, policymakers have tasked government agencies with creating their own.[309] Two straightforward examples of this are a mortgage calculator and health insurance exchanges.

At its launch in 2011, the CFPB offered an online mortgage calculator.[310] Any consumer could go to the website, enter a credit score, loan amount, and zip code to see what interest rates actual consumers with the same data points had achieved.[311] This is powerful information in the sense that a consumer could compare a quote received by a mortgage broker to the best rate similar consumers had found locally.

The mortgage calculator filled a gap in the existing consumer helper landscape because the existing online mortgage calculators had different goals of either themselves selling mortgages or linking consumers to third parties for a commission.[312] To achieve those goals, the other mortgage calculators had little interest in giving consumers actual data about what other consumers had achieved, and instead sought to convince consumers that the calculator's results would be attractive.[313] Consequently, no

306. *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1175–76 (9th Cir. 2007) (finding that Amazon and Google had insufficient control over third-party websites).

307. *See supra* note 302 and accompanying text.

308. *See* 15 U.S.C. § 78f(b).

309. *See* Van Loo, *supra* note 228, at 1315.

310. *Id.* at 1304–08.

311. *Id.* at 1305.

312. *See* M.P. McQueen, *Refinancing: Whom Can You Trust?*, WALL ST. J. (Sept. 18, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052748704652104575494190518195172 [https://perma.cc/S485-WTWY].

313. *Id.*

mortgage calculator like the CFPB's existed at the time, and markets failed to solve this problem for years thereafter.[314] The CFPB's mortgage calculator thus demonstrates how a government entity might fill an informational gap by introducing a digital market actor.

More ambitious than the CFPB's calculator are the healthcare insurance exchanges.[315] Rather than simply providing personalized market information to consumers, these exchanges seek also to facilitate the transactions between consumers and insurance companies.[316] After entering personal information, consumers can see a list of plans compared by price, benefits, and even quality ratings.[317] Operated at both the federal and state levels, government-run exchanges help about twenty-one million people obtain insurance annually.[318]

In short, judicial holdings, industry-specific legislation, and administrative agency authority have imposed duties on businesses to act on consumers' behalf, removed barriers blocking consumer agents, and created public sector digital tools to help consumers make better decisions. These scattered developments sketch the contours of an expanded consumer law framework. At its most ambitious, this emerging framework evinces a willingness to invest the state's authority to reconfigure commercial relationships and even the set of market actors in the consumer economy.

IV. DEVELOPING THE NEW CONSUMER LAW

The discussion so far has shown how the foundational consumer law framework ignored agents at a time when that made more sense. Since then, however, consumer agents have become more common, needed, and feasible. Various laws and policies have also demonstrated a nascent recognition of the importance of promoting agents through consumer laws. Yet despite the potential for digital agents to advance consumer interests, in many markets they have yet to offer the kind of powerful services that would be expected. The limitations of these tools raise the question of whether a more comprehensive or better developed consumer law framework might benefit society.

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314. *Id.*

315. Van Loo, *supra* note 228, at 1297–304 (discussing health-insurance exchanges and effects on consumer decision making, resource allocation effectiveness).

316. *Initial Guidance to States on Exchanges*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Sept. 10, 2024, 6:11 PM), https://www.cms.gov/cciio/resources/files/guidance_to_states_on_exchanges [https://perma.cc/4BG5-U2WP].

317. *Id.*

318. Press Release, Ctrs. for Medicare & Medicaid Servs., Historic 21.3 Million People Choose ACA Marketplace Coverage (Jan. 24, 2024), https://www.cms.gov/newsroom/press-releases/historic-213-million-people-choose-aca-marketplace-coverage [https://perma.cc/8V9K-U4ZY].

Of course, political economy barriers are inevitably part of the story of why such tools do not exist and are an obstacle to the path forward. Yet those political economy barriers have been overcome at various times for investors, workers, and consumers despite a lack of strong business interests supporting the reforms.[319] In the case of consumer intermediaries, some of the biggest companies—such as Alphabet's Google Shopping and Capital One's shopping tool, among others—now operate various consumer agents. Having powerful business interests on both sides of the debate has led to more balanced policies in other regulatory contexts, even without consumer interests also justifying regulation.[320] Additionally, the market-oriented nature of the new consumer law means that it has strong normative foundations.[321]

Although there is reason to think that the political economy forces might align, in some ways the new consumer law has shown that it may be implemented without broad-reaching federal legislation. Many other actors—including regulatory agencies, state legislatures, and social entrepreneurs—have the potential to advance third-party help without any action from Congress. Whenever reform opportunities arise, and at whatever level they appear, legal architects would ideally begin from a conceptual framework that reflects market realities. A more comprehensive vision for consumer law can guide future adjustments to the legal framework that more effectively integrate consumer agents.

A. Critiquing the Emerging Framework

The emerging consumer law framework is vulnerable to at least three major critiques. Some may view the new regime as government overreach into private affairs. Others will see too much public reliance on private actors whose profit motives render them suspect. Finally, some will be skeptical that, even if motivated to do so, consumer agents can make a meaningful difference.

