Article

The Public Stakes of Consumer Law: The Environment, the Economy, Health, Disinformation, and Beyond

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INTRODUCTION

Many of society's most pressing challenges hinge on transactions between businesses and consumers. Over seventy percent of greenhouse gas emissions come from household consumption, which includes transportation, food, and electronics purchases.[1] Because consumer spending accounts for approximately two-thirds of gross domestic product (GDP), businesses' ability to manipulate consumers can influence inflation, recessions, and the distribution of wealth.[2] Even democracy is now under siege by disinformation spread through social media, which is accessed on consumer electronic devices and financially fueled by consumer marketing.[3]

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1. S*ee* Edgar G. Hertwich & Glen P. Peters, *Carbon Footprint of Nations: A Global, Trade-Linked Analysis*, 43 ENV'T SCI. & TECH. 6414, 6417–18 (2009) (finding that "72% of greenhouse gas emissions are related to household consumption," including from mobility needs (17%), residences (19%), and manufactured goods (13%)). *See generally New Report Shows Just 100 Companies Are Source of Over 70% of Emissions,* CDP (July 10, 2017), https://www.cdp.net/en/articles/media/new-report-shows-just-100-companies-are-source-of-over-70-of-emissions [https://perma.cc/A4QA-V7KW]. These consumer figures are consistent with observations that over seventy percent of emissions come from one hundred fossil fuel companies. These seemingly disparate figures—what consumers contribute and what fossil fuel companies contribute—are consistent because those one hundred fossil fuel companies make a variety of products, such as automobile gasoline and plastic materials, that consumers purchase, *see id*.

2. Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1357–59 (2015) [hereinafter Van Loo, *Buyers Beware*] (linking consumer spending to inequality); Rory Van Loo, *Inflation, Market Failures, and Algorithms*, 96 S. CAL. L. REV. (forthcoming 2023) (manuscript at 3–4) [hereinafter Van Loo, *Inflation*], https://ssrn.com/abstract=4226318 (linking consumer law to inflation); Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions*, 34 YALE J. ON REGUL. 791, 827–28 (2017) (discussing the relationship between consumer spending and recessions); *Households and NPISHs Final Consumption Expenditure (% of GDP) – North America*, INDEXMUNDI, [hereinafter *Households and NPISHs*], https://www.indexmundi.com/facts/indicators/NE.CON.PRVT.ZS/map/north-america [https://perma.cc/3F8P-VCSB] (showing that U.S. household consumption spending exceeded sixty-seven percent of GDP in 2019).

3. Although it is true that platforms' users are not always the only customers or the most important customers, as a matter of law and scholarship they are seen as consumers. *See, e.g.*, *infra* Part I.D (explaining how the Federal Trade Commission Bureau of Consumer Protection enforces consumer protection laws against platforms); TIM WU, THE ATTENTION MERCHANTS: AN EPIC SCRAMBLE TO GET INSIDE OUR HEADS 335–36 (2016) (explaining that consumers exchange attention and data to use information technologies, which online platforms such as Google and Facebook then monetize).

These diverse societal threats share a common tie not only in human behavior but also in law. This Article shows how consumer law, a field "derided as the law of small problems,"[4] is more accurately viewed as important for addressing large-scale societal threats. It also offers a more integrated conceptual and institutional approach to consumer law so that the field can have a better chance of fulfilling its societal potential.

Consumer law merits a more prominent place in the legal toolkit for addressing large-scale problems even under a narrow definition of consumer law. The core of consumer law is often seen as synonymous with the Federal Trade Commission's (FTC) mission to halt unfair and deceptive acts and practices (UDAP).[5] Federal and state UDAP laws, many of which can be enforced by private litigants, as well as more recently by the Consumer Financial Protection Bureau (CFPB) for financial products, have provided the authority for some of the largest legal actions against companies in U.S. history. Those actions include a $5 billion fine against Facebook for privacy violations and a $3 billion enforcement action against Wells Fargo for creating millions of fake customer accounts.[6] The UDAP core of consumer law is arguably overlooked in terms of regulatory resource allocation and the lack of awareness about its broader reach to issues such as equality, the environment, and public health.[7]

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4. KATHERINE PORTER, MODERN CONSUMER LAW, at xxii (2016). Consumer law can be distinguished from the closely related field of antitrust because antitrust regulates competition and business-to-business transactions, such as mergers and acquisitions. Consumer law's challenges in producing a widely supported self-definition are discussed *infra* notes 8–11 and accompanying text.

5. *Bureau of Consumer Protection*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection [https://perma.cc/4VGD-YNSK].

6. *Wells Fargo Agrees to Pay $3 Billion to Resolve Criminal and Civil Investigations into Sales Practices Involving the Opening of Millions of Accounts without Customer Authorization*, U.S. DEP'T OF JUST. (Feb. 21, 2020), https://www.justice.gov/opa/pr/wells-fargo-agrees-pay-3-billion-resolve-criminal-and-civil-investigations-sales-practices [https://perma.cc/GA9U-HEGK]; *FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, FED. TRADE COMM'N (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].

7. *See infra* Part I. Scholars have more recently shown how UDAP can play major roles with other high-profile issues, such as discrimination. *See e.g.*, Andrew D. Selbst & Solon Barocas, *Unfair Artificial Intelligence: How FTC Intervention Can Overcome the Limitations of Discrimination Law* 171 U. PA. L.

The importance of consumer law to society becomes more apparent after expanding the lens to include consumer laws focused on physical harms, such as food and drug laws that protect consumers' health, and various safety laws regulating the use of consumer products, such as seatbelt mandates or the prohibition of toys that create choking hazards.[8] Indeed, at its broadest, consumer laws are the legal rules that govern exchanges of value between individuals and businesses.[9] This more expansive sense of consumer law encompasses large parts of antitrust law, much of which is rooted in a consumer welfare analysis.[10] For ease of exposition, this Article will use consumer law in the more familiar sense—largely overlapping with consumer protection and excluding antitrust—but its core policy proposals would be strengthened by including antitrust within the fold of consumer law, as some already do.[11]

Given the economic and societal importance of consumers, one would expect consumer law to be a prominent area of legal activity. Indeed, history has repeatedly taught the lessons of ignoring consumer laws.[12] Businesses did not need to test the safety of new drugs until 1938, after scores of people died from consuming elixirs marketed as relieving sore throats.[13]

REV (forthcoming 2023) (arguing that the FTC's focus on UDAP is better suited to monitoring AI than traditional discrimination law).

8. *See* 16 C.F.R. § 1501.4 (2022) (discussing the method for identifying toys that present a choking hazard to young children).

9. *See* PORTER, *supra* note 4, at 1 ("Consumer laws provide rights to individuals and duties on businesses when these parties engage in a transaction for money or value."). Porter goes on to distinguish consumer law from other areas, like antitrust. *Id.* at 13.

10. *See id.* at 13 ("Antitrust seeks to protect the larger economy from anticompetitive practices, which helps businesses grow. Antitrust law does have some concern with consumers' well-being. Consumer injury, for example, is an aspect of claims under the Sherman Antitrust Act.").

11. *See* Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution,* 95 NOTRE DAME L. REV. 211, 218 (2019) (arguing for broadening consumer law to encompass both antitrust and consumer protection); Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2216 (2012) ("The potential complementarities between antitrust and consumer protection law—collectively, 'consumer law'—are well known."); Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 715 (1997) (offering a "unified theory of consumer sovereignty").

12. *See infra* Part II.

13. *See* Carol Ballentine, *Sulfanilamide Disaster*, FDA CONSUMER (June

Automobiles were not required to have seatbelts until 1968, following years of countless avoidable injuries and deaths.[14] More recently, inadequate consumer financial protection paved the way for tens of millions of families to lose their homes in the mortgage crisis of the 2000s, which contributed to the Great Recession.[15] Although such events momentarily captured lawmakers' attention,[16] consumer law faded to the background again after the disasters passed.[17] Even in the face of growing concerns about the environmental, social, and governance (ESG) implications of corporations, and a renaissance in antitrust law, there has been little focus on consumer law.[18] Moreover, whereas workers and businesses are the focus of standing congressional committees, well-resourced executive departments, and ubiquitous law school courses, consumer law lacks similar institutional status.[19]

Consumer law's invisibility has its legal roots in the common law, which through at least the nineteenth century did not distinguish between consumers and businesses.[20] Since then, several conceptual developments have made it less likely that consumer law's full importance would be appreciated. Most immediately, by some historical accounts, as consumer law began to gain traction in law schools in the 1970s, the field's

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1981), https://www.fda.gov/files/about%20fda/published/The-Sulfanilamide-Disaster.pdf [https://perma.cc/FP9G-VAMG] (explaining that deaths caused by sulfanilamide sparked the passage of the Federal Food, Drug, and Cosmetic Act).

14. See *Primary Enforcement of Seat Belt Laws*, CDC (Feb. 22, 2022), https://www.cdc.gov/transportationsafety/calculator/factsheet/seatbelt.html [https://perma.cc/VY9U-T49Y]; *see, e.g.*, Martha Chamallas, *The Disappearing Consumer, Cognitive Bias and Tort Law*, 6 ROGER WILLIAMS U. L. REV. 9, 11 (2000) (summarizing the long inattention to consumer safety).

15. *See* Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1682 (2012) (explaining that Congress enacted the Dodd-Frank Act in the wake of the 2008 recession).

16. Congress responded to the mortgage crisis by creating the Consumer Financial Protection Bureau. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376, 1031, 1036 (2010) (codified as amended in scattered sections and titles of 12 U.S.C. and 15 U.S.C.).

17. *See infra* Part II.A (discussing crisis-oriented consumer law).

18. The point is not that consumer law is more important than these other areas, but that it has received significantly less attention. *See infra* Part III.

19. *See infra* Part II.

20. *See* Michael S. Greve, *Consumer Law, Class Actions, and the Common Law*, 7 CHAP. L. REV. 155, 156 (2004) (observing also that the concept of the consumer is, to a great extent, an invention of the twentieth century).

momentum was halted by an era of deregulation.[21] A negative view of regulation hurts consumer law because it is a form of regulation.[22]

At a deeper level, the field's intellectual framing obscures its full importance. Analysis of the laws that govern consumer markets is dominated by efficiency, which is a capacious concept in theory but a narrow one as traditionally applied in consumer law.[23] Efficiency analyses in consumer law are microeconomic, focusing especially on considerations such as price and output that result from the intersection of customers and firms in particular markets. A narrow microeconomic analysis has value in terms of its ease of application and clearer guidance for policymakers, and indeed has repeatedly been used to support concrete regulatory interventions, such as information disclosures.[24]

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21. *See infra* Part II.B.

22. *Cf.* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 4 (2008) (stating that, in some circles, "regulation"—the "R-word"—is an epithet).

23. *See, e.g.*, Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 668 (1979) (arguing that efficiency is the overriding interest that market regulation should advance); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building A Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1789–90 (2020) (summarizing and critiquing the influence of efficiency). Efficiency has long influenced U.S. law. *See, e.g.*, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (noting law's emphasis on rational, economically efficient outcomes). The proper definition of efficiency is debated, but it generally seeks to maximize the value created by markets. Under Kaldor-Hicks efficiency, legal reforms that overall increase value would be pursued even if they leave some actors worse off. *See* Jules Coleman, *Efficiency, Exchange and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221, 239 (1980) ("A redistribution of resources is Kaldor-Hicks efficient if and only if under the redistribution the winners win enough so that they could compensate the losers. The notion of Kaldor-Hicks efficiency does not require that the winners actually compensate the losers."); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 491 (1980) ("Kaldor-Hicks criterion . . . requires . . . not that no one be made worse off by the move, but only that the increase in value be sufficiently large that the losers could be fully compensated."). Efficiency is also closely associated with a reduction in transaction costs. *See, e.g.*, R. H. COASE, THE FIRM, THE MARKET AND THE LAW 15 (1988) ("What my argument does suggest is the need to introduce positive transaction costs explicitly into economic analysis so that we can study the world that exists.").

24. *See, e.g.*, Schwartz & Wilde, *supra* note 23 (emphasizing informational

However, these analyses have largely ignored externalities such as environmental, health, and distributional harms. Additionally, the most pressing economic issues, including inequality, inflation, and recessions, are the domain of macroeconomics.[25] Consumer law's analytic focus on microeconomic issues, such as a few extra dollars in bank fees or the price of beer, makes it unlikely to catch the attention of either the public or the policymakers trying to solve trillion-dollar economic problems like income inequality and recessions. As an institutional matter, the FTC and CFPB prioritize microeconomic and nonphysical consumer harms. In contrast, agencies like the Environmental Protection Agency (EPA), National Highway Traffic Safety Administration, Federal Reserve, and Internal Revenue Service prioritize the health, safety, systemic risk, and macroeconomic implications of market transactions, while mostly ignoring or subordinating microeconomic efficiency.

This sketch helps to illuminate the paradox of consumer law being both ubiquitous and invisible. Those practicing or researching food law, drug law, and environmental law do not necessarily see themselves as engaged in consumer law. It is thus not surprising that someone recognizing the importance of these areas may not think much about consumer law as a field. Outside of finance, federal consumer law authority is often either relegated to a weak consumer agency or slotted into better-resourced agencies whose missions are so broad or focused elsewhere that they are unlikely to take a comprehensive approach to the consumer markets whose externalities they regulate.[26]

This fragmented institutional and conceptual landscape risks disconnecting consumer law's identity from justice,

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interventions through an efficiency lens). Disclosures have proved difficult to implement. *But see* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 647 (2011) (arguing that disclosures are often ineffective or even counterproductive).

25. *See, e.g.*, Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-36, § 2201(a), 134 Stat. 281, 335 (2020) (codified as amended at 26 U.S.C. § 6428) (providing tax credits for eligible individuals as a form of coronavirus relief); Lorie Konish, *Economists Are Calling for More Stimulus Checks. Here's Where Assistance Plans Stand*, CNBC (Nov. 23, 2020), https://www.cnbc.com/2020/11/23/economists-want-second-1200-stimulus-checks-where-the-relief-stands.html [https://perma.cc/Y62E-3NZJ] (noting that a group of over 125 economists was pushing for direct cash payments).

26. Other parts of the institutional landscape include state consumer agencies, attorneys general, and a small and limited Consumer Product Safety Commission. *Infra* Part II.

equality, and other leading societal goals. That disconnect has the potential to weaken the field in terms of how consumer law is analyzed, executed, and developed. The disconnect also means that consumer law is less likely to come to mind as relevant to anyone interested in public service. The implicit message is that legislators writing new laws, legal scholars choosing research topics, and law students choosing careers should look to fields other than consumer law. Consequently, the intellectual and organizational approach to consumer law creates a division of labor that diminishes its perceived importance.

It is difficult to know the extent to which consumer law's fragmentation realistically can be lessened. Some institutional division of labor is likely inevitable and beneficial. Indeed, such a division of labor finds theoretical support in one of the most influential ideas in law and economics: that an emphasis on efficiency in market rules gives other areas of law, such as tax law, more to distribute.[27] Consequently, that influential theory holds, the law should focus on a narrower efficiency analysis in regulating markets and allow the resulting distributional issues and other externalities to be handled elsewhere. But whatever the merits of that much-debated theory, the division of labor across the federal government today means that no agency is tasked with a comprehensive analysis of consumer law. The main consumer law institutions at the federal level omit consideration of many of the most important externalities. They therefore fail to take steps to address even externalities that are not adequately handled elsewhere.

Such an incomplete and fragmented analysis was presumably never envisioned as part of a division of labor for law and economics. Nor do many leading law and economics scholars today view it as appropriate to ignore externalities in analyzing efficiency. Moreover, an array of scholars in other fields have called for expanding the regulatory paradigm to more accurately reflect factors such as politics, power, and the environment.[28] Interdisciplinary scholarship thus provides theoretical foundations for a more comprehensive institutional and conceptual approach to consumer law.

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27. *See, e.g.*, Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994) (arguing that distributional issues are best handled through tax law).

28. *Infra* Part III.

Institutionally, a more comprehensive approach means exploring new bodies focused on consumer law, such as a Department of Consumer Affairs in the executive branch and consumer committees in the House and Senate. Law schools could also better signal to students that consumers represent an important area of law to consider for courses, careers, and research, as law schools do with workers and businesses.

Conceptually, the field would benefit from an explicit *public priority principle*. A public priority principle expresses the idea that consumer law should strive for a more holistic consideration of the reasons for and against intervention. The traditionally narrow consumer law version of an efficiency analysis remains an important input into the public's interests, but the analysis should not end there. At a minimum, it should be recognized that—as a descriptive matter—consumer law's narrow version of an efficiency analysis does not currently take priority over externalities once the issue is viewed more comprehensively. After all, many agencies focused on those externalities currently intervene in consumer markets without prioritizing efficiency. Ideally, consumer law decision makers would, whenever possible, consider other costs and benefits when analyzing efficiency, such as to the environment, public health, wealth distribution, and democracy.

To elaborate, this more holistic approach might involve expanding consumer law analyses in three related ways. The first is to recognize that increasing consumer market efficiency can offer considerable public benefits beyond what most associate with the concept of wealth maximization. Investing more in interventions that improve even a narrow concept of efficiency can sometimes advance environmental, health, and distributional goals. Even though there is already an efficiency justification for such interventions, seeing those broader payoffs matters because it can provide more motivation than what would exist without them. That extra motivation could help overcome institutional inertia or industry lobbying that would otherwise block efficiency-improving reforms.

Second, the consumer law analysis should consider a fuller set of harms to individual consumers in a transaction. Since those consumers are also citizens, broadly construed, they are individually harmed by environmental and democratic degradation. Thus, fully weighing consumers' interests with respect to a transaction means not only viewing the immediate economic effects that the transaction has on the consumer—such as the

immediate financial harm—but also the ways that many such transactions, aggregated across society or over the course of a consumer's life, affect that consumer's less immediate personal interests, such as in democracy and long-term health.