1. Overreaching Public Authority

The emerging regime in some ways appears to expand legal authority in astonishing ways. Judges, lawmakers, and regulators are pushing businesses to act as administrative agencies. The business conscripted as a regulator is

319. *Supra* Section I.C.

320. One example is that unlike the complete shielding of immunity for internet platforms, Hollywood succeeded in lobbying to have their copyright interests protected online. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

321. *Infra* Section IV.A.3.

expected to audit third parties and administer sanctions and must use private contracts to govern these relational powers.[322] Not only does this impinge on autonomy, but it expands the reach of the administrative state in subtle and arguably unaccountable ways.[323] In the case of access mandates, businesses have invested in building data sets—one of the world's most valuable assets—and are now, arguably, being forced to share their private property with others.[324]

One threshold observation is that the new consumer law is, at a high level of abstraction, responsive to those concerned about excessive government overreach in private affairs. It relies heavily on private actors for solutions compared to a regime that deployed government inspectors and utility-style regulation across the economy.[325] One of the emerging regime's main mechanisms would be to unleash the creative potential of entrepreneurs by giving them access to data and removing legal barriers.[326] Unless one is prepared to accept a status quo of allowing consumer market failures, the new consumer law may offer the least intrusive option.[327]

Still, some of the examples of the emerging regime are more clearly legitimate than others. When the FTC uses its general unfair and deceptive acts authority to require Google to act as a regulator of third-party app developers, it is more suspect than when the SEC exercises explicit statutory authority to order stock exchanges to police misconduct in listings.[328] Rulings about the appropriate bounds of administrative agency discretion are underway at the highest levels of the judiciary, with the Supreme Court recently curtailing agency discretion.[329] Those fluctuating boundaries mean both that it is debatable whether the consumer agent is legitimate and that

322. *See, e.g.*, Agreement Containing Consent Order at 5, *In re* Google Inc., F.T.C. No. 102-3136, at 5 (Mar. 30, 2011), 2011 WL 1321658 (stating that Google must require "service providers by contract to implement and maintain appropriate privacy protections"); *supra* Section III.C.

323. *See generally* Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 522 (2020) ("The public role of the firm and the private reach of the administrative state expand farther than is commonly understood."). These issues include whether this use of authority is appropriate and how to ensure sufficient accountability for both the administrative agency in using the authority and the business in exercising its duties. *See id.* at 516–22.

324. *Supra* Section III.B.2. This is not to concede that consumers' data should be the property of businesses that collect it, but merely to summarize this view.

325. *Supra* Part III.

326. *Supra* Section II.B.

327. Again, this is not to say that direct regulation (and direct liability) is not without value. For a proposal for increasing direct liability for online platforms, see Spier & Van Loo, *supra* note 48.

328. *Supra* Section III.C.2. This exercise of authority is what Christopher Brummer, Yesha Yadav and David Zaring call "[r]egulation by enforcement." *See* Chris Brummer, Yesha Yadav & David Zaring, *Regulation by Enforcement*, 96 S. CAL. L. REV. 1297, 1334 (2024).

329. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 410–11 (2024); Brummer et al., *supra* note 328, at 1326–27.

there are formal mechanisms for challenging misuse of administrative authority in service of consumers.

Further perspective comes from situating consumer law within the broader legal architecture. Most of the emerging consumer laws reflect private law principles that courts have applied for centuries.[330] This private law influence is clearest in the context of applying agency theory to large businesses to enforce the law and impose fiduciary duties on consumer agents.[331] Even when the CFPB and FTC use unfair and deceptive acts authority to compel businesses to monitor third parties, it is exercising an authority rooted in common law concepts of duty.[332] Moreover, those judicial developments and the administrative agency extension of them arguably are not forging new ground. For centuries, the doctrine of respondeat superior held the powerful liable for the acts of those they control.[333] But legal scholars have argued that in the latter half of the twentieth century corporations pushed risky activities to subsidiaries and independent contractors, enabling the parent company to avoid liability for conduct that would have previously been handled internally.[334] According to one prominent account, those strategic corporate shifts put corporate liability "at risk of death."[335] If those historical accounts are correct, by using common law principles and administrative authority to again hold corporations liable for the acts of those they can plausibly control, the new consumer law arguably amounts to a functional revival of respondeat superior.[336] The powerful are once again being held accountable for the acts of those they can control.[337] These roots in private law principles mean that

330. Van Loo, *supra* note 303, at 159–62.

331. *Supra* Section III.A.

332. This common law influence was seen in the first FTC deception case to reach courts. Sears, Roebuck & Co. v. FTC, 258 F. 307, 311 (7th Cir. 1919)). In later interpreting unfair and deceptive acts authority, courts continued to look to the common law in developing FTC doctrine, although the statute sought to make it easier than it was under the common law to bring such actions. *See, e.g.*, FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937) ("[T]he rule of *caveat emptor* should not be relied upon to reward fraud and deception.").

333. *See, e.g.*, John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 317–18 (1894); David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2198–99 (2005); Deanna N. Conn, *When Contract Should Preempt Tort Remedies: Limits on Vicarious Liability for Acts of Independent Contractors*, 15 FORDHAM J. CORP. & FIN. L. 179, 180–81 (2009).

334. *See, e.g.*, Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 4 (1996) (summarizing the shift).

335. *Id.* at 7. Corporate reorganizations have many different motivations, so the true extent of outsourcing for liability-avoidance purposes is difficult to know. *See* Van Loo, *supra* note 303, at 173–74.

336. *See id.* at 159–62.

337. *Id.*

the new consumer law is not, at least as much as it may first appear, a radical departure from past legal duties.

In a similar vein, the use of authority in the new consumer law is not a big departure from other market regulatory frameworks. Beyond the analogies above to labor and securities law, in antitrust, authorities take more extreme interventions in private affairs than does consumer law—most significantly, by breaking up companies into small pieces.[338] Moreover, one of the most common antitrust remedies is mandating access for competitors.[339] For instance, in one of the most significant antitrust cases of the digital era, the remedy was ordering Microsoft to share its APIs so that users would be able to choose their browser and other software applications rather than being confined to Microsoft's versions.[340] The broad policy behind those remedies is improving market competition by removing anticompetitive barriers erected by incumbents.[341] Consumer law interventions, like antitrust, also advance competition as conceived in basic economic theory, since full competition requires not only a sufficient number of competitors (antitrust) but also informed and rational consumers (consumer law).[342] It is unclear why extensive market intervention would be acceptable to advance competition through antitrust laws—indeed, deploying the same basic access remedy—but not through the emerging consumer law regime.

In short, appropriate administrative law guardrails are appropriate to curb excess authority, especially in the conscription of businesses as regulators. Overall, however, the new consumer law is consistent with a lighter touch model of regulation and does not clearly exceed well-established and broadly supported regulatory authority.

338. There is a case, however, that breakups are not so radical as they are often made out to be, among other reasons because businesses regularly break themselves up voluntarily. *See* Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1959 (2020).

339. *See* Herbert Hovenkamp, *Antitrust Interoperability Remedies*, 123 COLUM. L. REV. F. 1, 13 (2023) (discussing remedies to monopolistic behavior including "requir[ing] firms to share data, operations, or some significant asset").

340. United States v. Microsoft Corp., 253 F.3d 34, 100 (D.C. Cir. 2001).

341. Hovenkamp, *supra* note 339, at 30. On access mandates promoting competition in social media, see Madhavi Singh, *Reimagining Social Media Through Middleware: A Structural Path to Competition and User Agency*, 26 N.C. J.L. & TECH. 459 (2025).

342. *See, e.g.*, J.K. Pappalardo, *Economics of Consumer Protection: Contributions and Challenges in Estimating Consumer Injury and Evaluating Consumer Protection Policy*, 45 J. CONSUMER POL'Y 201, 203–07 (2022) (cataloguing markets in which consumer protection law enforcement has improved competition and market efficiency).

2. Excess Reliance on Private Governance

The second major critique is that for-profit consumer agents, whether third-party shopping assistants or tech companies conscripted to enforce laws, cannot be trusted because they have strong incentives to exploit consumers or shirk their law enforcement duties.[343] At a more philosophical level, many will feel uncomfortable with for-profit businesses playing perhaps the most important role in advancing consumers' interests and enforcing consumer laws. Under this view, it would be preferable for the state to play a stronger role, whether through courts or administrative agencies, in holding businesses accountable. Relying on private actors, by this view, is an abdication of public responsibility and potentially relieves political pressure to build governmental regulatory institutions.

As a conceptual matter, those viewing a lack of accountability as a deal-breaker for consumer agent policies would benefit from some perspective on the likely alternatives. The most likely short-term alternative to relying on consumer agents is not necessarily a public actor assuming that role. In a world of significant political economy constraints facing any increase in consumer regulation, the alternative is instead likely the status quo of limited attention to consumer agents, or even a continually deteriorating public regulatory structure.[344] Although tipping points are possible following some crisis or broad public outrage, the regulatory structure tends to lag well behind.[345] Moreover, even with full political support, public authorities face limits in directly regulating many of the harms.[346]

This concern about heavy reliance on private enforcers is nonetheless valuable because it shows how consumer laws would ideally provide for the means to contain potential future abuses by consumer agents rather than solely mandating access for consumer agents.[347] The design of that accountability structure requires further study, but it would be fair to see the need for it—as well as the complications in designing one—as a challenge facing the new consumer law. Still, as a first step, any future blueprints for

343. *See supra* Section II.C.