Finally, a public priority principle highlights the need to ask what implications one consumer's transaction has on other people not involved in the transaction. Consumer laws and agencies should not hesitate to factor in market conduct that causes environmental, distributional, or other harms to those outside the market.[29]

In many ways, this vision for consumer law is consistent with, if not more loyal to, a robust economic analysis. After all, society's broader interests already motivate the law's emphasis on efficiency, as illustrated by how efficiency is often justified by the goal of maximizing aggregate wealth. Moreover, the traditional law and economics emphasis on efficiency was always meant to inform the design of a legal architecture that addresses issues such as the redistribution of wealth and protection of the environment. A division of labor simply sought to address those externalities in a way that was as economically beneficial as possible.[30]

A public priority principle is also arguably consistent with the economics motivating a division of labor, despite sometimes producing different institutional conclusions. A division of labor between market laws and other fields occurred at a time when the legislative process was perhaps more functional, or at least before evidence had become clear about the precipitous rise in economic inequality, the gravity of climate change, the advent of widespread disinformation through social media, and many other major societal challenges. The law has repeatedly failed to prevent or adequately address those challenges. Thus, whereas a complete division of labor is sensible in theory, as a practical matter, the assumption that those other issues will be addressed elsewhere may not be justified in the face of political barriers.[31]

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29. These harms to those outside of the market may coincide with the more holistic analysis of consumers' interests mentioned above in that the consumer's interests as a citizen will often encompass these other harms. But there will be times when the interests of most or all consumers and firms in a given market do not align with the broader interests of society. The idea of the law addressing market externalities is well established in economics.

30. *Cf.* Kaplow & Shavell, *supra* note 27 (proposing a division of labor).

31. *Cf.* Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1052–53 (2016) (making a

Consequently, if an important issue can be addressed in consumer law and is not being adequately addressed in another area of law, consumer law should not refrain from acting on that issue simply because another area of law could, in theory, better address it.

Economics also justifies an institutional unification of labor for consumer law when it is more efficient to prevent externalities through market constraints rather than to allow consumer transactions to cause such externalities that other areas of law or government must then fix. A growing literature has shown how market laws, such as bankruptcy and consumer law, can in some contexts address distributional issues more efficiently than tax law.[32] Efficiency in this instance means consumer law achieving the same outcome that might be less efficiently achieved through other areas of law which, instead of preventing harm through market interventions would provide a remedy afterwards. The point is not to take externalities away from nonconsumer agencies or diminish their authority, but to supplement those other agencies' work when doing so through consumer law would be a more cost-effective means of achieving similar goals.

A final reason why greater institutional integration makes economic sense has to do with administrative agency expertise. Consumer law authorities will sometimes have certain expertise advantages, such as when implementing an environmental measure depends on information disclosures to consumers.[33] In such situations, it may be desirable for agencies with complementary expertise to work together, rather than viewing an issue like climate change as only under the purview of the EPA. Ultimately, however, whether the EPA or the FTC undertakes a given consumer market analysis is less important than recognizing that consumer law has an important role to play in comprehensive policy solutions—and that in light of the current administrative agency architecture, it is necessary to consider how consumer agencies might advance a given policy goal not traditionally identified with them.

Even viewing the holistic needs of the consumer as a citizen is not a great conceptual reach beyond what currently happens.

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broader point about how law and economics sometimes fails to consider that political barriers may prevent other areas of law from advancing the expected distributional interests).

32. *Infra* Part I.

33. *See infra* Part I.A.

If all the institutions engaged in consumer law are considered, consumer law already allows for weighing a range of harms, including physical injuries and health. Yet that landscape is a continually evolving reflection of society's awareness of the harms resulting from consumer transactions.[34] As the empirical evidence becomes stronger that consumer transactions harm society in concrete environmental, distributional, and political ways, the expansion of consumer law is a natural result. Thus, a public priority principle in many ways articulates existing dimensions of consumer law. It is as much descriptive as prescriptive.

This broader vision for consumer law will be particularly important as policymakers gear up for intractable issues such as responding to climate change, mitigating economic inequality, and regulating the technological gatekeepers of information. An intellectual reconstruction of consumer law better calibrates the law to confront those and other formidable tasks facing the world in the coming years.

Part I of this Article outlines the importance of consumer law. It maps consumer law's connections to some of the most pressing societal threats: climate change, public health, inequality, and disinformation. Part II focuses on consumer law's place in the legal academy and government. Currently, important legal institutions marginalize consumer law. Part III concludes by broadening the field beyond protection or microeconomics. The goal is to move toward a more holistic vision for consumer law rooted intellectually in a public priority principle and institutionally in a legal system that invests in consumer law in accordance with its societal value.

I. THE IMPORTANCE OF CONSUMER LAW

This Part provides an overview of connections between consumer law and four of the most pressing societal threats: climate change, public health, economic inequality, and disinformation. Before exploring consumer law's expansiveness, it is helpful to have a sense of its center. At its core, consumer law prohibits business practices that do physical or monetary harm to the consumer. Harms can range from toasters that create fire hazards to predatory mortgages whose fine print clauses cause homeowners to lose their homes due to unexpected increases in

34. *Infra* Part II.

monthly payments.[35] Consumer law also provides shoppers with helpful information, like requiring unit pricing on grocery store shelves so it is easier to compare, for instance, the per-ounce cost of different peanut butter options.[36]

A potential source of confusion is that consumer law undeniably includes parts of fields that have strong identities. To illustrate, consumer law encompasses much of privacy law—the part concerned with how businesses, rather than government, misuse personal information.[37] Indeed, the largest fine in the FTC's Bureau of Consumer Protection's history was for $5 billion against Facebook for privacy violations in the wake of the Cambridge Analytica scandal.[38] The authority for that fine came from an extremely broad statutory prohibition of "unfair or deceptive acts or practices in or affecting commerce" that does not even mention privacy.[39]

This Part moves beyond those more familiar applications of consumer law. These case studies were selected from common lists of the leading societal threats with the goal of identifying examples that illustrate consumer law's underappreciated relevance.[40] Consequently, the point is not that consumer law is

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35. *See, e.g.*, Baher Azmy, *Squaring the Predatory Lending Circle*, 57 FLA. L. REV. 295, 340–41 (2005) (discussing balloon payments).

36. *See A Guide to Retail Pricing Laws and Regulations*, U.S. DEP'T OF COM., NAT'L INST. OF STANDARDS & TECH. [hereinafter *Retail Pricing Laws*], https://www.nist.gov/pml/weights-and-measures/laws-and-regulations/retail-and-unit-pricing-laws [https://perma.cc/QBU4-GJQS] (May 4, 2022) ("Currently, nineteen (19) states and two (2) territories have unit pricing laws or regulations in force. Eleven (11) of these have mandatory unit pricing provisions.").

37. *Cf.* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 585 (2014) (summarizing the FTC's leadership on privacy enforcement).

38. *See FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, *supra* note 6 (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, Docket No. 9383 (F.T.C. Nov. 25, 2019) (ordering Cambridge Analytica to delete consumer information, and enjoining the company from selling or using the consumer data).

39. 15 U.S.C. § 45 (providing unfair and deceptive acts authority without mentioning privacy).

40. The threats that people identify as most important in these polls are heavily influenced by the phrasing of the question and the multiple choice options provided, but for a sense of people's perceptions of the greatest risks; *see, e.g.*, Anthony Salvanto, Kabir Khana, Fred Backus & Jennifer de Pinto, *Americans See Democracy Under Threat—CBS News Poll*, CBS (Jan. 17, 2021), https://www.cbsnews.com/news/joe-biden-coronavirus-opinion-poll [https://

relevant to all societal threats. Nor is this list meant to be comprehensive. Examples of other important areas that intersect with consumer law include international trade,[41] criminal law,[42] immigration,[43] and constitutional law.[44] Rather than seeking to provide an exhaustive treatment of consumer law, the discussion below begins to map some of the outer boundaries of the field's research agenda. Like early topographical maps, these overviews are based on observed realities—even if the fine details and full boundaries must await further exploration.

A. CLIMATE CHANGE

Climate change is often cited as the greatest current threat to humanity.[45] To see how consumer behavior influences climate change, consider several examples. Transitioning from personal cars to public transportation would reduce carbon emissions by

perma.cc/95PC-ZFVQ] (polling Americans and finding that biggest perceived threats are political divisions, economic forces, environmental issues, and viruses); *Americans' Views of the Problems Facing the Nation*, PEW RSCH. CTR. (Apr. 15, 2021), https://www.pewresearch.org/politics/2021/04/15/americans-views-of-the-problems-facing-the-nation [https://perma.cc/JQ3T-LLP9] (identifying health care, violent crime, economic inequality, and climate change as among ten biggest problems).

41. *See, e.g.*, Kenneth A. Bamberger & Andrew T. Guzman, *Keeping Imports Safe: A Proposal for Discriminatory Regulation of International Trade*, 96 CALIF. L. REV. 1405, 1407 (2008) (analyzing how to maximize consumer protection through product safety regulations with importation rules).

42. *See, e.g.*, Alex Kornya, Danica Rodarmel, Brian Highsmith, Mel Gonzalez & Ted Mermin, *Crimsumerism: Combatting Consumer Abuses in the Criminal Legal System*, 54 HARV. C.R.-C.L. L. REV. 107, 112 (2019) (outlining how the criminal legal system subjects individuals and families to consumer abuses, "from prison commissary to bail bonds, from telephone and video-calling services to debit release cards," thereby deepening challenges to getting their lives back on track).

43. *See, e.g.*, Alvin C. Harrell, *Teaching Consumer Law in Our Popular Culture and Social Media*, 20 J. CONSUMER & COM. L. 78, 82 (2016) (listing immigration as a core part of the consumer law curriculum).

44. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018) (upholding a baker's right to refuse service and noting the need to protect individuals from "indignities when they seek goods and services in an open market").

45. *See, e.g.*, *The Global Risks Report 2020*, WORLD ECON. F. 12 (2020), https://www3.weforum.org/docs/WEF_Global_Risk_Report_2020.pdf [https://perma.cc/GB43-ZEAW] (ranking environmental concerns among the biggest threats to the world).

about fourteen percent.[46] Switching to a vegan diet is estimated to lower an individual's carbon emissions by almost fifteen percent, which if correct would mean that even partially reducing consumption of beef, poultry, and pork products can make a significant impact.[47] And if every American household replaced one standard lightbulb with an energy-efficient lightbulb, it would prevent greenhouse emissions equivalent to nearly a million cars annually.[48] Consumer-facing businesses heavily influence the behavior adopted in each of these areas.[49]

The most straightforward connection between such behavior and consumer law is that many environmentally beneficial changes would also result from making markets more efficient in the narrow sense that consumer law has typically approached efficiency, even ignoring externalities. Many of the same disclosures that help the environment would also save consumers money in the long run. In the example where every household replaces a standard bulb with an energy-efficient lightbulb, that change would also save those households an estimated $600 million each year.[50] As another example, in 2007, Congress required energy efficiency disclosures for common appliances like televisions and dishwashers to inform consumers of the approximate

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46. *See* Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498, 502 (2020) ("There exists a vast system of legal rules that offer indirect yet extravagant subsidies to driving . . . ."); Donald C. Shoup, *The Trouble with Minimum Parking Requirements*, 33 TRANSP. RSCH. 549, 555 (1999) (observing how urban planners have assumed free parking in every land use plan, and this subsidy creates "[u]biquitous free parking [which] then stimulates the demand for vehicle travel").

47. *See* Gibran Vita, Johan R. Lundström, Edgar G. Hertwich, Jaco Quist, Diana Ivanova, Konstantin Stadler & Richard Wood, *The Environmental Impact of Green Consumption and Sufficiency Lifestyles Scenarios in Europe: Connecting Local Sustainability Visions to Global Consequences*, 164 ECOLOGICAL ECON. 1, 10 (2019), https://doi.org/10.1016/j.ecolecon.2019.05.002 ("A Vegan diet with Less Waste and Organic Food could potentially reduce footprints of up to 18, 11 and 24%, for carbon, land, and water, assuming the effects are additive.").

48. Brian Dakss, *"Green" Light Bulb Buying Guide*, CBS NEWS (June 9, 2007), https://www.cbsnews.com/news/green-light-bulb-buying-guide [https://perma.cc/P5B9-CA3M] ("If every American home replaced just one light bulb with an Energy Star qualified bulb, we would save enough energy to light more than 3 million homes for a year . . . and prevent greenhouse gases equivalent to the emissions of more than 800,000 cars.").

49. *See e.g.*, Shill, *supra* note 46, at 525–26 (discussing how the auto industry has shaped laws subsidizing driving and marketed automobile consumption).

50. *See* Dakss, *supra* note 48.

annual electricity costs of these devices.[51] Disclosing the full costs in energy expenditures per year allows people to make more informed decisions about the full monetary costs of the product—which is desirable from a narrow efficiency perspective.[52] Although the policy goal animating lawmakers was the desire to reduce energy consumption, Congress did not charge the EPA with writing and enforcing those rules.[53] Instead, it looked to the FTC's Bureau of Consumer Protection.[54]

These and other behavioral interventions, sometimes known as "green nudges," have limits beyond the scope of this Article, most notably the difficulty of designing them effectively.[55] When designed well, however, providing energy savings information or addressing behavioral biases can significantly increase the likelihood that consumers will purchase more energy-efficient products that ultimately save them money.[56] Disclosures can also change business incentives, such as the EPA's Toxic Release Inventory Program, which caused firms to lower their use of toxic ingredients after they were required to disclose such information publicly, perhaps to avoid being shamed.[57]

Another behavioral intervention, changing the default, has also proved powerful. For instance, fewer than one percent of households voluntarily adopt solar power without any

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51. Energy Labeling Rule, 16 C.F.R. § 305 (2022).

52. On informational disclosures and efficiency, see Schwartz & Wilde, *supra* note 23, at 636.

53. *See id.* at 679 nn.107–08.

54. *See id.*

55. *See, e.g.*, Georgios Dimitropoulos & Philipp Hacker, *Learning and the Law: Improving Behavioral Regulation from an Internal and Comparative Perspective*, 25 J.L. & POL'Y 473, 520–27 (2017) (explaining the nature and limits of green nudges); *see also* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosures*, 159 U. PA. L. REV. 647, 679 (2011) (explaining the low success rate of disclosures and identifying some factors crucial for beneficial design).

56. For a review of the literature, see Todd D. Gerarden, Richard G. Newell & Robert N. Stavins, *Assessing the Energy-Efficiency Gap*, 55 J. ECON. LITERATURE 1486, 1494–99.

57. *See* Shameek Konar & Mark A. Cohen, *Information as Regulation: The Effect of Community Right to Know Laws on Toxic Emissions*, 32 J. ENV'T ECON. & MGMT. 109, 123 (1997) ("Firms with the largest negative stock price effects following announcement of their TRI emissions were found . . . to subsequently reduce their TRI emissions more than other firms in their industry . . . .").

government intervention.[58] However, a town that made one simple change—establishing solar power as the default option if the homeowner took no action to opt out—had over ninety-nine percent participation in solar.[59] These behavioral interventions are politically important because they do not reduce freedom to act and instead allow market participants the autonomy to do what they want.[60]

Fuel efficiency disclosures provide another example of how consumer law is important in this broad category of environmental behavioral regulation. A 1975 law required manufacturers to disclose their automobiles' miles per gallon.[61] The purpose was not to help consumers but to address challenges in energy supply.[62] Although the EPA set the guidelines for testing fuel efficiency, the FTC's Bureau of Consumer Protection wrote rules to ensure advertisements were not misleading.[63] Consumer law expertise proved valuable in designing miles-per-gallon disclosures because auto dealers had found ways to confuse consumers about vehicle efficiency.[64] More broadly, consumer agencies that understand the complex dynamics between consumers, firms, and information are vital to preventing firms from manipulating environmental laws that rely on market mechanisms to alter consumer behavior.

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58. *See* Daniel Pichert & Konstantinos V. Katsikopoulos, *Green Defaults: Information Presentation and Pro-Environmental Behaviour*, 28 J. ENV'T PSYCH. 63, 66 (2008), https://doi.org/10.1016/j.jenvp.2007.09.004.

59. *See id.*

60. 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, 1222 (2003) ("A regulation is asymmetrically paternalistic if it creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational. Such regulations are relatively harmless to those who reliably make decisions in their best interest, while at the same time advantageous to those making suboptimal choices.").

61. Energy Policy and Conservation Act, Pub. L. No. 94-163, § 506, 89 Stat. 871, 910 (1975) (codified as amended in scattered sections of 42 U.S.C.).

62. *See* James W. Moeller, *Electric Demand-Side Management Under Federal Law*, 13 VA. ENV'T L.J. 57, 62 (1993) ("In 1975, Congress enacted the Energy Policy and Conservation Act, which is the cornerstone of federal energy conservation efforts.").

63. *See* Guide Concerning Fuel Economy Advertising for New Automobiles, 16 C.F.R. § 259 (2022) (advising advertisers to disclose fuel economy estimates for new automobiles).

64. See *id.*

Another information-based avenue for consumer laws to advance environmental causes comes from companies' voluntary disclosures. Labeling a product "green" can boost sales because consumers feel better about their purchases.[65] And many companies have voluntarily taken steps that benefit the environment because sustainability initiatives make their brand more appealing to the conscious consumer.[66] However, there is a risk that companies "greenwash" their products by claiming fake environmental benefits or even by hiding abusive practices.[67] Greenwashing is a core consumer law issue, which is why the FTC's Bureau of Consumer Protection has issued guidance for environmental marketing claims that violate deceptive advertising laws.[68] The agency has taken legal action against companies like America's Favorite Chicken Company, the Popeyes fast food chain's parent corporation, which exaggerated the ability to recycle its packaging,[69] and Moonlight Slumber, which falsely claimed its baby mattresses were organic.[70] Without effective consumer laws, companies would have less motivation to voluntarily take big steps to help the environment because they could more easily take meaningless steps—or even no steps at all—while still appearing green.

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65. *See* Patrick Hartmann & Vanessa Apaolaza Ibáñez, *Green Value Added*, 24 MKTG. INTEL. & PLAN. 673, 676 (2006), https://doi.org/10.1108/02634500610711842 (referring to empirical research finding that people accept mark-ups for green energy products to "feel better about themselves," not primarily for the environmental impact of their choice).

66. *See, e.g.*, Hope M. Babcock, *Corporate Environmental Social Responsibility: Corporate "Greenwashing" or a Corporate Culture Game Changer*, 21 FORDHAM ENV'T L. REV. 1, 43–58 (2010) (discussing voluntary environmental initiatives instituted by corporations); Becky L. Jacobs & Brad Finney, *Defining Sustainable Business-Beyond Greenwashing*, 37 VA. ENV'T L.J. 89, 93 (2019) (presenting REI, BMW, and Starbucks as examples of companies that have chosen to enact sustainability programs).

67. Stephen M. Johnson, *Junking the "Junk Science" Law: Reforming the Information Quality Act*, 58 ADMIN. L. REV. 37, 41 n.6 (2006) (defining "greenwashing").

68. *See* Nick Feinstein, *Learning from Past Mistakes: Future Regulation to Prevent Greenwashing*, 40 B.C. ENV'T AFFS. L. REV. 229, 230 (2013) (summarizing the FTC's efforts).

69. Complaint at 2, Am.'s Favorite Chicken Co., 118 F.T.C. 1, 2 (1994) (listing the FTC's allegations).

70. *See* Decision and Order at 4, Moonlight Slumber, LLC, Docket No. C-4634 (F.T.C. Dec. 11, 2017) (prohibiting Moonlight Slumber from making misleading representations about its products).

Many state and local governments have also pursued environmental claims under consumer protection statutes and related consumer law areas.[71] For a state-level example, former Massachusetts Attorney General Maura Healey brought a suit under the Massachusetts Consumer Protection Act arguing that "Exxon began to lead a multi-million dollar, extremely successful consumer deception campaign, repeatedly taking public positions, either directly or through paid proxies, that contradicted the climate science Exxon itself had helped to develop."[72] At the local level, the city of Hoboken filed a lawsuit under New Jersey's Consumer Fraud Act, alleging that oil companies "deceptively worked to influence consumer demand for fossil fuel products through a long-term advertising and communications campaign centered on climate change denialism."[73]

Of course, consumer law does not offer a comprehensive solution to climate change. But even if such efforts resulted in only a few percentage points of emissions reduction overall, consumer law can be part of a pluralistic approach to solving major environmental challenges. Since the contributors to climate change are manifold, the policy solutions will require multiple levers as well. And the deception lawsuits discussed above, if successful at causing firms to internalize the environmental costs of their operations, could have a large-scale impact by deterring environmentally harmful behavior.

B. HEALTH THREATS

Compared to climate change, scholars have paid more attention to the link between consumer law and health, even if that connection remains underdeveloped. For instance, many laws governing the health of products use familiar terms such as "consumer protection."[74] One of the most visible relationships between health and consumer law is in the tobacco industry.

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71. For a summary of some of the state claims, see N.Y.U. Sch. of L., *State Suits Against Oil Companies*, STATE ENERGY & ENV'T IMPACT CTR., https://stateimpactcenter.org/issues/climate-action/suits-against-oil-companies [https://perma.cc/GQC9-SMKA].

72. *See* Complaint at 5, Commonwealth v. Exxon Mobil Corp., No. 19-03333, 2019 WL 11666641 (Mass. Super. Ct. Nov. 29, 2019).

73. Complaint at 139, City of Hoboken v. Exxon Mobil Corp., No. HUD-L-003179-20 (N.J. Super. Ct. Law Div. Sept. 2, 2020).

74. *See, e.g.*, Food Allergen Labeling and Consumer Protection Act of 2004, Pub. L. No. 108-282, § 201, 118 Stat. 891, 905 (deploying the term "consumer protection" in the context of food-related health legislation).

Lawsuits by states and former smokers led to over $200 billion in settlements and arguably reduced cigarette toxicity.[75] Studies have found that laws mandating disclosures about the harms of smoking and labels on cigarette packages drove down the number of smokers.[76] Those efforts are estimated to have saved millions of lives.[77]

Besides the fact that mandatory labels and class-action suits for harm are core consumer law activities, the FTC's Bureau of Consumer Protection was also involved in the federal government's mobilization against smoking.[78] More recently, the FTC initiated investigations and lawsuits against companies whose products led to the spike in vaping-related deaths among teenagers.[79]

Another prominent consumer product contributor to poor health is food, as unhealthy diets are responsible for millions of deaths annually.[80] Business marketing promotes excess food

75. *See* Jean Macchiaroli Eggen, *The Synergy of Toxic Tort Law and Public Health: Lessons from a Century of Cigarettes*, 41 CONN. L. REV. 561, 582 (2008) (detailing the impact of lawsuits).

76. *See* David Hammond, *Health Warning Messages on Tobacco Products: A Review*, 20 TOBACCO CONTROL 327, 331 (2011) (concluding that health warnings on cigarette labels, particularly prominent and visual warnings, encourage smoker cessation and prevent smoking initiation).

77. David T. Levy, Zhe Yuan, Yuying Luo & Darren Mays, *Seven Years of Progress in Tobacco Control: An Evaluation of the Effect of Nations Meeting the Highest Level MPOWER Measures Between 2007 and 2014*, 27 TOBACCO CONTROL 50, 56 (2016) (estimating that health warnings saved 4.1 million lives between 2007 and 2014).

78. *FTC to Study E-Cigarette Manufacturers' Sales, Advertising, and Promotional Methods*, FED. TRADE COMM'N (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] (referring to the agency's attention to smoking health crisis).

79. *See id.* (announcing the issuance of FTC Act 6(b) orders to investigate six e-cigarette companies); *FTC Sues to Unwind Altria's $12.8 Billion Investment in Competitor JUUL*, FED. TRADE COMM'N (Apr. 1, 2020), https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sues-unwind-altrias-128-billion-investment-competitor-juul [https://perma.cc/FXK6-8ZH3] (taking antitrust action for coordination in the e-cigarette market); *see also Warning Letters Are Part of Joint Effort to Protect Youth from Dangers of Nicotine and Tobacco Products and Part of FDA's New Youth Tobacco Prevention Plan*, FED. TRADE COMM'N (May 1, 2018), https://www.ftc.gov/news-events/news/press-releases/2018/05/ftc-fda-take-action-against-companies-marketing-e-liquids-resemble-childrens-juice-boxes-candies [https://perma.cc/9PX3-AFSC] (discussing efforts to protect minors from harms associated with e-liquid products).

80. *See* GBD 2017 Diet Collaborators, *Health Effects of Dietary Risks in 195*

consumption, and obesity alone reduces lifespans by an estimated five to twenty years.[81] Dietary health ailments hit poor and minority communities the hardest, especially those living in food deserts, or areas that lack access to healthy foods.[82] And individuals of any weight can have their lives significantly shortened, and their quality of life reduced, by diabetes, heart disease, and cancers linked to diet.[83] Part of the consumer law response has been to require packaged foods to include nutrition labels that inform consumers about the amount of sugar, calories, and potentially harmful ingredients in the product.[84]

Consumer law also holds companies accountable for exaggerated health claims, akin to environmental greenwashing. For instance, Dannon settled a deceptive advertising class action for $45 million after claiming that its Activia products would "strengthen the immune system."[85] And the Supreme Court recently ruled that POM Wonderful, as a private party, can sue

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Countries, 1990–2017: A Systematic Analysis for the Global Burden of Disease Study 2017, 393 LANCET 1958, 1961 (2019), https://doi.org/10.1016/S0140-6736(19)30041-8 (finding that in 2017, dietary risks were responsible for eleven million deaths globally, or twenty-two percent of all adult deaths).

81. S. Jay Olshansky, Douglas J. Passaro, Ronald C. Hershow, Jennifer Layden, Bruce A. Carnes, Jacob Brody, Leonard Hayflick, Robert N. Butler, David B. Allison & David S. Ludwig, *A Potential Decline in Life Expectancy in the United States in the 21st Century*, 352 NEW ENG. J. MED. 1138, 1140 (2005).

82. *See id.* at 1143 (explaining that obesity may have a disproportionate impact on minority populations with limited access to healthcare). Low-income households also cannot afford more expensive, healthier foods. *See* Adam Drewnowski & Nicole Darmon, *The Economics of Obesity: Dietary Energy Density and Energy Cost*, 82 AM. J. CLINICAL NUTRITION 265S, 269S (2005) ("Additional support for a causal link between poverty and obesity is provided by the growing price gap between healthy and unhealthy foods."); Adam Drewnowski & Nicole Darmon, *Food Choices and Diet Costs: An Economic Analysis*, 135 J. NUTRITION 900, 903 (2005) ("Low-income families attempting to maintain food costs as a fixed percentage of diminishing income will be driven in the direction of energy-dense foods and a higher proportion of foods containing grains, added sugars, and added fats.").

83. *See* Harmon Eyre, Richard Kahn & Rose Marie Robertson, *ACS/ADA/AHA Scientific Statement: Preventing Cancer, Cardiovascular Disease, and Diabetes*, 109 CIRCULATION 3244, 3244, 3248–49 (2004), https://doi.org/10.1161/01.CIR.0000133321.00456.00 (finding that heart disease, cancer, and diabetes, often linked to diet, account for approximately two thirds of deaths in the United States each year).

84. *See, e.g.*, 21 C.F.R. § 101.13 (2022) (providing requirements for nutrition labeling on food products).

85. Camille Currey, *Despite What You've Been Sold—Unwrapping the Falsities Surrounding Food Labels*, 118 W. VA. L. REV. 1279, 1279–80 (2016).

Coca-Cola for labels that exaggerated the inclusion of actual fruit juice in its beverages.[86]

The next layer of suspected health implications concerns harmful substances that are less well known but seem to be following a similar path toward awareness and regulation as other health threats before them. A growing array of research suggests that many common foods contain large amounts of pesticides, heavy metals, and other potentially harmful contaminants. For instance, independent labs have found that products such as chocolate, rice, and bread have high levels of arsenic, mercury, lead, and other components linked to cancer and neurological impairment.[87] Despite these potential hazards, no federal laws require food companies to disclose the presence of chemicals, heavy metals, or other harmful substances.[88]

In the absence of mandated health disclosures, consumers wanting to challenge problematic behavior often must rely on ineffective, general consumer laws that apply to all products.[89] One plaintiff unsuccessfully sued the chocolate company, Mars, under California's prohibition against false or misleading statements, for failing to disclose high cadmium levels.[90] More lawsuits may materialize to target some of these currently poorly understood substances. It took decades of scientific research and public criticism to build a strong case that the weedkiller

86. POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 120–21 (2014).

87. *See, e.g.*, Ekpor Anyimah-Ackah, Isaac W. Ofosu, Herman E. Lutterodt & Godfred Darko, *Exposures and Risks of Arsenic, Cadmium, Lead, and Mercury in Cocoa Beans and Cocoa-Based Foods: A Systematic Review*, 3 FOOD QUALITY & SAFETY 1, 4 (2019) (discussing varying results from studies testing contaminants in cocoa food products).

88. *Fixing the Oversight of Chemicals Added to Our Food: Findings and Recommendations of Pew's Assessment of U.S. Food Additives Program*, PEW CHARITABLE TRS. 1–2 (Nov. 2013), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content_level_pages/reports/foodadditivescapstonereportpdf.pdf [https://perma.cc/KQ7H-PDQU] (noting that the "FDA has not reevaluated the safety of many chemicals originally approved decades ago" in the Food Additives Amendment of 1958).

89. Melissa Mortazavi, *Tainted: Food, Identity, and the Search for Dignitary Redress*, 81 BROOK. L. REV. 1463, 1479 (2016) ("Many food-related cases today are brought pursuant to statutory tort regimes that protect consumers from misleading statements and false advertising.").

90. Am. Env't Safety Inst. v. Mars, Inc., No. BC273433 (Cal. Super. Ct. May 8, 2002). The case was dismissed the following year. Deborah E. Glass & Thomas H. Clarke Jr., *Beware of Clever Metaphors:* Kasky v. Nike *Could Be Harmful to Your Company's Health*, ACC DOCKET 80, 93 n.5 (April 2004).

Roundup caused non-Hodgkin lymphoma.[91] The herbicide's maker, Monsanto, ultimately faced tens of thousands of lawsuits and agreed to pay over $10 billion.[92]

Exposure to harmful substances is not limited to food. Federal statutes have long regulated ingredients allowed in drugs and cosmetics.[93] However, those laws have failed to keep up with the marketplace, and cosmetics often contain hazardous ingredients, such as mercury and formaldehyde.[94] Moreover, recent studies show that the body absorbs far more of these products' ingredients through the skin than previously understood.[95]

Consumer spending also affects health in numerous indirect ways. Whereas the harm from outdoor air is well known, indoor air is less well understood. At the University of Texas, a group of sixty scientists from across the nation recently built a lab to measure indoor air.[96] Most of them were surprised to find that

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91. Patricia Cohen, *Roundup's Maker to Pay More than $10 Billion to Settle Thousands of Claims That the Weedkiller Causes Cancer*, N.Y. TIMES (June 25, 2020), https://www.nytimes.com/2020/06/24/business/roundup-settlement-lawsuits.html [https://perma.cc/PHP4-RP67] (reporting on settlement negotiations).

92. *Id.*

93. *See, e.g.*, 21 U.S.C. § 361 (determining when a cosmetic shall be deemed adulterated).

94. Anastasia De Paz, *The Cosmetic Regime Needs a Makeover: Advocating to Empower the FDA Through the Safe Cosmetics Act of 2011*, 31 TEMP. J. SCI. TECH. & ENV'T L. 337, 340 (2012) (describing that, although formaldehyde is a known human carcinogen and strong irritant, its use in cosmetics products is not illegal under federal regulation); Rajiv Shah & Kelly E. Taylor, *Concealing Danger: How the Regulation of Cosmetics in the United States Puts Consumers at Risk*, 23 FORDHAM ENV'T L. REV. 203, 221 (2012) (noting that mercury-containing cosmetic products remain available on market today despite the 1990 ban of its use in cosmetics).

95. *See, e.g.*, Murali K. Matta, Jeffry Florian, Robbert Zusterzeel, Nageswara R. Pilli, Vikram Patel, Donna A. Volpe, Yang Yang, Luke Oh, Edward Bashaw, Issam Zineh, Carlos Sanabria, Sarah Kemp, Anthony Godfrey, Steven Adah, Sergio Coelho, Jian Wang, Lesley-Anne Furlong, Charles Ganley, Theresa Michele & David G. Strauss, *Effect of Sunscreen Application on Plasma Concentration of Sunscreen Active Ingredients: A Randomized Clinical Trial*, 323 J. AM. MED. ASS'N 256, 267 (2020), doi:10.1001/jama.2019.20747 (testing six active ingredients found in sunscreen formulations and finding that all were systemically absorbed).

96. Nicola Twilley, *The Hidden Air Pollution in Our Homes*, NEW YORKER (Apr. 1, 2019), https://www.newyorker.com/magazine/2019/04/08/the-hidden-air-pollution-in-our-homes [https://perma.cc/E3FZ-24D4] (describing experiment of cooking Thanksgiving meal to chart its effects on pollution and finding that, in just a few hours of cooking, "the fine-particulate concentration had risen

common household activities, like cooking with gas stoves and cleaning with certain products, can create indoor air quality levels worse than the outdoor air quality in the dirtiest cities on Earth.[97] Yet no federal laws require the manufacturers of cooking and cleaning products to disclose potentially hazardous airborne substances despite preliminary evidence that exposure may be linked to various cancers, diseases, and cognitive decline.

There is somewhat greater recognition of harmful chemicals in a few other areas, largely due to the potential harm to children. Many products, such as mattresses and furniture, must include disclosures of potentially toxic flame retardants used.[98] Childhood exposure to lead impairs mental development, prompting Congress to ban it from many products, such as paint and toys.[99] However, it was not until widespread public outcry in 2008 about elevated lead levels in many imported toys that Congress passed a law increasing federal toy inspection by the Consumer Product Safety Commission.[100]

In short, the law currently reaches a long list of well-known connections between consumer products and health. Those laws particularly affect the communications around health products but also include bans. Consumer laws have thus made a difference between sickness and health, and life and death, on a large

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to such a level that, if the house were a city, it would have been officially labelled polluted").

97. *Id.* For a recent example of how products impacting indoor air can turn lethal, see Kate Gibson, *CDC Confirms Deadly Bacteria in Home Spray Recalled by Walmart*, CBS NEWS: MONEY WATCH (Oct. 28, 2021), https://www.cbsnews.com/news/cdc-deadly-bacteria-room-spray-walmart-recall [https://perma.cc/X7GA-3RPT] ("Federal health officials have confirmed that a room spray recently recalled by Walmart contained a 'rare and dangerous' bacteria that infected four people, killing two, including a child.").

98. *See, e.g.*, CAL. BUS. & PROF. CODE § 19094 (West 2022) (requiring disclosure of potentially toxic flame retardant chemicals in upholstered furniture); VT. STAT. ANN. tit. 18, § 1775 (2022) (requiring disclosure of many chemicals in children's products, including some flame retardant chemicals used in bedding and mattresses).

99. 15 U.S.C. § 1278a (banning lead in paint and toys); *see* Talia Sanders, Yiming Liu, Virginia Buchner & Paul B. Tchounwou, *Neurotoxic Effects and Biomarkers of Lead Exposure: A Review*, 24 REVS. ON ENV'T HEALTH 15, 16 (2009) (discussing dangers of lead exposure for children, including "hyperactivity; deficits in fine motor function, hand-eye coordination, and reaction time; and lowered performance on intelligence tests").

100. *See* Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 106, 122 Stat. 3016, 3033.

scale. And more opportunities exist for consumer laws to address some health risks that currently receive inadequate attention.

C. THE ECONOMY, INEQUALITY, AND INFLATION

Many important macroeconomic issues hinge on consumer spending. The rest of this Section focuses on how stronger, efficiency-improving consumer laws might reduce economic inequality, though a similar case can be made for economic growth and inflation.[101] Income inequality has skyrocketed over the past four decades.[102] The racial income gap has fluctuated greatly as well, and the median Black individual income is about seventy-nine percent of the median white individual income.[103] Many CEOs of multinational corporations, governmental leaders, and scholars see economic inequality as one of the greatest threats to societal stability. A major concern is the risk that when the wealthy have an outsized influence on politics it can undermine support for democracy.[104]

When companies can charge higher prices, business owners and leaders benefit disproportionately.[105] With excess profits, senior executives and the most influential employees have more leeway to increase their salaries.[106] High prices also direct more income to owners, which contributes to inequality because the

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101. *See, e.g.*, Van Loo, *supra* note 11, at 212–18 (examining how consumer law can serve as a wealth redistribution tool); Van Loo, *Inflation*, *supra* note 2 (manuscript 3–4) (arguing that consumer laws aimed at lowering prices and improving markets can lower inflation).

102. *See* Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849, 852 (2013) (discussing dramatic growth in income inequality since the 1970s).

103. *See id.* at 857 (discussing income inequality statistics from 2011). The racial wealth gap is even starker, with the median white household having twenty times the wealth of the median Black household. *Id.* at 858.

104. *See* SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 216–18 (2018) (arguing that human rights have failed to check market fundamentalism because they do not sufficiently address material inequality); WORLD ECON. F., *supra* note 45, at 24 (noting that concerns about inequality have sparked social unrest globally).