344. On these political economy constraints, see Jonathan S. Gould & Rory Van Loo, *Legislating for the Future*, 92 U. CHI. L. REV. 375 (2025); John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019 (2012). In the face of such deterioration, private law provides a backup. *See infra* note 353 and accompanying text.

345. *See, e.g.*, Sharon B. Jacobs, *Crises, Congress, and Cognitive Biases: A Critical Examination of Food and Drug Legislation in the United States*, 64 FOOD & DRUG L.J. 599, 600–01 (2009) (observing that crises tend to precede major legislation throughout history, even if they are not the only factor).

346. *Supra* Section II.D.

347. On the risks of excess intermediary influence, see Judge, *supra* note 31, at 583–88.

consumer law (and antitrust) can address these concerns by taking a comprehensive rather than piecemeal approach.[348]

As a practical matter, one way to address the concern about self-dealing would be to strengthen accountability mechanisms for consumer agents, such as through court-enforced fiduciary duties or administrative agency inspections.[349] Thus, this concern could be seen not as a deal-breaker but as providing input into the design of the new consumer law. There is a tension here, however, between responding more fully to this concern in designing stronger oversight of consumer agents, such as through government inspections, and receiving support from those preferring less government involvement. The model that might prove sufficiently acceptable to both sides may be private law duties without agency oversight.

Since the turn of the twentieth century, however, the initial legislative preference for no ongoing governmental monitoring has in most major industries later been seen as overly optimistic.[350] Throughout the twentieth century, financial crises, food poisoning fatalities, oil spills, and other crises prompted Congress to require regulatory inspections.[351] Thus, before defaulting to an absence of regulatory monitoring out of political compromise or uninformed intuition, it would be ideal to at least consider on the merits whether the opaqueness of harms and algorithms driving them justify a regulatory monitoring model in addition to a duties model.[352]

Even without such formal accountability mechanisms included in future consumer agent policies, however, it is worth recognizing that some accountability mechanisms for consumer agents already exist. As mentioned above, courts have often applied common law principles to hold consumer agents to a higher duty of dealing.[353] Additionally, the FTC, CFPB, and other regulators have jurisdiction that enables them to bring enforcement actions against consumer agents for any unfair or deceptive

348. On antitrust as part of a holistic consumer law, see Van Loo, *supra* note 6, at 254.

349. *Supra* Section III.A.

350. *See* Van Loo, *supra* note 162, at 384–95.

351. *Id.* at 427. Note that this does not necessarily mean that inspections were appropriate.

352. On how information asymmetries, subtlety of the injury, and other features of digital platform harms may justify regulatory monitoring, see Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 24–25 (2014) (proposing auditing of consumer scoring systems); Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 169–71 (2010) (building the case for monitoring of search engines); Van Loo, *supra* note 105, at 1563, 1585–602 ("An irony of the information age is that the companies responsible for the most extensive surveillance of individuals in history—large platforms such as Amazon, Facebook, and Google—have themselves remained unusually shielded from being monitored by government regulators.").

353. *Supra* Section III.A.

acts.[354] That jurisdiction raises the possibility that an update to their framework for viewing consumer markets could bring heightened accountability mechanisms without any legislative action.

3. Limited Evidence of Success

A final but related source of skepticism is that for some, it is difficult to imagine consumer agents helping meaningfully, given the scale of the consumer market failures. This point is valid in the sense that it cannot be known with great confidence in advance what impact consumer agents fully supported by the law might have. There are, nonetheless, grounds for concluding that the new consumer law has some meaningful potential.

One cause for tempered optimism is that at least some of the types of reforms discussed above have benefited consumers and small businesses in other countries.[355] Again, the Israeli statute providing third-party digital access to retail store pricing and product information was estimated to have lowered prices by 4 to 5%.[356] The Bank of England found that consumers with strong credit and small businesses were more likely to obtain loans following the introduction of open banking laws, mostly from fintechs.[357] Moreover, lower interest rates on credit were associated with greater access to fintechs.[358] The laws were also associated with an increase in consumer surplus, new firm entry, and greater competition overall.[359]

In a project underway, I and co-authors add to this literature by building an online platform and giving participants real money to spend on it.[360] The platform's choice interface manipulated participants into paying more for gift cards using drip pricing, with the most aggressive treatment leading to about 13% overcharge.[361] Some participants received help from a digital agent, however, through textual advice and a link to a better deal.[362]

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354. *See, e.g.*, *supra* Section III.B.2. (discussing the CFPB's jurisdiction over fintechs); *supra* Section I.B. (summarizing the FTC's broad jurisdiction).

355. *Supra* Section III.B.2.

356. Ater & Rigbi, *supra* note 284, at 2.

357. Tania Babina et al., *Customer Data Access and Fintech Entry: Early Evidence from Open Banking* 22–28 (Bank of Eng., Staff Working Paper No. 1,059, 2024), https://www.bankofengland.co.uk/working-paper/2024/customer-data-access-and-fintech-entry-early-evidence-from-open-banking [https://perma.cc/L7VL-JKL9].

358. *Id.* at 27.

359. *Id.* at 28–30, 36–37.

360. Benjamin Lu, Daniel Markovits, Andrew Miller & Rory Van Loo, Measuring and Mitigating Drip Pricing Overcharge: Evidence from an Online Marketplace Experiment with a Digital Shopping Assistant 1 (Oct. 4, 2025), https://ssrn.com/abstract=5565238 [https://perma.cc/B4AK-8R9F] (unpublished manuscript).

361. *Id.* These are preliminary results.

362. *Id.* These are preliminary results.

Although much of the literature shows limited effects in reducing overcharge from direct disclosures, our digital agent reduced the average overcharge paid by about half.[363]

One can only speculate about the societal magnitude of the upsides. Laboratory experiments do not necessarily translate into the real world. Saving 4 to 5% would be meaningful across the economy, but the Israeli price study was only in a single market and could not establish the precise causal mechanism for the decrease in prices—whether it was due to the use of online price comparison tools or something else.[364] The U.K. open banking laws are too recent to provide definitive answers on the full impact and did not disentangle the more antitrust-related competition effects (more competitors offering credit) from those related to consumer law (digital agents helping consumers find better deals).[365] For social media, consumer tools may not produce the same mental health benefits as stopping social media was found to produce in controlled experiments because, for instance, some of the improvements may have simply resulted from less screen time right before bedtime.[366] Researchers attempting to study social media tools face the same lawsuits and technical access barriers as entrepreneurs, preventing them from running experiments.[367] Thus, the direct empirical evidence is of limited predictive value.[368]

Analogizing to securities markets also has clear limitations, among other reasons because consumer products are more fragmented and idiosyncratic than securities, which can all be bought and sold on the same exchange. On this point, however, it is worth noting that consumer markets could become more like securities markets if digital agents one day automate consumer purchases—even executing transactions with delegated authority. In such a world, consumer agents could bring about meaningful increases in price efficiency as they have done in securities markets.[369] Although speculative,

363. *Id.* These are preliminary results.

364. Ater & Rigbi, *supra* note 284, at 2–4 (exploring causality).

365. For instance, the already positive results from the United Kingdom were despite the fact that API access required under the UK's open banking laws was not fully implemented by banks until 2024, though it had begun in 2018. *See* Press Release, Open Banking, Three Years Since PSD2 Marked the Start of Open Banking, the UK Has Built a World-Leading Ecosystem (Jan. 13, 2021), https://www.openbanking.org.uk/news/three-years-since-psd2-marked-the-start-of-open-banking-the-uk-has-built-a-world-leading-ecosystem [https://perma.cc/KTL6-EAXM].

366. *See* Marcotte & Hansen*, supra* note 40, at 23–26.

367. *See, e.g.*, Laura Edelson & Damon McCoy, Opinion, *We Research Misinformation on Facebook. It Just Disabled Our Accounts*, N.Y. TIMES (Aug. 10, 2021), https://www.nytimes.com/2021/08/10/opinion/facebook-misinformation.html [https://perma.cc/2GEG-BDJ3] ("We learned last week that Facebook had disabled our Facebook accounts and our access to data that we have been using to study how misinformation spreads on the company's platform."); *supra* Part II.

368. *See supra* notes 356–65 and accompanying text.

369. On this possibility and the risks that would come with it, see Van Loo, *supra* note 31.

and although there are meaningful barriers to such a scenario unfolding,[370] the economic benefits could be substantial even if the new consumer law were to eliminate only a fraction of the increase in markups from 21% to 61% since 1980.[371]

Despite empirical limitations making it impossible to predict what impact emerging consumer laws might have if expanded, the state of the empirical literature is significantly further along than it was for lawmakers who decided to support third-party help in securities and labor markets in the 1930s.[372] At the time, there was little, if any, rigorous empirical evidence about the effects of third-party help—indeed, researchers are only now, ninety years later, beginning to document causality.[373] Relatedly, scholars are still debating what antitrust interventions are economically sound.[374] Consumer law should not be held to a higher standard than other areas in terms of the burden of proving likely success.

The decision on whether to intervene inevitably comes down to an assessment of the potential upsides compared to costs. There are no doubt costs of intervening—including compliance expenditures and new duties imposed by the law that impinge on private autonomy.[375] On this point, in the case of consumers, there is a risk of undervaluing the societal stakes of intervening. Consumer harms can seem small because individually—such as the $50 e-commerce dispute or teenagers choosing to view harmful content on social media—they appear to be less significant than a worker losing a job or an investor losing thousands of dollars. As a matter of analytic rigor, in deciding whether and how to intervene it is important to have a bigger-picture view of the aggregate importance of these incidents for economic inequality, public health, inflation, productivity, financial stability, climate change, and other pressing societal issues.[376] Regardless of the broader societal implications, over the course of an individual's life,

370. *Id.* at 845–70.

371. De Loecker et al., *supra* note 67, at 562 (providing figures for markups).

372. *See supra* Section I.C.