105. *See* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 238–39 (2017) (arguing that monopoly prices redistribute income to managers and owners of firms with market power).

106. *See, e.g.*, *id.* at 245 (discussing disproportionate affluence of executives and shareholders); MOYN, *supra* note 104, at 214.

top one percent of households owns fifty-five percent of the business sector.[107]

Although people often associate illegally high prices with monopolies and antitrust, another potential source for dramatically reducing inequality is consumer law.[108] For instance, a 2014 Israeli law required stores to make their price and product information available in machine-readable form.[109] Websites were subsequently launched to help people find the best deals.[110] As a result, average prices lowered by about four to five percent.[111]

Laws prohibiting unfair and deceptive acts can have a similar effect. For instance, if companies deceive consumers by using false claims, such as that products will last longer or are made of higher quality materials, the average consumer will pay a higher price than they would otherwise.[112] That difference between what an informed and rational consumer would pay and what they actually pay can be seen as "overcharge."[113]

Research indicates that businesses can systematically cause consumers to pay overcharge.[114] For instance, one study found that people pay eight percent more on average because they choose a more expensive cell phone plan among the complex offerings available at a single carrier.[115] Credit card rates were

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107. This figure accounts for broad stock ownership in retirement accounts. *See* Arthur B. Kennickell, *Ponds and Streams: Wealth and Income in the U.S., 1989 to 2007*, at 2–3, 78–79 figs.A5a & A5b (Fed. Rsrv. Bd., Finance and Economics Discussion Series No. 2009-13, 2009) (calculating businesses owned directly and indirectly).

108. Consumer law is one of many approaches. For examples of others, see DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE (2019), which summarizes contributors of and solutions to inequality.

109. *See* Itai Ater & Oren Rigbi, The Effects of Mandatory Disclosure of Supermarket Prices 3 (Oct. 2, 2017) (unpublished manuscript), https://ssrn.com/abstract=3046703.

110. *Id.*

111. *Id.* at 20.

112. *Cf.* Schwartz & Wilde, *supra* note 23, at 643–46 (outlining the market distortions of information asymmetries).

113. *See, e.g.*, Van Loo, *Buyers Beware*, *supra* note 2, at 1320 (analyzing retail overcharge).

114. *See generally* GERRIT DE GEEST, RENTS: HOW MARKETING CAUSES INEQUALITY 179–86 (2018) (discussing forms of overpricing).

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

estimated to be thirty-seven percent higher because of factors like susceptibility to teaser rates and insufficient competition.[116] And other research has concluded that online shoppers paid six to nine percent more for retail goods because sellers obfuscated the quality, return practices, shipping costs, and other aspects of the purchases.[117] There is evidence that Black and Latinx consumers pay more of this overcharge in certain contexts, thereby contributing to racial and ethnic wealth gaps.[118]

Moreover, companies further outmaneuver consumers by leveraging big data, behavioral economics, and scientifically honed marketing.[119] That sophistication means that companies continually improve their ability to exploit our particular psychological tendencies—such as when we may be too tired or too desperate to pay attention to prices.[120] In other words, as industry executives themselves acknowledge, machine learning algorithms have turned consumer markets into laboratories of experimentation on how to extract more profits.[121]

How much do these transfers matter across the economy? Answering that question requires a more macro approach to consumer law than is typically undertaken. Although the macro-level magnitude of overcharge is unknown, a conservative back-of-the-envelope application of studies of individual markets is consistent with overcharge of ten percent or more of all

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116. *See* Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50, 73 (1991) (using data from 1983 to 1988).

117. *See* Glenn Ellison & Sara Fisher Ellison, *Search, Obfuscation, and Price Elasticities on the Internet*, 77 ECONOMETRICA 427, 428–29 (2009) (explaining how obfuscation can lead to higher prices for consumers).

118. *See, e.g.*, Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 835, 855 (1991) (finding that Black car purchasers were quoted higher prices); Pamela Foohey & Nathalie Martin, *Fintech's Role in Exacerbating or Reducing the Wealth Gap*, 2021 U. ILL. L. REV. 459, 459 ("Research shows that Black, Latinx, and other minorities pay more for credit and banking services, and that wealth accumulation differs starkly between their households and white households.").

119. *See* Van Loo, *Buyers Beware*, *supra* note 2, at 1331–34 (discussing how companies use technology and behavioral economics to capitalize on consumer limitations).

120. *See id.* at 1326–28 (discussing limitations on consumer sophistication).

121. *See* Tara Balakrishnan, Michael Chui, Bryce Hall & Nicolaus Henke, *The State of AI in 2020*, MCKINSEY (Nov. 17, 2020), https://www.mckinsey.com/business-functions/mckinsey-analytics/our-insights/global-survey-the-state-of-ai-in-2020 [https://perma.cc/PK4Z-Y5Q3] (surveying industries and concluding that companies are increasingly "using AI as a tool for generating value").

expenditures, or over one trillion dollars annually.[122] For the median household spending $50,000 annually, removing ten percent of overcharge would put $5,000 back into their pockets, which could be used for savings, paying off debt, buying healthier food, or taking a vacation.[123] When antitrust is added and less conservative assumptions are made, the actual level of overcharge could be closer to twenty percent of consumer spending, or over two trillion dollars.[124] These numbers are necessarily conjectural, in part because the government has not taken the study of overcharge seriously enough to collect relevant nonpublic data held by companies—perhaps another sign of consumer law's marginalization. Regardless, the preliminary evidence of overcharge suggests that it is of a magnitude sufficient to potentially counteract years, if not decades, of increasing income inequality.[125]

Consumer law has heavier tools than mandatory disclosure to reduce overcharge. Sometimes consumer laws ban harmful practices outright. For example, state laws prevent stores from listing a bread maker as discounted from $200 to $150—unless it actually sold for a reasonable time at $200.[126] Other statutes outlaw historical practices like redlining[127] or charging minority communities higher rates on loans.[128] And antitrust laws block

122. See Van Loo, *supra* note 11, at 229–39 (analyzing overcharge and its impact on inequality).

123. See *id.* at 231.

124. *Id.* at 229–30.

125. *See id.* at 239–42 (reporting findings from static simulation that reducing this level of overcharge would lower inequality to the more balanced levels that existed in 1980).

126. *See* David Adam Friedman, *Reconsidering Fictitious Pricing*, 100 MINN. L. REV. 921, 922–25 (2016) (describing efforts to prevent "fictitious pricing," the advertising tactic of listing a product as discounted from a price at which the product was never actually sold).

127. *See, e.g.*, Press Release, Justice Department Announces New Initiative to Combat Redlining (Oct. 22, 2021), https://www.justice.gov/opa/pr/justice-department-announces-new-initiative-combat-redlining [https://perma.cc/H2BE-FQUX] ("Redlining is an illegal practice in which lenders avoid providing services to individuals living in communities of color because of the race or national origin of the people who live in those communities. The new Initiative represents the department's most aggressive and coordinated enforcement effort to address redlining, which is prohibited by the Fair Housing Act and the Equal Credit Opportunity Act.").

128. *See, e.g.*, Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1136–37 (2019) (discussing legislation prohibiting discrimination).

mergers like the one Comcast and Time Warner proposed in 2014, which would have created a near-monopoly for cable and internet in many households nationwide.[129]

As a result, consumer law provides policymakers with an alternative to their typical approach of boosting the economy through tax rebates and stimulus payments. As a practical matter, consumer law may be important as an alternative to tax law because the desired level of redistribution may never come to fruition due to political impediments.[130] Consumer law may be more politically actionable because it does not depend on higher taxes. Instead, new consumer laws or stronger enforcement of existing laws could prevent companies from manipulating consumers to increase prices in the first place, rather than waiting for those market failures to happen and then raising taxes. Moreover, unlike higher taxes, which are viewed as distorting markets, these consumer laws aim to correct market failures.[131] Additionally, if those statutes offer significant compensation for consumer plaintiffs—such as the treble damages allowed in many consumer law contexts—they could increase incentives for private parties to take up more consumer cases. A related move would be for Congress to reinvigorate class actions by banning mandatory arbitration clauses.

Stronger consumer laws would disproportionately benefit minority households in those markets in which overcharge disproportionately affects them.[132] Policymakers thus could address some portion of racial and ethnic economic inequality in a more targeted manner by prioritizing the practices that harm minorities most.

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129. William P. Rogerson, *Economic Theories of Harm Raised by the Proposed Comcast/TWC Transaction (2015)*, *in* THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 423, 423–26 (John E. Kwoka Jr. & Lawrence J. White eds., 7th ed. 2019) (discussing the proposed merger and its opposition).

130. Fennell & McAdams, *supra* note 31 (arguing that the redistribution assumed by law and economics scholars often does not happen due to political barriers in passing tax legislation).

131. *See, e.g.*, OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 6–9 (2012) (discussing reforms targeting behavioral economics that would reduce price and improve efficiency).

132. *See* Ayres, *supra* note 118 (discussing the results of a test finding that white males receive significantly better prices than women and Blacks); Foohey & Martin, *supra* note 118, at 504–05 (discussing the disproportionate impact that debt and wealth inequality have on communities of color, and advocating for a plan to reform American banking and lending practices).

In short, consumer laws play an important role in maintaining low prices. As a result, new consumer legislation or more enforcement of existing authority could increase equality.

D. DEMOCRACY AND DISINFORMATION

Unfounded conspiracy theories have become mainstream through consumer technologies such as Google, TikTok, and Facebook. On social media, falsehoods spread six times faster than truths and disseminate far more widely.[133] This era of evolving technological disinformation has complicated the task facing the primary regulator of social media, the FTC's Bureau of Consumer Protection, which has long guarded against harms that can result from inadequate, misleading, or false information.[134]

Part of the challenge comes from the rapidly evolving consumer tools available. Deepfakes can make anyone appear to say or do just about anything by swapping one person's face for another's in videos.[135] England's leading news channel sparked outrage after producing a deepfake video of Queen Elizabeth performing a popular TikTok dance.[136] The possibility of more nefarious fabrications is illustrated by the basic video editing used to convince millions that Nancy Pelosi publicly slurred her words as if she were inebriated.[137] Consumer technology has become simple enough for almost anyone to create an increasingly realistic deepfake.[138] As deepfake technologies improve and proliferate, it will only become more difficult to debunk conspiracy theories.

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133. *See* Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCI. 1146, 1150 (2018) (discussing study results).

134. *See, e.g.*, Solove & Hartzog, *supra* note 37, at 598–602 (outlining FTC responsibilities).

135. *See* Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1758–62 (2019) (detailing the foundations of deepfake technology and its capabilities).

136. *See* Cass R. Sunstein, *Can the Government Regulate Deepfakes?*, WALL ST. J. (Jan. 7, 2021), https://www.wsj.com/articles/can-the-government-regulate-deepfakes-11610038590 [https://perma.cc/QYA3-3ZQC] (describing Channel 4's use of deepfake technology in its 2020 "alternative Christmas address").

137. Regina Rini, *Deepfakes Are Coming. We Can No Longer Believe What We See*, N.Y. TIMES (June 10, 2019), https://www.nytimes.com/2019/06/10/opinion/deepfake-pelosi-video.html [https://perma.cc/KV9R-HMGJ].

138. *See id.* ("Digital technology is making it much easier to fabricate convincing fakes. . . . [Y]ou could probably do it yourself after watching a few YouTube clips about video editing.").

Moreover, the societal harms of these activities extend well beyond creating falsehoods. People take actions based on conspiracies. In 2016, a man armed with an assault rifle stormed a run-of-the-mill pizza parlor, believing that children were being held in its basement by Hillary Clinton and other top Democrats.[139] One U.S. Representative won in 2020 on a platform openly supporting QAnon.[140] And a long, twisted road of conspiracy theories about Democrats stealing elections fueled the deadly Capitol Riots.[141]

The ability to manipulate videos and spread fictitious news also can interfere with people learning correct information that is central to a healthy democracy. The mere existence of manipulated media enables public figures who misbehave to claim that an authentic video of them is fake.[142] Governmental leaders now commonly call unwelcome truthful allegations "fake news."[143] Over forty percent of people have responded to disinformation by consuming less news overall—thereby potentially becoming less informed voters.[144] Public accountability becomes far more difficult in a world without the ability to tell truth from lie.

Consumer law has a potentially meaningful role to play in addressing these challenges. Indeed, it may be the leading area

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139. Marc Fisher, John Woodrow Cox & Peter Hermann, *Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html [https://perma.cc/6BJN-K3GB].

140. Matthew Rosenberg, *A QAnon Supporter Is Headed to Congress*, N.Y. TIMES (Nov. 4, 2020), https://www.nytimes.com/2020/11/03/us/politics/qanon-candidates-marjorie-taylor-greene.html [https://perma.cc/7RK4-FGWY].

141. *See* Elizabeth Williamson, *'I'm Not Surprised': Rioters Took Long Conspiratorial Road to Capitol*, N.Y. TIMES (Jan. 28, 2021), https://www.nytimes.com/2021/01/27/us/politics/capitol-riot-conspiracies.html [https://perma.cc/GH77-866K] (providing an outline of conspiracy theories promoted since 2012 and their links to the January 6th riot).

142. *See* Chesney & Citron, *supra* note 135, at 1785 ("Deep fakes will make it easier for liars to deny the truth in distinct ways.").

143. *See* Tom O'Connor, *'Fake News!' Following Donald Trump, These Other World Leaders Have Blamed the Media for Troubles at Home*, NEWSWEEK (Oct. 11, 2018), https://www.newsweek.com/fake-news-donald-trump-world-leaders-1165892 [https://perma.cc/XYS7-P9KR] (listing several world leaders who have adopted the "fake news" mantra).

144. Amy Mitchell, Carrie Blazina, Galen Stocking, Mason Walker & Sophia Fedeli, *Many Americans Say Made-Up News Is a Critical Problem that Needs to Be Fixed*, PEW RSCH. CTR. (June 5, 2019), https://www.journalism.org/2019/06/05/many-americans-say-made-up-news-is-a-critical-problem-that-needs-to-be-fixed [https://perma.cc/9E3D-MB2B].

in which to intervene because of two main barriers that have hindered other legal responses. Most importantly, the First Amendment prevents laws from impinging on speech.[145] And Section 230 of the Communications Decency Act shields social media companies such as Facebook from liability for what third parties post online.[146]

One proposal that might circumvent those obstacles relies on UDAP statutes.[147] The idea is that, by not taking reasonable steps to stop disinformation, the platform is failing to meet the consumer's expectations and is thus engaging in unfair or deceptive acts.[148] This proposal could overcome First Amendment and Section 230 obstacles because it does not attempt to hold the platform responsible for third-party acts, but instead for breaking commitments that the platform makes to the consumer.[149] However, for this approach to have a major impact, it would depend on regulators, or lawmakers, pushing UDAP laws into new territory.

Another tool proposed recently is the content label.[150] Twitter and Facebook rolled out labels in the 2020 campaign to address mounting criticism about their role in spreading misinformation.[151] For instance, before ultimately banning his account in January 2021, Twitter repeatedly labeled President Trump's tweets with a warning that the content shared was "disputed and might be misleading about an election or other civic process."[152]

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145. U.S. CONST. amend. I.

146. Chesney & Citron, *supra* note 135, at 1806.

147. 15 U.S.C. § 45 (authorizing the FTC to enforce unfair and deceptive acts).

148. 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 (2020).

149. Unfair and deceptive acts would not be going after the platform for either its speech or something a third-party did, but instead would hold the platform accountable for "procedurally inadequate content moderation programs." *Id.*

150. *See, e.g.*, Vosoughi et al., *supra* note 133 (encouraging the use of "labeling and incentives to dissuade the spread of misinformation").

151. Dawn Carla Nunziato, *Misinformation Mayhem: Social Media Platforms' Efforts to Combat Medical and Political Misinformation*, 19 FIRST AMEND. L. REV. 32, 34–35 (2020).

152. Kate Conger, *Twitter Has Labeled 38% of Trump's Tweets Since Tuesday*, N.Y. TIMES (Nov. 5, 2020), https://www.nytimes.com/2020/11/05/technology/donald-trump-twitter.html [https://perma.cc/EW3B-HFGJ].

Such labels are a core consumer law tool, but in the context of disinformation they were slow to arrive and have generally remained disconnected from the law.[153] Additionally, social media companies do not necessarily have the right incentives to systematically reduce disinformation, which drives user engagement and thus advertising profit.[154] In any case, the movement of extremist groups to alternative platforms like Parler means that voluntary action by the largest tech companies may be insufficient to squash disinformation.[155] To prevent disinformation from reaching a critical mass on all major platforms, laws may be needed. If so, consumer law offers options.

This is not meant to be an exhaustive application of consumer law to disinformation. Instead, the point is that consumer law potentially provides existing tools and authority for legal intervention. It would thus be unwise to not at least consider the field when designing policy responses to disinformation—and thus to one of the biggest threats to democracy in the digital age.[156]

E. SUMMARY OF CONSUMER LAW'S IMPORTANCE

The main goal of this Part has been to show the underappreciated relevance of consumer law to society. As a matter of law, the FTC and state authorities have already exercised legal authority at the economic core of consumer law—the prohibition of unfair and deceptive acts—on issues related to climate change, public health, and inequality. Legal reforms or the devotion of more resources to consumer law could potentially have a significantly greater impact on each of these areas, as well as on disinformation.

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153. *See supra* Part I.B for discussion on health threats and consumer label laws.

154. *Cf.* Karen Hao, *How Facebook Got Addicted to Spreading Misinformation*, MIT TECH. REV. (Mar. 11, 2021), https://www.technologyreview.com/2021/03/11/1020600/facebook-responsible-ai-misinformation [https://perma.cc/VK5C-CUQQ] (quoting Professor Hany Farid as saying, "When you're in the business of maximizing engagement, you're not interested in truth.").

155. *See* Mike Isaac & Kellen Browning, *Rightists Flee Facebook for a Safe Space*, N.Y. TIMES (Nov. 12, 2020), https://www.nytimes.com/2020/11/11/technology/parler-rumble-newsmax.html [https://perma.cc/BXS4-89ZZ] (reporting Parler's growth).

156. *See, e.g.*, Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J.F. 337 (2017) ("Following the 2016 U.S. presidential election, 'fake news' has dominated popular dialogue and is increasingly perceived as a unique threat to an informed democracy.").