373. *See supra* notes 122–26, 136–39 and accompanying text (summarizing the still-tentative nature of the literature on securities and labor intermediaries).

374. For a summary of the limitations of the empirical literature related to antitrust breakups, see Van Loo, *supra* note 338, at 1972–81.

375. *Supra* Part III.

376. *See generally* Rory Van Loo, *The Public Stakes of Consumer Law: The Environment, the Economy, Health, Disinformation, and Beyond*, 107 MINN. L. REV. 2039 (2023) (summarizing the underappreciated importance of consumer law to climate change, public health, and democracy); Van Loo, *Market Failures*, *supra* note 76 (showing how consumer law has important implications for inflation); Van Loo, *supra* note 6, at 229–31 (concluding that consumer law has a potentially large impact on macroeconomic issues such as GDP growth and economic inequality); *supra* Section I.A.

across tens of thousands of transactions,[377] small instances of overcharge, wasted time, or other harms can add up to something substantial. Additionally, consumer law reinforces the basic societal expectation that even powerful institutions should treat people with respect—including respect for their autonomy rather than, say, forcing them to spend hours figuring out how to cancel a gym membership, cable plan, or online subscription.[378] Each of these considerations should be weighed, alongside the costs, in determining whether to intervene rather than to leave the status quo in place.

None of this should be taken to argue that the concerns expressed above are unfounded. Reasonable observers can disagree about the appropriate role of government in markets, or of private firms as public enforcers, of course. Moreover, there is no doubt that the preliminary nature of the empirical evidence leaves open the question of consumer agents' overall effectiveness.

Nonetheless, despite the limited direct empirical study of consumer markets, the preliminary evidence suggests that consumer markets have deteriorated significantly in recent decades, dominated by the dyadic regulatory model;[379] that third-party market actors, supported by the law, have helped workers and investors;[380] and that third-party interventions have improved some consumer markets.[381] Moreover, the emerging consumer law reflects centuries-old private law principles. It is within the bounds of well-established exercises of government authority in other market contexts, such as antitrust, labor, and securities.[382] It is grounded in some of the most broadly supported normative foundations for intervention—addressing market failures, promoting fair dealing, and distributing wealth equitably.[383] Assuming that one has these or related goals for consumer markets, the task then becomes to figure out how to design the regulatory architecture.

One of this Article's main points is that it would be misguided to overlook third-party help in consumer markets out of an intuitive sense that such interventions are not what consumer law does or what consumer markets are about. Whatever one's regulatory priors are, as a historical

377. *See* BERHAN BAYEH, ISAIAH NARDONE, SHAUN O'BRIEN & HAILEY PHELPS, FED. RSRV. FIN. SERVS., 2025 FINDINGS FROM THE DIARY OF CONSUMER PAYMENT CHOICE 4 (2025), https://www.frbservices.org/binaries/content/assets/crsocms/news/research/2025-diary-of-consumer-payment-choice.pdf [https://perma.cc/6ZVR-5QXU] (estimating the average monthly transactions at forty-eight).

378. McCants, *supra* note 14, at 477.

379. *Supra* Section I.A.

380. *Supra* Section I.C.

381. *Supra* notes 356–63 and accompanying text.

382. *Supra* Section I.C.

383. *Supra* Parts I, III.

matter, that intuition may have been correct, but it no longer is. Proceeding under a working hypothesis that consumer agents have tremendous potential to benefit society but should be subject to greater scrutiny, perhaps the best that can be done, for now, is to try to understand how to best conceptualize the emerging regime and explore what it might look like if expanded. The following section turns to those questions.

B. Reconceptualizing Consumer Law

Consumer law's emerging conceptual shift means moving from focusing on a dyadic consumer-business relationship to considering the network of market actors involved in any given consumer transaction. Part of the shift is also moving beyond focusing too narrowly on how market actors harm consumers to looking at whether market actors might play more meaningful roles as third parties preventing some harm. Directly regulating harms to consumers still would be necessary. Both identifying problems and crafting comprehensive solutions, however, now require a deeper understanding of third-party relationships. That shift makes even more sense in a heavily intermediated economy.

In some ways, this conceptual emphasis for consumer law describes what already exists in select contexts.[384] At the same time, the older default approach to consumer law is still deeply established and can erect conceptual barriers, as illustrated by the CFPB's initial failure, for over a decade, to provide data access to third-party fintechs despite explicit statutory authority to do so.[385] Although it is impossible to know the counterfactual, that delay perhaps shows the importance of the conceptual shift in addition to legal authority. Had the agency's leaders seen consumer agents as central to its regulatory framework, it would have been driven to take earlier action in the interests of consumers at a time when such help might have mattered most—before banks had over a decade to catch up and acquire startups at a discount.[386]

Two main institutional categories of actors who might help consumers were identified above, and they require tailored policy approaches. The first is existing intermediaries whose main purpose is to offer consumer services ranging from advice to transacting on the consumer's behalf—entities like Block Party and Gobo. For them, the policy tasks are to empower them by removing legal and technical barriers and then to make sure they do not abuse consumers' trust. To empower consumer agents, it is worth

384. *Supra* Part III.
385. *Supra* Section III.B.2.
386. On the effects of the delay, see Van Loo, *supra* note 222, at 243.

considering flipping the default from anti-access to pro-access where no industry-specific laws currently exist—whether on an industry-by-industry statutory basis or through generalized authority granted to the FTC. Any access mandates should be sensitive to size, perhaps only requiring consumer-facing businesses above a certain size threshold to provide consumer agents with information and marketplace access. The access would need to address both general information and account-specific information.