Multiple institutional options exist for legal reforms or increased enforcement vigor in these areas. For instance, whether the FTC or EPA oversees disclosures or outright product bans aimed at climate change, expertise about consumer markets and behavior will be crucial. It would thus seem that relying on the considerable consumer market expertise built up in the FTC and other consumer agencies will be valuable and avoid waste. Similarly, when consumer agencies act on issues related to climate change or other externalities, they would ideally leverage the expertise residing elsewhere.

These case studies also highlight important legal and institutional intersections. Health effects from spending decisions influence household budgets. By purchasing environmentally harmful appliances or high-sugar foods, people may pay more in health care costs from pollution or obesity-related sicknesses.[157] Sickness harms careers and deprives the economy of valuable labor.[158] The two leading causes of consumer bankruptcy are poor health and job loss—both of which can be influenced by the shape of consumer laws.[159] Whether someone lays in a hospital bed on life support or loses their home flows from a confluence of factors, many of which consumer law can improve. For firms to internalize the full costs of their activities or for lawmakers to write legal rules that maximize the societal benefits of consumer transactions it is necessary to have a holistic approach to different areas of law and to the human condition.

The precise nature of these connections, as well as the magnitude of the impact consumer law reforms might have, await

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157. The typical obese person spends on average $1,429 more than the average nonobese person annually in health care costs. Eric A. Finkelstein, Justin G. Trogdon, Joel W. Cohen & William Dietz, *Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates*, 28 HEALTH AFFS. w822, w825 (2009), https://doi.org/10.1377/hlthaff.28.5.w822.

158. *See* Penelope Dash, Grail Dorling, Katherine Linzer, Aditi Ramdorai, Kristin-Anne Rutter & Shubham Singhal, *How Prioritizing Health Could Help Rebuild Economies*, MCKINSEY GLOB. INST. (July 8, 2020), https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/how-prioritizing-health-could-help-rebuild-economies [https://perma.cc/2T8E-TX2W] (describing how poor health impacts GDP through premature deaths and lost earning potential).

159. *See supra* Part I.B; *see also* David U. Himmelstein, Robert M. Lawless, Deborah Thorne, Pamela Foohey & Steffie Woolhandler, *Medical Bankruptcy: Still Common Despite the Affordable Care Act*, 109 AM. J. PUB. HEALTH 431, 432 tbl.1 (2019), https://doi.org/10.2105/AJPH.2018.304901 (listing income loss as a contributor to bankruptcy for seventy-eight percent of respondents, and medical expenses in general as a contributor to bankruptcy for fifty-eight percent).

further study. However, consumer laws must have substantial societal implications because, as a simple fact of human behavior, market transactions between firms and consumers constitute the core sphere of human activity that gives rise to climate change, many of the leading causes of death, a regressive distribution of wealth, and disinformation. A sensible working hypothesis for policymakers moving forward is that consumer law, institutions, and lawyers have a leading role to play in pushing markets toward better outcomes for the environment, public health, equality, and democracy. Moreover, whether as a matter of politics or unintended consequences of the current legal framework, approaches outside of consumer law may prove inadequate on their own. Given the magnitude of these societal problems and the difficulty of solving them, policymakers need all potential solutions on the table and must mobilize as many different areas of the law as necessary. Overlooking consumer law cuts off a promising avenue for greatly improving society.

II. THE MARGINALIZATION OF CONSUMER LAW

Given the common law's limits, statutes are now the bedrock of consumer law authority.[160] The most prominent example is that all fifty states and the federal government codified elements of common law unconscionability and fraud into UDAP statutes.[161] When a business practice is not justified by efficiency and tends to significantly harm or deceive consumers, UDAP statutes permit authorities to bring actions to halt the unfair or deceptive conduct and compensate consumers for the harm.[162]

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160. Scholars have, however, sometimes pointed out that the common law may provide powerful solutions to very modern consumer problems if applied appropriately. *See, e.g.*, Barak D. Richman, Nick Kitzman, Arnold Milstein & Kevin A. Schulman, *Battling the Chargemaster: A Simple Remedy to Balance Billing for Unavoidable Out-of-Network Care*, 23 AM. J. MANAGED CARE e100, e100 (2017), https://cdn.sanity.io/files/0vv8moc6/ajmc/d5b6246ebd83595780b768ebcfc707db37a3becc.pdf/AJMC_04_2017_Richman.pdf [https://perma.cc/9G9C-7TGW] (concluding that contract law provides a promising solution to healthcare providers overbilling vulnerable patients).

161. *See* PORTER, *supra* note 4, at 3–7. The Uniform Commercial Code also distinguishes merchants from consumers. *See* U.C.C. §§ 2-104(1), 9-102(22)–(26) (AM. L. INST. & UNIF. L. COMM'N 2010) (identifying merchants as dealers of goods, and consumers as a class of buyer primarily in the market for personal, family, or household purposes).

162. *See, e.g.*, Lee v. Conagra Brands, Inc., 958 F.3d 70, 76 (1st Cir. 2020) (discussing how Massachusetts courts follow the FTC's interpretations of "deceptive" in analogous state UDAP cases).

Despite the ubiquity of consumer law statutes, there is reason to think that even core consumer law issues remain undervalued in terms of the resources and attention devoted to the field by key legal institutions. This Part explores consumer law's status by focusing on all three branches of government and law schools. As a caveat, attempting to identify the optimal institutional structure or level of resources devoted to a field raises empirical questions that perhaps cannot be rigorously answered. Institutional decisions about consumer law consequently reflect subjective value judgments about the importance of various fields of law. The examination of these decisions below is animated by a belief that at least making the underlying value judgments explicit is preferable to an intuitive implicit institutional design when the societal stakes are so high.

A. GOVERNMENT

It is perhaps unsurprising that the legislative process often overlooks consumers. After all, they are a dispersed group made up of almost every individual. In contrast, large businesses can concentrate lobbying resources and easily overpower less well-funded consumer groups during the legislative process.[163] This political economy offers a potential explanation for how consumer law can be both marginalized and extensive. This Section focuses on the ways in which Congress has failed to give adequate attention to consumer law, as expressed through its committee structure and authorization of administrative agencies. State actors also have advanced consumer law, so a comprehensive analysis of the resources devoted to consumer law would consider activities at the state level as well. The focus here is at the federal level to manage the scope of the inquiry and because a considerable portion of consumer transactions are conducted by companies operating in multiple states or nationwide, in which case an individual state actor will represent only a fraction of the consumers who might be harmed by a given practice. Also, the inquiry below compares consumer law to other areas of regulation that also have state-level actors, so the reference points used are all at the federal level.

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163. *See, e.g.*, Jean Braucher, *Foreword: Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L.Q. 1, 3–4 (1997) (describing obstacles to consumer participation); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 227 (2012) ("[C]itizen groups that engage in lobbying have fewer resources than business groups and 'are often spread thin.' . . . They often find themselves in a David and Goliath position . . . .").

1. Congressional Committees

Congress has fifty-three committees that produce new legislation and oversee administrative agencies in subject matters ranging from small business affairs to the environment. None of these committees focuses on consumers.[164] Instead, consumer matters are dispersed among several broader committees, including the Senate Committee on Commerce, Science, and Transportation; the Senate Committee on Banking, Housing, and Urban Affairs; the House Committee on Financial Services; and the House Committee on Energy and Commerce.[165]

Despite the empirical difficulty in knowing the practical implications, several points are worth considering in assessing the current committee design. Consumers are less prominent than veterans and small businesses, which both have their own committees. Consumers are also less prominent than workers, who have a committee largely focused on them, in the House Committee on Education and the Workforce, particularly since education is a crucial part of preparing people to work.[166] In contrast, nowhere does the word "consumer" or a word synonymous with that group appear at the committee level. Thus, regardless of its implications for the production of laws, the absence of a consumer-focused committee in Congress reflects one form of obscurity and fragmentation that other groups do not have.

One must look to the subcommittees to find consumers mentioned. But even at that level, in the House, consumers are not the focus. Instead, they are covered in the "Innovation, Data, and Commerce" subcommittee. That subcommittee is charged with "[i]nterstate and foreign commerce, including all trade matters within the jurisdiction of the full committee" on Energy and Commerce.[167] Moreover, that subcommittee resides in the

164. *Committees*, U.S. HOUSE OF REPRESENTATIVES [hereinafter *House Committees*], https://www.house.gov/committees [https://perma.cc/QNN6-4AX7]; *Committees: List of Committees for the 118th Congress*, U.S. SENATE [hereinafter *Senate Committees*], https://www.senate.gov/committees [https://perma.cc/J4E9-BB35].

165. *See Senate Committees*, *supra* note 164; *House Committees*, *supra* note 164 (identifying consumer protection as a focus of certain subcommittees or within the general missions of the committees themselves).

166. *House Committees*, *supra* note 164.

167. *Innovation, Data, and Commerce*, HOUSE COMM. ON ENERGY & COM., https://energycommerce.house.gov/committees/subcommittee/innovation [https://perma.cc/4FF2-F87U]. The Senate has a subcommittee focused on consumers, the "Subcommittee on Consumer Protection, Product Safety, and Data

committee that has "the broadest jurisdiction of any congressional authorizing committee."[168] Thus, in the House's main institutional home for consumer matters, consumer legislation must compete for attention at the subcommittee level with broad matters of commerce and international trade, and then overcome the six other subcommittees within the authorizing committee that has the broadest agenda in Congress.

Beyond the lack of visibility and focus, this design forces consumers to compete with other interests. In both the House and the Senate, consumers must vie with commerce. To illustrate the potential tensions, the House Committee on Energy & Commerce oversees and shares jurisdiction with the Department of Commerce,[169] which per its own official description "serves as the voice of business in the Federal Government."[170] Consequently, the same committee must be the legislative voice of both businesses and consumers. As another example, the Senate Committee on Banking, Housing, and Urban Affairs was previously called the Senate Banking Committee and still is tasked with ensuring bank safety and soundness—preventing banks from failing—along with consumer financial protection.[171] The risks of situating consumer financial protection within the same entity tasked with protecting financial institutions from failing were seen in the years leading up to the mortgage crisis of the 2000s, when those regulators failed to protect consumers from predatory lending.[172] Thus, the institutional design of Congress reflects a lower status for consumer law and risks contributing to inadequate legislative attention by forcing the field to compete

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Security." *Consumer Protection, Product Safety, and Data Security*, U.S. SENATE COMM. ON COM., SCI. & TRANSP., https://www.commerce.senate.gov/consumer-protection-product-safety-and-data-security-subcommittee [https://perma.cc/YG4L-ZLR4].

168. *About*, HOUSE COMM. ON ENERGY & COM., https://energycommerce.house.gov/about [https://perma.cc/4ZFK-26KR].

169. *See id.* (describing the Committee's jurisdiction as covering both interstate and foreign commerce).

170. *About Commerce*, U.S. DEP'T OF COM., https://www.commerce.gov/about [https://perma.cc/77RF-6KDW].

171. *About*, U.S. SENATE COMM. ON BANKING, HOUS., AND URB. AFFS., https://www.banking.senate.gov/about [https://perma.cc/WEH2-CLFP]; Thomas Zells, *The Post-2008 Lending Environment and the Need for Raising the Credit Union Member Business Lending Cap*, 6 WM. & MARY BUS. L. REV. 739, 758 (2015).

172. *See* McGarity, *supra* note 15, at 1682 & n.30, and accompanying text (discussing regulators' interest in saving failing banks during the 2008 financial crisis while also instituting new consumer protection measures).

with deep-pocketed industry lobbying to even get out of committee.

Ultimately, the outcomes that those committees produce matter more than their structure. Because Congress authorizes administrative agencies, they are a direct reflection of lawmakers' priorities. As discussed in the following Sections, the outcomes produced can be seen in a range of regulatory contexts, from heavily regulated industries to technology companies.

2. The Executive Branch and Administrative Agencies

a. Heavily Regulated Industries

Heavily regulated industries are typically marked by both a large number of laws constraining behavior and a great deal of information passing between administrative agencies and businesses. The financial regulatory structure illustrates several of the main design challenges facing consumer law in heavily regulated industries. In the fall of 2008, the nation was in a precarious position. Prominent businesses collapsed, stocks plummeted, retirements disappeared, and millions of homeowners were destined for foreclosure.[173] At the roots of the unexpected economic turmoil were mortgages—in particular, many people had taken out loans that they could not afford after housing prices plummeted.[174] Many mortgages had predatory characteristics, such as balloon payment clauses, which caused the monthly payments to increase by hundreds or thousands of dollars after a few years.[175] The unraveling of mortgage markets had a domino effect on the financial system.[176]

Consumer law professors Kathleen Engel and Patricia McCoy warned of this looming mortgage crisis years before.[177] But Congress only began to pay serious attention to consumer law scholars as the financial system reeled in 2008, in the aftermath of a crushing mortgage crisis that proved Engel and McCoy

173. *See* Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. 1257, 1260–64 (2009) (detailing the housing and financial collapse and the role of the subprime mortgage crisis).

174. *See id.*

175. *See* Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1283–86 (2002) (describing predatory subprime lending terms).

176. *See* Eggert, *supra* note 173, at 1264–68 (explaining the nature and reach of mortgage-backed securities).

177. Engel & McCoy, *supra* note 175.

correct. At that point, law professors Elizabeth Warren and Oren Bar-Gill diagnosed the regulatory structural problem.[178] They explained that the main federal consumer regulator, the FTC, lacked the authority to intervene against many harmful business practices, partly because it lacked jurisdiction over banks.[179] Bank regulators, like the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation, had adequate consumer protection authority but lacked the motivation because they had other priorities, like keeping banks from collapsing to ensure bank profitability.[180]

As a result, Warren and Bar-Gill argued, no federal entity had the right combination of motivation and authority to regulate consumer financial markets. Those consumer financial protection shortcomings were also seen as contributing to the financial crisis. Congress responded to consumer law's marginalization in financial regulation by accepting Warren's proposal (later joined by Bar-Gill) to create a new agency, the CFPB, focused solely on consumer financial matters.[181] But the nation had already paid a heavy price for an administrative structure that subordinated consumer law. Moreover, it took a mortgage crisis and accompanying financial crisis that brought the nation's economy to the edge of a cliff for Congress to finally recognize the law's consumer finance blind spot.

The case of financial regulation illustrates how the regulatory state tends to overlook consumers absent a catalyzing event. In other heavily regulated industries, it took a string of fatalities for lawmakers to enact laws. For instance, after children died from tainted vaccines in 1902,[182] Congress authorized federal agents to "enter and inspect any establishment for the propagation and preparation of any virus, serum, toxin, [or] antitoxin."[183] That function ultimately went to the Food & Drug Administration (FDA), which today administers many other statutes

178. *See* Bar-Gill & Warren, *supra* note 22, at 6 (advocating for increased regulation of consumer credit products).

179. *Id.* at 97.

180. *Id.* at 86–90.

181. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1031–36, 124 Stat. 1376, 2005–11 (2010) (codified at 12 U.S.C. §§ 5531–36).

182. *See* 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, 601 (2009).

183. Biologics Control Act of 1902, Pub. L. No. 57-244, § 3, 32 Stat. 728, 729 (codified as amended at 42 U.S.C. § 262(c)).

prompted by twentieth-century pharmaceutical tragedies.[184] Another notorious example comes from Upton Sinclair's *The Jungle*, which exposed vermin-infested meat factories in 1906, prompting lawmakers to charge the Department of Agriculture with inspecting meat facilities.[185]

There are several potential concerns related to this regulatory approach to consumer law. As a practical matter, because this administrative design is panic-driven, it risks resulting in strong consumer laws only in areas and on issues in which the threats to consumers have sparked widespread outrage. Other than consumer finance, which was linked to an alarming financial crisis, most of these salient threats are physical because the human mind perceives physical threats more vividly.[186] This approach may overlook many other types of harm.

Indeed, even within physical harms, more subtle issues may go unaddressed even if backed by science. For instance, the ill effects of indoor air quality produced by gas stoves and other appliances have yet to prompt significant legislative action.[187] A more longstanding health threat ignored by U.S. regulators comes from potentially toxic ingredients in cosmetics.[188] By way of contrast, Europe, which gives consumer law greater priority, bans over 1,600 ingredients from cosmetics and regularly updates that list, compared to only eleven regulated ingredients in the United States.[189] The U.S. list, which has not been

184. *See generally* Jacobs, *supra* note 182 (recounting the history of food and drug laws).

185. Meat Inspection Act, Pub. L. No. 59-242, 34 Stat. 1256, 1260–65 (1907) (codified as amended at 21 U.S.C. §§ 601–95; *see* Roger Roots, *A Muckraker's Aftermath: The Jungle of Meat-Packing Regulation After a Century*, 27 WM. MITCHELL L. REV. 2413, 2417–19 (2001) (detailing public outcry to health violations).

186. *See e.g.*, Ioni Lewis, Barry Watson, & Richard Tay, *Examining the Effectiveness of Physical Threats in Road Safety Advertising: The Role of the Third-person Effect, Gender, and Age*, 10 TRANSP. RSCH. 48, 57–58 (2007) (finding that drivers were more likely to be persuaded by threat-based transportation safety advertisements).

187. *See supra* note 97 and accompanying text. This issue has been in fluctuation since the original writing and submission of this Article in March 2021.

188. Matta et al., *supra* note 95 (discussing proposed regulations and finding that six ingredients in tested sunscreens were absorbed at higher levels than assumed by government regulators).

189. Kaiser Health News, *California Law Banning Toxic Chemicals in Cosmetics Will Transform Industry*, U.S. NEWS & WORLD REP. (Nov. 23, 2020), https://www.usnews.com/news/best-states/articles/2020-11-23/california-law

meaningfully updated since 1938, ignores decades of medical research establishing formaldehyde and many other substances as carcinogenic.[190]

Another challenge created by this administrative landscape is that it obscures consumer law as a field. The FDA resides in the Department of Health and Human Services, which has a broader mandate that includes fighting pandemics and offering social services.[191] Extensive meat, poultry, and egg inspection services reside in an agency sitting within the Department of Agriculture, which has twenty-nine agencies and a variety of goals beyond consumer issues, such as "helping rural America to thrive."[192] These agencies and departments are not generally seen as engaging in consumer law. Nor is there a department focused on consumers.