To illustrate, Amazon may need to provide access to an API feed of its product information, as required in the Israeli statute,[387] as well as to consumers' purchase history when the consumer wants such access for third parties. This would be akin to the CFPB's open banking rule, only for open retail.[388] Congress or agencies could relax or expand that default rule in particular contexts, and consumers or their agents should be able to sue the incumbents for access, with penalties, when agencies fail to enforce these laws and incumbents obstruct access. The access requirements might be limited to the existence of certain conditions, such as the presence of high markups or network effects.[389] The access mandates must also be sensitive to protecting privacy and allowing technology platforms to continue to show advertisements to their users.[390]

The second main category of institutional actors is comprised of the businesses transacting with one another to offer the end product—the brick-and-mortar store, the pharmaceutical company, the credit card company, or the social media platform. The goal here is to push these businesses to regulate their counterparties, such as call centers, testing laboratories, or app developers, on behalf of consumers. Here, the policy task is not about empowering. Instead, the goal is to decide what affirmative duty to impose. For both categories of institutional actors, the law must then ensure, perhaps through inspections, private rights of action, or other means, that the end business follows through with its duties.

From an enforcement standpoint, one vision for how this might develop is as a largely private dispute system with public appeals available. Businesses would, as a first step, hold one another accountable. In a world in which the digital assistant's ranking of products is based on the merits

387. Ater & Rigbi, *supra* note 284, at 2.

388. *See* Van Loo, *supra* note 75, at 1383.

389. These access mandates are different from those used as antitrust remedies, but some of the analyses, such as of network effects, could draw on those used in antitrust. On considering network effects and other factors in deciding on antitrust remedies, see Hovenkamp, *supra* note 339, at 15–23.

390. This is not to say that all advertisements must be allowed—for instance if an advertisement contains harmful content. But the consumer agent should not be allowed to block all ads as one of its services.

rather than kickbacks, businesses would face more market pressure to truly offer a more innovative or lower-cost product. If they have the lowest-price product and the digital assistant is co-opted, the business should have an incentive to appeal to a court or administrative agency to correct the problematic consumer agent behavior. Administrative agencies, whether at the state or federal level, could supplement this private system with occasional inspections of consumer agents as they do for restaurant food safety, factory pollution, bank safety and soundness, and almost every major industry.[391]

Importantly, this new frame involves a more imaginative approach than in the traditional analysis. The policy designer does not simply analyze the existing set of actors and relationships. Instead, legal architects ask what different set of actors and relationships might better serve consumers. The answer has sometimes been that government funds should be used to create a government-run digital consumer agent, such as the health insurance exchanges.[392] In other instances, the access was the subsidy, in a sense. In the case of the Israeli statute, lawmakers passed legislation forcing supermarkets to provide product information available online, thereby making it less costly for digital intermediaries to collect such information.[393] These are not mutually exclusive options. The CFPB, for instance, ultimately offered its own digital mortgage adviser, conscripted banks to police independent mortgage brokers, and wrote data access rules for private fintech advisers.[394]

At its most ambitious, another conceptualization of this expanded framework is as a type of consumer industrial policy. Industrial policy is more typically associated with governmental investment, often through tariffs or subsidies, in industries deemed particularly strategic. Although strategic industries are most prominently those advancing international security or competitiveness, in reality government has often invested in other ways, such as by subsidizing solar panels or electric vehicles for environmental goals.[395]

The point is not to propose subsidies, but rather to suggest that such a move would be consistent with a broader conceptualization of the new

391. *See* Van Loo, *supra* note 162, at 384–95.
392. *Supra* Section III.D.
393. Ater & Rigbi, *supra* note 284, at 2–4.
394. *Supra* Part III.
395. Press Release, U.S. Env't Prot. Agency, Biden-Harris Administration Launches $7 Billion Solar for All Grant Competition to Fund Residential Solar Programs that Lower Energy Costs for Families and Advance Environmental Justice Through Investing in America Agenda (June 28, 2023), https://www.epa.gov/newsreleases/biden-harris-administration-launches-7-billion-solar-all-grant-competition-fund [https://perma.cc/3DJB-D6UW].

consumer law. Moreover, in the case of digital agents, the economic theory is stronger than in many other leading cases of industrial policy. Many leading industrial policies, such as sugar or automobile tariffs, are not supported by economics in that they're not solving a market failure.[396] Instead, they often advance some other goal, such as lessening competition for politically influential groups like auto workers or protecting national security interests. Those interventions go against traditional economic theory, in part because they block the production of goods going to the nation with the strongest production capacity.[397]

In contrast, digital agents would be expected to increase productivity by addressing market failures.[398] Furthermore, international competitiveness motivations are not irrelevant, as U.S. firms subjected to greater competition may be more likely to fare better on the international stage. To see why, consider how U.S. companies insulated from competition may have insufficient drive to innovate. If later put into intense international competition, insulated U.S. companies might be disadvantaged against foreign companies whose businesses were honed by more competitive markets abroad. By forcing U.S. incumbents to face more discerning consumers, rather than relying on obfuscation tactics, digital agents could ultimately advance U.S. business interests on the international stage. It is also possible that U.S. digital consumer agents would be more likely to gain market share abroad later if they are first given the chance to develop in home markets, rather than getting left behind foreign consumer agents whose home country policies allow them to flourish.

A final possibility worth considering is that wealthy donors or other private funding sources could fill some of the consumer agent gaps. One advantage of access mandates, for instance, is that they lower the cost of operating, making it more feasible for a nonprofit concerned about mental health, for instance, to offer a social media consumer agent. Or a nonprofit concerned about global warming might create a shopping app that allowed people to factor in the climate change or labor implications of purchases as a tiebreaker for similarly priced and similarly rated items.[399] Indeed, the

396. There are many complicated nuances to this assertion, including how to classify instances in which protective tariffs respond to a foreign country subsidizing its own industry.

397. The economics are more complicated when another country is subsidizing its industry, or when there are long-term economic benefits to a domestic industry surviving that short-term market forces might undermine.

398. *Supra* Part I.

399. For examples of such apps, see *Top 10 Sustainability Apps to Green Up Your Life in 2025*, SUSTAIA, https://sustaia.com/sustainability-apps [https://perma.cc/T7BR-9TQ9]; *Getting Greener Together: The New App Set to Combat Climate Change by Bringing Together Consumers and Brands*, MICROSOFT (Mar. 27, 2023), https://news.microsoft.com/en-au/features/getting-greener-together-the-new-app [https://perma.cc/WE39-6SPE].

Sloan Foundation has provided millions of dollars in grants for digital services to the nonprofit Consumer Reports, which is developing an AI tool to help consumers.[400]

In short, any number of institutional actors may advance the new consumer law—including states, nonprofits, legislatures, agencies, and startup businesses. The emerging consumer law arguably is about creating opportunity in the sense of seeking to remove legal, financial, technological, and normative barriers so that consumer-oriented social entrepreneurship can thrive in whatever organizational form it may take. A more explicit recognition of the importance of consumer agents would improve the chances that future policies give third-party help the sustained attention it merits in the twenty-first-century economy.

CONCLUSION

The main area of law governing digital markets, consumer law, is rooted in an idiosyncratic dyadic paradigm in an increasingly intermediated world. Directly regulating the relationship between a consumer and the harmful business remains relevant. It is inadequate by itself, however, in the face of increasingly sophisticated harms and the technological possibility of more powerful consumer agents. These agents have the potential to significantly help consumers by shopping on their behalf, advising on the best loan options, and filtering out unwanted content. Yet dominant incumbent businesses often coopt or block them. In the alternative, without proper oversight, these digital intermediaries may themselves manipulate consumers.

To address these challenges, consumer law should more systematically, explicitly, and rigorously develop an unarticulated ad hoc conceptual shift already underway. Instead of defaulting to policing harmful bilateral relationships, this expanded frame considers whether consumer law should emphasize cultivating collaborative multilateral relationships. This shift involves creating policies that recognize helpful agents as a core part of consumer law. Much like the securities regulation and labor regimes of almost a century earlier, emerging consumer laws have begun to impose duties and provide access so that agents might better advance the interests

400. *Grant to Consumer Reports, Inc. (2022)*, ALFRED P. SLOAN FOUND., https://sloan.org/ grant-detail/g-2022-17192 [https://perma.cc/5CQK-ABMR] ($1,148,509); *Grant to Consumer Reports, Inc. (2024)*, ALFRED P. SLOAN FOUND., https://sloan.org/grant-detail/g-2024-22439 [https://perma.cc/GC26-B267] ($1,199,990); *Opportunity: Data Scientist Consultant (LLM Evaluation)*, CONSUMER REPS. (Feb. 22, 2024), https://innovation.consumerreports.org/opportunity-data-scientist-consultant-llm-evaluation [https://perma.cc/RR7U-JU93] (job posting for "an impact-minded Data Scientist to help advance the Lab's work on generative AI and consumer centric conversational experiences").

of those they serve. This expanded framework is not without its limitations, but at least as a conceptual starting point better positions consumer law to promote a more efficient, equitable, and ethical twenty-first-century economy.