The CFPB sought, in part, to change consumers' lack of visibility. Interestingly, when Warren took charge of building that agency, one of her decisions was to name the agency the "Consumer Financial Protection Bureau," putting the word consumer first so that it would be extra clear that the agency was prioritizing consumers. When President Trump later appointed Mick Mulvaney, an avowed opponent of the agency, as the CFPB's acting director, one of his first moves was to call for changing the name of the agency to how it was listed in the statute—the Bureau of Consumer Protection. Those renaming efforts failed and would have had a questionable impact in any case. But the case of the CFPB suggests that symbolism and concentration of authority may matter, underscoring a potential risk of the dispersed nature of consumer law in the federal government even after the creation of the CFPB. What this arrangement may say about the analysis of consumer law will be returned to after first considering the agency with probably the broadest consumer mandate, the FTC.

-banning-toxic-chemicals-in-cosmetics-will-transform-industry [https://perma.cc/AV8Y-QRRV].

190. *Id.*

191. *About HHS*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/index.html [https://perma.cc/SC6F-ZVFV].

192. *About the U.S. Department of Agriculture*, U.S. DEP'T OF AGRIC., https://www.usda.gov/our-agency/about-usda [https://perma.cc/TRT7-V4SU]. That agency is the Food Safety and Inspection Service (FSIS). *See* Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 383 (2019).

b. The FTC, Technology Companies, and Antitrust

For nonphysical harms, such as false advertising and privacy violations, the main consumer regulator is the FTC. The FTC is also the main regulator of the largest tech companies. Reliance on the FTC is problematic because it has insufficient authority and funding. The FTC was once more powerful, but in the 1970s and 1980s, industry waged a campaign against what it saw as the FTC's consumer protection excesses.[193] In a controversial move, the agency sought to regulate advertisements of sugary food products to children during cartoon commercials.[194] A scathing *Washington Post* editorial called the FTC the "national nanny," arguing that people did not need the federal government to tell them how to parent their children.[195]

In response to that criticism and industry lobbyist pressure, a deregulatory Congress curtailed the agency's rulemaking authority.[196] The same legislation also removed the FTC's ability to fine companies for consumer protection violations unless the FTC had previously executed a successful enforcement action against that company for the same issue.[197] In contrast, agencies like the EPA and OCC can issue fines and write rules with greater ease, which is crucial for keeping up with fast-moving markets.[198]

In addition to curbing the FTC's authority, Congress has weakened it through funding decisions.[199] The FTC's staff and

193. *See, e.g.*, Robert Reich, *Toward a New Consumer Protection*, 128 U. PA. L. REV. 1, 3 (1979) (summarizing increased industry lobbying efforts in the late 1970s).

194. *See* Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy*, 39 LOY. L.A. L. REV. 79, 79–80 (2006) (detailing the FTC proposals considered in 1978).

195. *The FTC as National Nanny*, WASH. POST (Mar. 1, 1978), https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b [https://perma.cc/5KLE-25WK].

196. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (codified as amended at 15 U.S.C. § 57(h)).

197. *See* 15 U.S.C. § 45(l) (enabling the FTC to bring civil penalties against a company after the company violates the FTC's cease and desist order).

198. *See* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 1580 (codified as amended in scattered sections and titles of 33 U.S.C.). Some may also believe that the FTC lacks authority to write rules related to antitrust. *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 368 (2020).

199. *See* Peter Swire, *Funding the FTC: Globalization and New Information Technologies Necessitate an Appropriations Boost*, CTR. FOR AM. PROGRESS

funding are less than what they were in the 1970s.[200] Since then, the U.S. population—and thus the number of consumers—has grown by over sixty percent, and the executive branch has expanded by roughly thirty-seven percent.[201] Over that period, technological changes have added entirely new industries to the FTC's jurisdiction. To illustrate, Amazon, Apple, Alphabet (Google), Microsoft, and Meta (Facebook) did not exist in 1974 but recently became five of the six most valuable U.S. companies.[202] Amazon alone has over 400 in-house lawyers, more than either the FTC's Bureau of Consumer Protection or the CFPB,[203] and the company regularly supplements its in-house counsel by hiring leading corporate law firms.[204] Thus, the FTC's funding

(Feb. 26, 2007), https://www.americanprogress.org/article/funding-the-ftc [https://perma.cc/BA7V-45WD] (summarizing the FTC's budget inadequacies).

200. *Id.*

201. *Historical Federal Workforce Tables: Executive Branch Civilian Employment Since 1940*, OFF. OF PERS. MGMT., https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940 [https://perma.cc/2TLM-Z7F6] (reporting 983,000 Executive Branch civilian employees in 1970); OFF. OF MGMT. & BUDGET, BUDGET OF THE U.S. GOV'T: HISTORICAL TABLES, tbl.17-1 (2021) (reporting 1,344,000 Executive Branch civilian employees in 2019); *Historical National Population Estimates, July 1, 1900 to July 1, 1999*, U.S. CENSUS BUREAU (2000), https://www2.census.gov/programs-surveys/popest/tables/1900-1980/national/totals/popclockest.txt [https://perma.cc/TV9M-YHTV] (listing estimated U.S. population in 1970 as 205,052,174); America Counts Staff, *Last Census Population Estimates of the Decade Preview 2020 Census Count*, U.S. CENSUS BUREAU (Apr. 6, 2020), https://www.census.gov/library/stories/2020/04/nations-population-growth-slowed-this-decade.html [https://perma.cc/CCG7-2RU9] (listing estimated U.S. population in 2019 as 328,239,523).

202. Kyle Daly, *Big Tech's Power, in 4 Numbers*, AXIOS (July 22, 2020), https://www.axios.com/big-techs-power-in-4-numbers-de8a5bc3-65b6-4064-a7cb-3466c68b2ea0.html [https://perma.cc/J75X-VZYK].

203. *See* FedScope, *Status Data: Employment Cubes,* OFF. OF PERS. MGMT. [hereinafter FedScope], https://www.fedscope.opm.gov/employment.asp (last visited Feb. 24, 2023) (click on "September 2022"; then "Agency–All" in the top bar; then "All Agencies"; then "Bureau of Consumer Financial Protection"; then, in the top bar, scroll to and select "Occupation"; then "White Collar"; then "Legal and Kindred"; and finally, "General Attorney") (putting the CFPB's lawyers at 342 as of September 2022); Jennifer Williams-Alvarez, *Inside Amazon's Legal Department with GC David Zapolsky*, ALM MEDIA NEWS (Aug. 2, 2017), https://www.law.com/corpcounsel/2017/08/02/inside-amazons-legal-department-with-gc-david-zapolsky/?slreturn=20230124110116 [https://perma.cc/QT3Z-N25V].

204. *See* Mike Scarcella, *Amazon Hires Gibson Dunn, MoFo Teams to Sue Pentagon Over $10B Cloud Contract*, ALM MEDIA NEWS (Nov. 23, 2019),

has diminished even as the industries it regulates have grown in resources and complexity.

The array of laws and issues under the FTC's authority has also grown over time. The agency enforces over seventy laws across diverse industries, including laws targeting fraud, deception, identity theft, privacy, and antitrust.[205] Recent examples include actions against a web design company for making millions of robocalls promising lucrative work-from-home opportunities;[206] a debt collection firm for extracting $12 million from consumers by fraudulently claiming legal action was imminent;[207] two health care providers for an anticompetitive merger that would have diminished acute care options in Philadelphia;[208] and a cannabis company for making unsupported claims that marijuana oils would treat cancer, Alzheimer's, and diabetes.[209] As mentioned above, the FTC has sought to add greenwashing to the list of issues it oversees.

This resource inadequacy may impede the FTC from acting even when the public cares about an issue and the FTC has the authority to regulate it. FTC attorneys admit that they must manage their caseload knowing that large companies have the resources to delay investigations and fight every minor legal issue.[210] As a result, the agency can only handle a few cases in any area. For instance, even for one of its highest priorities, protecting privacy, the agency only has sufficient personnel to manage two lawsuits at any moment.[211] The agency is simply spread too

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https://www.law.com/nationallawjournal/2019/11/23/amazon-hires-gibson-dunn-mofo-teams-to-sue-pentagon-over-10b-cloud-contract [https://perma.cc/XDE8-6YJ8].

205. *Enforcement*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement [https://perma.cc/DE3K-YFL5].

206. Complaint for Permanent Injunction and Other Equitable Relief at 2–3, Fed. Trade Comm'n v. Nat'l Web Design, LLC, No. 2:20-cv-00846 (C.D. Utah Nov. 30, 2020).

207. Order for Permanent Injunction and Other Equitable Relief at 5–8, Fed. Trade Comm'n v. Nat'l Landmark Logistics LLC, No. 0:20-cv-02592-JMC (D.S.C. July 13, 2020).

208. Complaint for Temporary Restraining Order and Preliminary Injunction at 2–6, Fed. Trade Comm'n v. Thomas Jefferson Univ., No. 20-cv-1113 (E.D. Pa. Feb. 27, 2020).

209. Complaint at 16, Reef Indus. Inc., No. C-4737 (F.T.C. Feb. 4, 2021).

210. *See* Alex Kantrowitz, *'It's Ridiculous.' Underfunded FTC and DOJ Can't Keep Fighting the Tech Giants Like This*, BIG TECH. (Sept. 17, 2020), https://bigtechnology.substack.com/p/its-ridiculous-underfunded-us-regulators [https://perma.cc/4CGZ-8TCZ] (citing former FTC director).

211. *See id.*

thin across so many industries and laws. The FTC's funding has remained low across both Democratic and Republican administrations, despite many observers identifying the inadequacy.[212]

The resources invested across administrative agencies provide further perspective on consumer law's status. The FTC has about 1,158 employees compared to the EPA's 15,132.[213] Similarly, even after the 2008 financial crisis elevated consumer financial protection, the four main banking regulators—whose primary job is to prevent bank failures—have about 27,130 people, or over sixteen times more than the CFPB's 1,617.[214]

An alternative way of conceptualizing the existing administrative structure is by examining the resource allocation for agencies engaging in a narrower efficiency analysis of consumer markets compared to those focused on externalities. The main agency focusing on such efficiency, the FTC, has under 500 people dedicated to consumer protection. The agencies focused on what are often externalities in those efficiency analyses, such as the EPA and prudential regulators, have tens of thousands of people. By devoting so many more resources to these externalities, Congress has arguably legislated in line with a public priority principle, which is discussed in greater depth below. It has done so, however, in a piecemeal manner and often without any clear signal or awareness that it is engaging with consumer law.

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This discussion of regulation has focused on direct consumer harms. Because legislatures are often unaware of direct consumer harms, it is unsurprising that they also overlook consumer law when solving important issues that are less clearly

212. *See* Swire, *supra* note 199 (criticizing level of the FTC funding); Kantrowitz, *supra* note 210 (quoting a former DOJ antitrust official as calling FTC's funding "ridiculous").

213. FedScope, *supra* note 203 (click on "September 2022"; then "Agency–All" in the top bar; then "All Agencies"; then "Large Independent Agencies"; then "Federal Trade Commission"; then, repeat the process for the EPA). Even if the Consumer Product Safety Commission's 558 employees are added, the primary federal consumer regulatory infrastructure for most of the economy is still small by comparison to other legal areas. *Id.* (data found under "All Agencies"; then "Consumer Product Safety Commission").

214. *See id.* (providing personnel figures for the OCC (3,472 employees), FDIC (5,812 employees), and NCUA (1,160 employees)); *102nd Annual Report*, FED. RSRV. 308 tbl.13 (2016), https://www.federalreserve.gov/publications/annual-report/files/2015-annual-report.pdf [https://perma.cc/YX6K-HB5M] (estimating 16,686 full-time employees for the Federal Reserve).

linked to consumers, like climate change, public health, inequality, and disinformation. For instance, congressional debates about social media disinformation have centered around free speech, Section 230 of the Communications Decency Act, and election implications, rather than consumer law tools, like mandatory disclosures.[215]

In short, Congress tends to ignore consumers unless public outcry forces action on an unmistakable consumer issue. That negligence means that consumer regulators, most importantly the FTC, have failed to keep up with industry. Consumer law's invisibility not only harms consumers but also deprives lawmakers of mechanisms to address some of the greatest threats to society.

3. Courts and the Common Law

The relationship between courts and consumers defies easy characterization due to the great number of state and federal judges and oscillations over time, but judges have at times and in important ways exercised their discretion to contribute to the marginalization of consumer law. The common law mostly did not distinguish between consumer transactions and transactions among merchants.[216] It largely viewed the consumer as needing no different treatment than a business, in part because the commercial landscape was dominated by small businesses rather than large corporations.[217] Consequently, in many transactions there was little difference between a business and an individual. The common law's "blindness to consumer concerns" established the early lens through which legal institutions viewed consumer

215. *See, e.g.*, JASON A. GALLO & CLARE Y. CHO, CONG. RSCH. SERV., R46662, SOCIAL MEDIA: MISINFORMATION AND CONTENT MODERATION ISSUES FOR CONGRESS 27–31 (2021) (listing legislation introduced in 2019 and 2020 related to misinformation).

216. Greve, *supra* note 20, at 157.

217. See *id.*; Christopher K. Odinet, *Modernizing Mortgage Law*, 100 N.C. L. REV. 89, 103 (2021) (showing how mortgage legal principles lacked a consumer approach because, for much of early English and American history, mortgage markets were commercially and agriculturally focused).

law.[218] That lens is perhaps best symbolized by the philosophy of caveat emptor, or let the buyer beware.[219]

The common law nonetheless provided early doctrinal roots for consumer law. The common law protections against unfair competition and fraud provide foundations for the modern statutory consumer protection framework.[220] They were not at the time consumer law because they equally served to protect businesses suing one another, for instance.[221]

To be clear, consumers have not always been invisible to courts. Most notably, during progressive periods of consumer law expansion, such as the 1960s, some judicial decisions advanced the consumer cause. By historian Anne Fleming's account, the judicial decision in *Williams v. Walker-Thomas* sparked legislation protecting consumers from installment arrangements.[222] During this period, courts also deferred to the FTC's more ambitious application of UDAP authority, which strengthened protections for consumers.[223]

In the ensuing deregulatory decades, however, courts were at least at times complicit in the weakening of consumer law. Most importantly, leading up to the mortgage and financial crisis of the 2000s, courts hesitated to apply common law doctrines of liquidated penalty damages, fraud, and unconscionability, even in the face of excess fees and predatory lending that led to

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218. *Cf.* Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 14 (1997) (concluding that the UCC "inherits the common law's blindness to consumer concerns, the very blindness which led directly to the law reform efforts of the consumer movement").

219. Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 8 YALE L.J. 1133, 1135, 1163 (1931) (reviewing the history of the caveat emptor doctrine, "[t]he refusal of public authority, through legislature and judiciary, to accord effective protection to the purchaser," and stating that "[s]urely a *caveat emptor* may emerge from the folk-thought of the despised trades and stand without shame before judges as an ancient maxim of the common law").

220. *See, e.g.*, PORTER, *supra* note 4, at xx.

221. *See id.*; *see also* Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 453–55 (2021) (detailing how common law ideas, such as "unfair competition," gave rise to pro-consumer reforms like the creation of the FTC).

222. *See* Anne Fleming, *The Rise and Fall of Unconscionability as the Law of the Poor*, 102 GEO. L.J. 1383, 1389 (2014).

223. *See* Herrine, *supra* note 221, at 460–61 n.150 (detailing how courts became more deferential to FTC determinations of unfairness); *id.* at 509–10 (outlining the FTC's efforts to defend and preserve its unfairness determinations).

millions of evictions.[224] Some courts were also often reluctant to uphold punitive statutory damages even in the face of discriminatory lending practices.[225] In the years after the financial crisis, however, courts applied unconscionability doctrine more aggressively to protect consumers even from high interest rates.[226]

It is more difficult to summarize the current state of consumer law in the court system than in Congress or the administrative state. Thus, this Section's discussion of courts should not be taken as empirically establishing the state of judicial decisions, but rather as identifying signs consistent with at least some context-specific court obstacles to consumer interests. Courts have in recent years sided with businesses against consumers and consumer agencies in a number of meaningful cases. In a 2019 unanimous opinion and a 2017 divided opinion, both authored by Justice Breyer, the Supreme Court ruled against individual debtors subjected to questionable debt collection practices.[227] In 2020, a divided Court held that the CFPB's structure was unconstitutional because it had a single director removable only for cause, even though other agencies had a similar leadership structure.[228] And in a unanimous 2021 decision, the Court significantly constrained the FTC's ability to obtain equitable monetary relief on behalf of consumers.[229] These cases may reflect issues that go beyond consumers, but since some of them are unanimous or joined by liberal justices, they should not be reflexively attributed to the Court's latest shift toward a conservative majority.

Consumer agencies and litigants have also faced challenges beyond the Supreme Court. In 2022, the Fifth Circuit found that the CFPB's funding was unconstitutional because it receives its funding from the Federal Reserve rather than Congressional

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224. *See* Bar-Gill & Warren, *supra* note 22, at 71–72; Engel & McCoy, *supra* note 175, at 1317.

225. *See* Engel & McCoy, *supra* note 175, at 1317.

226. *See* Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 979 (2019) (discussing modern application of the unconscionability doctrine).

227. Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029 (2019) (delivering a unanimous decision); Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1415–16 (2017) (authored by Justice Breyer).

228. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2202 (2020) (acknowledging the similarities between the structure of the CFPB and the Federal Housing Finance Agency (FHFA)).

229. AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341 (2021).

appropriations.[230] A leading study of state court claims found that "mass filings of low-value claims are going uninspected, creating bad incentives for plaintiffs and resulting in the underenforcement of substantive and procedural protections for the consumers who find themselves defendants in these suits."[231]

The broad role of courts in consumer law's development merits greater and more systematic attention than space constraints allow here. One hypothesis worth testing is that courts have merely followed the ebb and flow of consumer law's broader regulatory and deregulatory cycles. Another possibility is that courts have overall tended to side with businesses over consumers, which would not be surprising given the challenges facing less well-resourced participants in the court system.[232] At a minimum, courts have at times limited the extent to which laws and administrative agencies can advance consumers' interests. Thus, each branch of government has at times contributed to the marginalization of consumer law.

B. LEGAL EDUCATION

Law schools also show signs of institutionally overlooking consumer law. Before turning to that discussion, it is worth explaining why this matters. Law schools shape the worldview of future lawyers by exposing them to career possibilities and encouraging scholarly pursuits at an impressionable point in their lives.[233] In Congress, about a third of Representatives and half of Senators have law degrees.[234] Almost sixty percent of U.S. presidents, including Presidents Biden, Clinton, and Obama, were lawyers.[235] Attorneys general and plaintiff-side lawyers

230. *See* Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau, 51 F.4th 616, 638 (5th Cir. 2022) (reasoning that the CFPB's funding structure was unique because it gets its funding from the Federal Reserve).

231. Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1758 (2022).

232. *See, e.g.*, *generally*, *e.g.*, *id.* (summarizing the literature).

233. *See, e.g.*, John C. Coates IV, Jesse M. Fried & Kathryn E. Spier, *What Courses Should Law Students Take? Lessons from Harvard's BigLaw Survey*, 64 J. LEGAL EDUC. 443, 444 (2015) (arguing that the function of course offerings is "inculcating a broad perspective on law and legal institutions" to inform graduates' career decisions).

234. JENNIFER E. MANNING, CONG. RSCH. SERV., R46705, MEMBERSHIP OF THE 117TH CONGRESS: A PROFILE 5 (2022).

235. *See Presidents of the United States by Occupation*, POTUS, https://www.potus.com/presidential-facts/occupations [https://perma.cc/5CK4-ELXC] (stating that twenty-seven of forty-six U.S. presidents were lawyers).

also have a large amount of discretion in deciding which cases to bring.[236] Thus, law schools have the potential to influence the extent to which future lawmakers, leaders, advocates, and researchers consider consumer law.[237]

Consumer law was largely absent from law schools in their early days, reflecting the common law's lack of differentiation between businesses and consumers.[238] That began to shift in the 1960s. In 1962, President John F. Kennedy introduced a Consumer Bill of Rights, which declared that consumers had the rights to be safe, informed, and heard.[239] Although the bill never passed, it reflected and generated growing attention to consumer matters.[240] A series of notable federal laws and cases, including in the Supreme Court, contributed further to the field's prominence.[241] By the 1970s, consumer law had become a hot subject in law schools.[242]

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236. *See* Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2004 (2001) (recounting "[t]he trend toward increased cooperation among state attorneys general . . . with the promulgation by the National Association of Attorneys General (NAAG) of a series of antitrust and consumer protection enforcement guidelines" that "encourage[ed] attorneys general to follow uniform standards in the exercise of their prosecutorial discretion").

237. Many students look to professors for guidance on research topics, and many professors chose their field of research because they were exposed to a topic in law school. *See, e.g.*, *How to Grow a Law Professor*, HARV. L. BULL. (Nov. 24, 2014), https://today.law.harvard.edu/feature/how-to-grow-a-law-professor [https://perma.cc/8T4Q-MESC] (providing examples of influences on law professors).

238. Chamallas, *supra* note 14, at 10–11 (describing the emergence of consumer protection law in law school classrooms).

239. John F. Kennedy, President of the United States, Special Message to Congress on Protecting Consumer Interest (Mar. 15, 1962), https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/037/JFKPOF-037-028 [https://perma.cc/2HFX-HQB5].

240. *See* Chamallas, *supra* note 14.

241. *See, e.g.*, Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 77–72 (1976) (finding "[t]he First Amendment . . . does not prohibit [a] State from insuring that the stream of commercial information flow cleanly as well as freely"); Fuentes v. Shevin, 407 U.S. 67, 90–92 (1972) (holding "extraordinary situations" that justify postponing due process rights after seizures include protecting consumers from "misbranded drugs" and "contaminated foods"); Williams v. Walker-Thomas Furniture, 350 F.2d 445, 448–49 (D.C. Cir. 1965) (holding unconscionability renders a contract unenforceable because consumers with "little bargaining power, and hence little real choice," do not manifest consent).

242. *See* Chamallas, *supra* note 14 (explaining how, in the 1970s, "the

But consumer law's academic rise proved short-lived. A deregulatory period emerged in the late 1970s and 1980s, symbolized by President Ronald Regan's pledge to "get the government off our backs" and lasted through the late 2000s.[243] That ethos is in tension with interest in consumer law given the field's focus on regulating markets. The 1980s also witnessed prominent criticism of government recipients of aid, raising the possibility that consumer law's association with "less dominant social groups" contributed further to the field's decline.[244] Finally, to the extent that earlier heightened interest in consumer law was motivated by the social justice movement of the 1960s, those interests did not fit as naturally with the legal academy's growing emphasis on efficiency as the primary determinant of market regulation.[245] Although it is difficult to know exactly what drove the change, consumer law courses and research fell out of favor for decades.[246]

The second renaissance of consumer law in legal academia occurred following the 2008 financial crisis. That crisis provided a very public repudiation of excess deregulation and reignited interest in consumer law because the crisis was preceded by collapses in mortgage and housing markets.[247] The number of law schools offering a consumer law clinic or general course increased substantially in the ensuing years.[248] Despite those

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consumer had direct billing in the law school curriculum and the course in Consumer Protection Law was considered one of the new, relevant courses to take").

243. Gregory Bradshaw Foote, Note, *Judicial Review of Rescission of Rules: A "Passive Restraint" on Deregulation*, 53 GEO. WASH. L. REV. 252, 252 (1984).

244. Chamallas, *supra* note 14, at 10.

245. Chamallas, *supra* note 14, at 19. For an early survey of this economic analysis, see Ernest Gellhorn & Glen O. Robinson, *The Role of Economic Analysis in Legal Education*, 33 J. LEGAL EDUC. 247, 254–68 (1983).

246. Chamallas, *supra* note 14, at 10.

247. Kara Scannell & Sudeep Reddy, *Greenspan Admits Errors to Hostile House Panel*, WALL ST. J. (Oct. 24, 2008), https://www.wsj.com/articles/SB122476545437862295 [https://perma.cc/5QRZ-53Z2].

248. *See* Jeff Sovern, *The Content of Consumer Law Classes III*, 22 J. CONSUMER & COM. L. 2, 2 (2018) (reporting that two-thirds of law schools did not offer a consumer law course in 2014); Neil Sobol, *Neil Sobol's Survey of Law Schools Offering Consumer Law Courses*, PUB. CITIZEN: CONSUMER L. & POL'Y BLOG (Aug. 6, 2020), https://pubcit.typepad.com/clpblog/2020/08/neil-sobols-survey-of-law-schools-offering-consumer-law-courses.html [https://perma.cc/FLT2-AA43] (finding forty-eight percent of law schools offered a consumer law course).

gains, by 2020, more than half of all law schools were still without a "consumer-specific class."[249]

Moreover, to inform students about career paths and which classes to choose, law schools typically list areas of study or practice areas, such as criminal law, health law, and international and comparative law.[250] It is standard for schools to list either a corporate or business law area.[251] Yet those lists regularly omit consumer law, either as its own area or within the textual description of business law.[252] For students still building their understanding of the legal system and the career opportunities that are available to them, that omission of consumer law as a field can be formative.[253]

In contrast, leading business schools put consumers at the heart of their *required* curriculum for M.B.A. degrees.[254] That business school emphasis reflects how consumer spending accounts for roughly two-thirds of economic activity, and thus a substantial portion of business revenues.[255] Law schools' curricular de-prioritization of consumer law is not inevitable.

Law schools' lack of awareness about consumer law as a field can also be seen in faculty priorities. Law schools are certainly not against hiring consumer law scholars, as they

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249. *Id.*

250. *See, e.g.*, Minn. L, *Subject Areas*, UNIV. OF MINN., https://law.umn.edu/academics/course-guide/subject-areas [https://perma.cc/TK84-VVGS] (listing twenty-two areas of study).

251. *See, e.g.*, *Areas of Study*, COLUM. L. SCH., https://www.law.columbia.edu/areas-study [https://perma.cc/6W9G-FZ2B] (describing corporate and business law as including other areas "such as bankruptcy, capital markets, contracts, fintech, mergers and acquisitions, real estate, securities regulation, taxes, and white-collar crime").

252. Indeed, even a rare school with an endowed chair in consumer law does not necessarily list consumer law in its offerings. *Programs & Impact*, UNIV. OF MD. FRANCIS KING CAREY SCH. OF L., https://www.law.umaryland.edu/Programs-and-Impact [https://perma.cc/EAD4-S7PG] (listing ten programs in its course catalog without listing consumer law).

253. *See* John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of "Public Interest Drift" in Law School*, 51 U.C. DAVIS L. REV. 1973, 2032 (2018) (providing empirical evidence that the information provided by law schools to students has a strong influence on career choices).

254. *See, e.g.*, *Required Curriculum*, HARV. BUS. SCH., https://www.hbs.edu/mba/academic-experience/curriculum/Pages/required-curriculum.aspx [https://perma.cc/WC72-NUNF] (requiring a core course in marketing focused on customers, and mentioning a final field project in which students meet with consumers).

255. *See Households and NPISHs*, *supra* note 2.

sometimes fill gaps in contracts, financial regulation, bankruptcy, or commercial law by hiring scholars who research consumer matters—even if only inadvertently.[256] However, most financial regulation, bankruptcy, and commercial law courses focus on transactions among businesses, not consumers.[257] Law schools rarely set out to hire for consumer law, unlike in environmental, labor, and many other areas. In the past five years, law schools have advertised for the hiring of ninety-two business or corporate professor positions at the entry level.[258] During that period, only one school advertised itself as looking to fill a consumer law position.[259]

Those hiring priorities may reflect perceived teaching needs rather than research priorities. Nonetheless, law schools' job postings may send an implicit message that consumer law research is less likely than core business topics to land a scholar a teaching job. Particularly at the entry level, that message could influence some early scholars' choice of research areas, given the highly competitive nature of law professor jobs.[260] Law

256. For example, in the most recent year of hiring, of the eighty-eight national hires, two listed consumer law as an area of study, along with contracts. *See* Alexander Tsesis, *Spring Reported Entry Level Hiring Report 2020*, PRAWFSBLAWG (May 15, 2020), https://prawfsblawg.blogs.com/prawfsblawg/2020/05/spring-reported-entry-level-hiring-report-2020-1.html [https://perma.cc/Z4WC-YMEN].

257. Adam J. Levitin, *The Law of the Middle Class: Consumer Finance in the Law School Curriculum*, 31 LOY. CONSUMER L. REV. 393, 396 (2019).

258. The listings were counted for the last five years at PrawfsBlawg, where law schools post their hiring committee information. *See, e.g.*, Sarah Lawsky, *Hiring Committees 2019–2020*, PRAWFSBLAWG (July 16, 2019), https://prawfsblawg.blogs.com/prawfsblawg/2019/07/hiring-committees-2019-2020.html [https://perma.cc/RPH8-JY8N]. Consumer law scholars would generally not fit into these business and corporate positions. *See supra* note 252 and accompanying text (showing the omission of consumers in law schools' descriptions of business areas).

259. That school was Wake Forest in 2019, which listed consumer law as one of thirteen areas of interest. Lawsky,*supra* note 258. Although this is the main location for sharing hiring information, not all schools share such information publicly, or may do so in other places. Thus, the more important point is a relative one of how consumer law compares to other areas.

260. *See* Sarah Lawsky, *Spring Reported Entry Level Hiring Report 2020*, PRAWFSBLAWG (May 15, 2020), https://prawfsblawg.blogs.com/prawfsblawg/2019/06/spring-self-reported-entry-level-hiring-report-2019.html [https://perma.cc/Z4WC-YMEN] (reporting law schools hired only twenty-four percent of first-time applicants for teaching positions in 2019 and providing typical backgrounds for successful candidates as having PhDs, clerkships, and fellowships).

professors' research focus also influences what research assistants do and what the emphasis is in a variety of courses.

The absence of consumer law from faculty priorities reflects awareness in scholarship. To provide a few examples, as of 2022, the annual conference for law and economics listed fifteen subject areas and about thirty-five sub-topics for submission of research papers, including environmental law, employment law, and health law, without listing consumers.[261] The only law journals that list subject matter areas to choose from, the *Yale Law Journal* and *Harvard Law Review*, do not mention consumer law as an option.

It is worth considering the extent to which student demand influences course offerings. In theory, law schools may not offer consumer law courses or seek to hire consumer law professors because students either are uninterested or perceive a lack of job opportunities in consumer law. It is difficult to know which way the causality runs—whether the lack of courses reflects inherent demand or results from the school's choices in curriculum, communications, and hiring.

As a threshold observation, the amount of consumer litigation is extremely high. Consumer lawsuits are the most common type of civil case at the federal level, especially debt collection.[262] Moreover, since many corporations are consumer-facing, many lawyers working in-house or for large law firms will touch on consumer law issues. Consumer finance alone offers various enforcement, defense counsel, and a growing number of compliance job opportunities.[263] If applicability to careers is the determinant of courses offered, it is not clear why consumer law should be absent from so many law schools of varying tiers.[264]

Law schools' intellectual framing of consumer law may influence student awareness. Law schools tend to intellectually frame the law in a way that implies two main paths. Students can study "market" courses, like antitrust, corporate law, and

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261. *See Call for Papers, August, 2022,* AM. L. & ECON. ASS'N, https://www.amlecon.org/files/Call_for_Papers_and_Instructions_ALEA_2022.pdf [https://perma.cc/VJ8U-PZSJ]. As program co-chair for the 2023 meeting, the author initiated the addition of consumer law to the list as a separate category.

262. *See* Wilf-Townsend, *supra* note 231, at 1708–09 (2022) (discussing findings that showed financial services companies and debt-collectors are the top-filers of law suits "across the country").

263. *See* Levitin, *supra* note 257, at 402–03 (focusing on consumer finance).

264. For data on how the availability of consumer law courses does not vary significantly across tiers of law schools, see Sovern, *supra* note 248, at 3.

contracts, that emphasize economics.[265] Or they can study public law courses, like constitutional law, immigration law, and critical race theory, that emphasize rights but largely exclude efficiency goals.[266] Consumer law is not traditionally studied in those public law courses or recommended to students interested in public service.[267]

By process of elimination, and based on intellectual taxonomy and common practice, consumer law fits into the market courses, in which consumers largely reside "on the margins."[268] However, when law schools put together advice for students on what courses are relevant for big law positions, consumer topics are also absent.[269] Thus, law schools' framings of legal paths too often render consumer law an orphan field.

Furthermore, law schools' tendencies to cast legal careers as a binary choice between lower-paying public interest careers and higher-paying corporate law careers implicitly communicates a message that students must decide between public service and financial security.[270] Most students enter law school with public service aspirations, but that changes dramatically.[271] In one survey, seventy percent of first-year students said they preferred public-interest careers, while only two percent had such plans by their third year.[272] Financial incentives and the information

265. *See* Britton-Purdy et al., *supra* note 23, at 1790.

266. *See, e.g.*, *id.* (arguing that constitutional law is "delimited to exclude economic power and other structural forms of inequality"). *But see Columbia Areas of Study, supra* note 251 (including Financial Regulation with Constitutional Law, Regulation, and Public Policy).

267. *See, e.g.*, PORTER, *supra* note 4, at 10–13 (situating consumer law in the law school curriculum).

268. *See* Levitin, *supra* note 257.

269. *See* Coates et al., *supra* note 233, at 445–49 (listing courses that big law firm attorneys indicated would be most helpful).

270. *Cf.* Catherine Albiston, Scott L. Cummings & Richard L. Abel, *Making Public Interest Lawyers in a Time of Crisis: An Evidence-Based Approach*, 34 GEO. J. LEGAL ETHICS 223, 267 (2021) (discussing the ways that law schools divide public and private paths).

271. *See* Howard S. Erlanger, Charles R. Epp, Mia Cahill & Kathleen M. Haines, Research Note, *Law Student Idealism and Job Choice: Some New Data on an Old Question*, 30 LAW & SOC'Y REV. 851, 853–55 (1996) (finding that although many students entered law school interested in public service careers, few went into such jobs upon graduation); ROBERT GRANFIELD, MAKING ELITE LAWYERS 48 (1992) (comparing survey results from first-year students with results from third-year students).

272. GRANFIELD, *supra* note 271.

students are exposed to in law school significantly influence the shift away from public service.[273]

Those career dynamics suggest that consumer law has the potential to be far more attractive in law schools than it currently is. Consumer law offers an opportunity for both a high salary and public service. For instance, the average attorney salary at the CFPB is about $147,767, or 56% above the national average for attorneys.[274] Additionally, many plaintiff-side firms pay their associates competitive private sector salaries while bringing lawsuits against companies responsible for breaking consumer laws.[275] Those consumer law jobs demonstrate the false dichotomy of framing career choices as between salary and service. Any limited demand for consumer law courses must be viewed through the legal academy's influence on the framing of choices.

As a final example to illustrate these dynamics, UC Berkeley School of Law in recent years has invested in consumer law by launching a Center for Consumer Law & Economic Justice,[276] starting a vibrant nationwide network of consumer law student groups at schools ranging from Duke to the University of Utah,[277] and hiring its first- and second-ever entry-level tenure-

273. *See* Bliss, *supra* note 253 (reporting findings of a qualitative study of over 150 students).

274. *Attorney Yearly Salaries in the United States at Consumer Financial Protection Bureau*, INDEED, https://www.indeed.com/cmp/Consumer-Financial-Protection-Bureau/salaries/Attorney [https://perma.cc/N9RX-K4W7]; *Attorney Salary in United States*, INDEED, https://www.indeed.com/career/attorney/salaries [https://perma.cc/GSS6-2JDJ] (putting the average at $94,492).

275. *See, e.g.*, *Consumer Protection*, LIEFF CABRASER HEIMANN & BERNSTEIN, https://www.lieffcabraser.com/consumer [https://perma.cc/W6EN-66G5] ("[W]e protect our clients' interests and help them achieve their goals by winning highly-complex consumer protection lawsuits against those that have defrauded consumers."); *Salary Details for an Associate Attorney at Lieff Cabraser Heimann & Bernstein*, GLASSDOOR, https://www.glassdoor.com/Salary/Lieff-Cabraser-Heimann-and-Bernstein-Associate-Attorney-Salaries-E30211_D_KO37,55.htm [https://perma.cc/9FSL-AFYG] (putting average associate attorney salaries at $163,390).

276. *See* BERKELEY CTR. FOR CONSUMER L. & ECON. JUST., https://consumerlaw.berkeley.edu [https://perma.cc/NC34-BS5S].

277. *See CLASS Chapters*, BERKELEY CTR. FOR CONSUMER L. & ECON. JUST., https://consumerlaw.berkeley.edu/projects-and-programs/consumer-law-advocates-scholars-students-class-network/about/chapters [https://perma.cc/GX86-NCFF] (listing chapters of the Consumer Law Advocates, Scholars, & Students Network).

track research faculty in consumer law.[278] It also launched an annual U.S. conference on consumer legal scholarship in 2019, aligning consumer law with other fields, like environmental law, that have had such meetings for decades.[279] It had eighty-three submissions in 2023, a strong number.[280] More broadly, Berkeley Law's institutional investment in consumer law illustrates how the academic marginalization of consumer law may reflect awareness, intuition, or inertia rather than demand.

In sum, course offerings, subject matter listings, and hiring priorities mean that law schools are less likely to plant consumer law seeds. Indeed, at many law schools, generations of students may have had no exposure to consumer law simply because their professors' interests resided elsewhere. At a minimum, a lack of exposure means that many students will miss the opportunity to explore potentially fulfilling legal careers. On a systemic level, lower awareness among law graduates may mean that fewer lawyers will research, enforce, and propose consumer laws as they move on to positions of legal authority. Thus, there is evidence that consumer law is institutionally marginalized in law schools and in government.

III. HOLISTIC CONSUMER LAW

This Article has so far shown that consumer law is both important and overlooked. Consumer law has the potential to play a meaningful role in addressing some of the world's most pressing challenges. Yet the field too often remains an afterthought outside of crises that directly implicate consumer law.

In moving from the descriptive to the normative, this Part first considers institutional reforms to legislatures, administrative agencies, and law schools. It then turns to the challenge of

278. *See The 2-Year Report*, BERKELEY CTR. FOR CONSUMER L. & ECON. JUST., https://consumerlaw.berkeley.edu/news/2-year-report [https://perma.cc/LHA2-RMGS].

279. *See Consumer Law Scholars Conference 2021*, BERKELEY CTR. FOR CONSUMER L. & ECON. JUST., https://consumerlaw.berkeley.edu/projects-and-programs/conferences-and-convenings/consumer-law-scholars-conference/consumer-law-1 [https://perma.cc/X8PD-LSC9] (describing the new consumer law scholars conference). A more longstanding biennial conference focuses on teaching consumer law. *See* Richard Alderman, *Teaching Consumer Law Conference*, PUB. CITIZEN: CONSUMER L. & POL'Y BLOG (Oct. 21, 2019), https://pubcit.typepad.com/clpblog/2019/10/teaching-consumer-law-conference.html [https://perma.cc/2QRR-DL2Q].

280. The author has been one of the co-organizers since its first year. *See Consumer Law Scholars Conference*, *supra* note 279.

beginning to map an expanded conceptualization of consumer law.

A. INSTITUTIONAL PROPOSALS

Consumers are another important axis of society, alongside workers and businesses. The institutional marginalization of consumer law raises the question of what structural reforms might better reflect consumers' centrality to society. Scholars have already called for greater attention to consumer law in curricular matters especially,[281] and ideally law schools would give greater prominence to consumer law in their career communications and research community as well.[282] The remaining discussion will focus on the more challenging and less well-explored institutional design question in government.

The House and Senate should each consider creating a consumer-focused committee. Lawmakers could also augment consumer law's contributions to society by authorizing more resources for consumer regulators, especially the FTC. And the creation of a Department of Consumer Affairs would organizationally situate consumers in the executive branch more similarly to businesses and workers, given the roles of the Department of Commerce and Department of Labor. For instance, some departments have an office devoted to proposing legislation advancing the department's mission. Such an office of consumer legislation would provide a potential vehicle for more holistic consumer lawmaking.

These institutional reforms would not be without risks and tradeoffs. To provide a brief sketch of some of the key issues, a new congressional committee or executive department would inevitably overlap in part with existing governmental entities. That raises the question of which of those existing responsibilities should be transferred into the new consumer home, left in their current location, or shared between the new and the old entity.

One approach is how lawmakers handled the creation of the CFPB. In that case, the FTC and prudential regulators retained many areas of consumer financial protection enforcement

281. *See, e.g.*, Levitin, *supra* note 257, at 408–10 (arguing that consumer finance courses would influence scholarship and set students up for career searches).

282. Indeed, if the problem is simply that students misperceive the opportunities presented by consumer law, it would seem the duty of a professional school to correct that misperception.

authority overlapping with that of the CFPB.[283] Indeed, overlapping authority is widespread in the administrative state, meaning that there are already foundations for understanding and addressing this issue, such as by expecting deference to the CFPB's position on consumer finance.[284] Scholarship on this issue observes that there are efficiency gains and other advantages from well-coordinated agencies with overlapping authority.[285] Thus, the design of institutional overlap must be considered closely but should not deter the creation of new consumer governmental structures.

A related institutional concern is that it could prove impractical or counterproductive to group such a diffuse set of laws and issues into one field. But other broad, interdisciplinary legal fields—such as constitutional law, environmental law, labor law, and corporate law—have stronger identities.[286] The path toward consumer law visibility is different and perhaps more challenging than for a field like environmental law.[287] Nonetheless, the analogy is potentially instructive. After giving insufficient attention to the environment for decades, we are now paying a heavy price. We have also too often overlooked consumers, and as a result may be paying a high price in our environment, equality, health, and democracy.

At a minimum, the consumer law analysis would sometimes benefit from taking an analytic lens that synthesizes institutions

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283. Joseph L. Barloon, Darren M. Welch & Neepa K. Mehta, *"Leveling the Playing Field": Implications of CFPB Authority over Non-Depository Financial Institutions*, ANTITRUST, Spring 2013, at 71, 75 (explaining that the FTC generally retains enforcement authority over consumer protection statutes).

284. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1133 (2012) (discussing shared regulatory space generally); Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 329–31 (2013) (discussing shared regulatory space specifically in consumer finance).

285. *See* Freeman & Rossi, *supra* note 284, at 1181–91 (arguing that agency coordination increases efficiency, effectiveness, and accountability); *cf.* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 203 (2006) ("[O]verlapping and underlapping jurisdictional assignment can produce desirable incentives for administrative agencies . . . .").

286. *See* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1605 (2018) (discussing well-established fields' dispersed identities).

287. But see Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 140–41 (2019), for a discussion of the underappreciated interdisciplinary nature of environmental law.

seen as operating in different fields. For example, if scholars and policymakers respond to tech companies in legal silos, such as separate antitrust and consumer protection enforcement actions, solutions will be incomplete. A broken-up Meta—separating Facebook from Instagram and WhatsApp—would still require considerable legal attention to privacy,[288] dispute resolution,[289] and content moderation.[290]

A final challenge is that consumer law suffers from a well-recognized difficulty in defining boundaries.[291] Part of the confusion is that consumer laws play a significant role in many fields that have independent identities, such as food law, financial regulation, and privacy.[292] That raises the question of whether it is counterproductive to group so many subjects together into one institution.

This Article's core thesis does not depend on any particular definition of consumer law. Even in a narrow and clear consumer law context, such as determining how to prevent deception by banks, it would still be ideal to weigh the full set of societal implications—such as for inequality and financial stability. Moreover, many other fields group diverse subjects together while maintaining a stronger identity than consumer law. For example, corporate law has many subfields, including mergers and acquisitions, corporate governance, and (often, but not always) securities regulation.[293] As another example, constitutional law

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288. See generally Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 YALE L.J.F. 647 (2021), for an overview of the interactions between antitrust law and privacy law.

289. *See generally* Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. 829 (2021) (discussing a framework for content moderation and Facebook's current efforts).

290. See generally Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353 (2018), for an in-depth discussion of online content moderation.

291. The field has "poorly defined boundaries, both in law school curricula and in legal practice." PORTER, *supra* note 4, at 1.

292. For instance, the FTC's Bureau of Consumer Protection is the primary enforcer of information privacy laws against companies. *See, e.g.*, Solove & Hartzog, *supra* note 37 (discussing how the FTC's Bureau of Consumer Protection creates privacy law in the absence of statutes on point). However, privacy asserted against the government falls outside of consumer law.

293. Some see securities regulation as part of corporate law, while others see them as distinct fields. See, for example, James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. REV. 116, 119–20 (2017), for a discussion on the evolving relationship between securities

scholars may focus on either structure or rights, and then further subdivide into areas ranging from free speech to gun rights.[294]

Thus, greater institutional prominence for consumer law ultimately advances this Article's conceptual aim of encouraging a broader understanding of consumer law as overlapping with, and essential for, many fields that have independent identities. That conceptual expansion reflects a growing scholarly awareness of the law's interdisciplinary nature. It does not undermine a field to show its breadth and overlap with clearly distinct fields. For instance, Sarah Light's declaration that "[t]he law of the corporation is environmental law" did not mean that environmental law and corporate law must abandon their individual identities.[295] Rather, that observation showed how corporate law could play an important role in advancing environmental law goals.[296] Accordingly, disagreement about definitions and boundaries should not obstruct recognition that a substantial expansion of consumer law's field of vision could bring substantial societal benefits. That expanded paradigm would better position advocates, scholars, and legislatures to tackle the twenty-first century's biggest challenges.

The institutional and the conceptual are intertwined. For instance, a reform such as elevating consumer affairs to the department level would have symbolic value. It could also help to underscore resource allocation decisions. For instance, a Department of Consumer Affairs that combined the FTC, the CFPB, and the Consumer Product Safety Commission would still only have about 3,300 people, compared to the Department of Labor's over 16,000 and the 50,000 in the Department of Commerce.[297]

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regulation and corporate law. Park describes the "movement to unify corporate and securities law," and argues that "securities law protects the investor while he is a trader, and corporate law protects the investor while he is an owner." *Id.*

294. *See* McKinley, *supra* note 286 (describing the separation of structural and rights scholars).

295. Light, *supra* note 287. Light argues "that the law governing the corporation throughout its life cycle—corporate law, securities regulation, antitrust law, and bankruptcy law—should be understood as a fundamental part of environmental law." *Id.* at 140.

296. *Id.* at 140–42.

297. See *Federal Agencies List*, OFF. OF PERS. MGMT., https://www.opm.gov/about-us/open-government/Data/Apps/Agencies/index.aspx (last visited Feb. 24, 2023), for a breakdown of agency personnel. For estimates on the number of employees in the FTC, the CFPB, and the consumer Product Safety Commission, see sources cited *supra* notes 203, 213–13, and accompanying text.

Complicated coordination challenges, and the tradeoffs between dispersed and concentrated consumer law administrative authority, are not necessarily reasons in favor of the status quo. The current institutional design involves risks and costs, such as the lack of a comprehensive consumer law analysis integrating externalities and consumer law's narrow version of an efficiency analysis. The current consumer law framework also has numerous coordination issues beyond consumer finance, since the FTC shares authority with many other agencies, including the Federal Aviation Administration.[298]

Thus, the status quo and its downsides must also be defended in assessing these proposed institutional reforms. Complicating the matter is that it is not possible to know the full tradeoffs in advance for or against the status quo. There are only imperfect options understood imperfectly.

The Department of Commerce provides potentially helpful perspectives on some of these tradeoffs involved in thinking about concentrated rather than dispersed authority. Businesses, like consumers, are scattered across industries. Businesses currently have their interests represented in numerous industry-specific agencies. For instance, as discussed above, the prudential regulators license banks and have traditionally been more focused on promoting the safety and soundness of those banks than they were on consumer protection.[299] Yet despite the presence of many industry-specific functions that promote business interests, there is still a Department of Commerce to serve as the concentrated voice of businesses in government. In assessing the possibility of a Department of Consumer Affairs, it would be helpful to consider why businesses and workers are in need of departments devoted to them while no department currently serves as the voice of consumers in government.

B. PUBLIC PRIORITY PRINCIPLE

To move consumer law beyond its image as the private law of "small problems,"[300] the field's breadth of implications must

298. *See, e.g.*, Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REGUL. 547, 585 (2016) (discussing FAA regulations on airline dispute resolution).

299. *See supra* notes 15, 172, and accompanying text.

300. What constitutes public law rather than private law is subject to debate, but consumer law is considered "private law" at least in the sense that it is concerned with the relations among private parties. *See generally* Thomas W.

become clearer. The difficulty in recognizing these implications stems from the lens through which many scholars and lawmakers examine consumer law.

Consider again the two main problems posed by a narrow analysis of consumer law. The first—overlooking macro considerations—means that mainstream law and economics research is unlikely to address the economic threats that most occupy lawmakers' attention.[301] The second main problem—that the narrow lens ignores non-economic problems—too often leaves issues like climate change, public health, racial equality, and disinformation omitted from consumer law market analyses.[302]

In theory, a microeconomic analysis can accommodate these types of considerations, and scholars writing about law and economics are increasingly turning their attention to inequality, environmental sustainability, and governance issues.[303] However, even when such externalities are discussed in this literature, the economic model tends not to analyze such externalities in any comprehensive manner, at least not the kinds of major externalities discussed in Part I. If externalities are not ignored or assumed away, the focus is typically on narrower market dynamics, such as whether ESG funds provide a competitive return on investment or whether the company's pricing practices might promote misperception. Those are important contributions and

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Merrill, *Private and Public Law*, in *The Oxford Handbook of the New Private Law* 143, 144, 158 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2020) (discussing the various ways to distinguish private and public law, including whether the law is concerned with public matters rather than relations among private parties). Given the difficulty in classifications, the dichotomy of public and private law is of questionable use, but it is nonetheless commonly deployed. *See generally id.* The point here is that consumer law has significant public law components. The point is not that consumer law is only public law. It is both private law and public law, depending on what criteria one uses to make the classification. See PORTER, *supra* note 4, for a depiction of consumer law as about "small problems."

301. *See supra* Part II.B.

302. Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1511–12 (2018). Economics still accommodates regulation for such purposes, most notably as externalities.

303. *See* BAR-GILL, *supra* note 131 (discussing consumer law and distribution); Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 48–56 (2020) (exploring ESG and corporate law); Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 395 (2021) (focusing on ESG investment returns); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 389 (2020) (analyzing the legality of ESG investing).

perhaps necessary first steps, but that research does not speak to, for example, how much ESG matters for climate change or how much consumer law might help with distribution.

Economists in other fields have produced sustained analyses of the magnitudes of large-scale externalities, such as climate change and the distribution of wealth, but they tend to focus on macroeconomics rather than the kinds of microeconomic issues that legal scholars use to design market laws.[304] Again, these disparate intellectual efforts are providing valuable building blocks for a comprehensive analysis, and scholars have called for bridging the gap between corporate law ESG.[305] But the law and economics literature mostly avoids the questions surrounding whether and how to integrate the micro and the macro, and usually leaves it unclear why policymakers working on large-scale social issues should care about consumer law.

Similar divisions can also be found institutionally. In the federal government, the economic analysis of consumer markets resides largely in the FTC and CFPB. Yet those agencies are not tasked with considering issues such as climate change, public health, income inequality, and disinformation. When those externalities are addressed in other agencies or fields of law, they are not generally seen as consumer law, and the accompanying analyses often do not involve microeconomic efficiency.[306]

That institutional division of labor weakens consumer law not only analytically, but also politically. Payoffs matter in motivating people. A narrow monetary efficiency analysis that ignores externalities is not as compelling as what more public-oriented legal fields offer—such as fighting inequality, saving lives, and preserving the environment. In other words, an excessively narrow application of economics has branded consumer law with an inaccurate intellectual purpose that fails to inspire.[307]

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304. For instance, one of the most influential economists in environmental law teaches and wrote a textbook on macroeconomics. *See William Nordhaus*, YALE UNIV., https://economics.yale.edu/people/william-nordhaus [https://perma.cc/K39D-YCKD] (listing courses taught as macroeconomics and environmental economics). The leading voices studying economic inequality also focus on macroeconomics. *See, e.g.*, *Emmanuel Saez*, UNIV. OF CAL. BERKELEY, https://eml.berkeley.edu/~saez [https://perma.cc/ML7C-J8EA] (teaching a course on macro business cycles).

305. As one of many examples, Sarah Light has argued that the law of the corporation should be seen as environmental law. *See* Light, *supra* note 287.

306. *See supra* Part II.B.

307. To be clear, consumer advocacy groups have sought to emphasize justice

This Article proposes framing the consumer law analysis as animated by a public priority principle. The emphasis on the public helps to underscore how there are bigger stakes than what most people think of when they hear consumer protection. Consumer law does not just protect individuals. It also advances society's broader interests.

For decades, many have criticized the law's excessively narrow efficiency emphasis.[308] In some ways a public priority principle is more of a meta-contribution to those debates, offering something for both sides. It is more responsive to integrating a broader set of considerations into the economic analysis than has often been the case.

In some ways, however, a public priority principle returns to efficiency's original purpose, and seeks updates to the process for achieving that original purpose. In 1897, seeking to explain the law's emphasis on efficiency despite efficiency causing some individual harms, Oliver Wendell Holmes observed that "the public good is supposed to be best subserved by free competition."[309] The animating question in some sense has long been what is in the public good, yet that emphasis is often lost. Recognizing that efficiency was always animated by a larger public goal is important because law and economics is the leading intellectual paradigm for analyzing market regulation.[310] In Congress, lawmakers on both sides still view competition and

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and fairness arguments for consumer law. *See, e.g.*, *About Us*, NAT'L CONSUMER L. CTR., https://www.nclc.org/about-us/about-us.html [https://perma.cc/748H-ZJS2] (centering the mission statement around economic justice and fairness).

308. *See, e.g.*, Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283, 1330 (2014) (calling for the government to regulate banks in a way that makes them deal fairly with consumers, even if it makes them forgo maximum profitability); *see also* Herrine, *supra* note 221, at 433 (criticizing the law and economics influence on unfairness authority); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 444–45 (1981) (criticizing the field of economics for choosing efficiency over equity). Space constraints, unfortunately, do not allow for a full summary or engagement with these debates.

309. See Holmes, *supra* note 23, at 466–67, for an early explanation of why the law prioritizes efficiency and emphasizes rational, economically efficient outcomes. This idea has long been criticized. *See* Kennedy, *supra* note 308.

310. *See, e.g.*, Britton-Purdy et al., *supra* note 23 (describing and challenging the dominance of efficiency in law schools and scholarship).

efficiency as the guideposts for regulating markets,[311] on issues ranging from housing laws to payday loans.[312]

A public priority principle also has descriptive power throughout consumer law's history. For instance, K-Sue Park has argued that the development of mortgage law in England was "in the service of English economic expansion."[313] As another example, Claire Priest found evidence suggesting that the Debt Recovery Act had important expansionary economic effects.[314] Large-scale federal investments in inspecting meat products, airplanes, nuclear power plants, pharmaceutical manufacturers, and many other businesses over the past century arguably reflect a prioritization of public interests over the private autonomy of business owners.[315] The law and economics case for consumer law to emphasize efficiency is so that markets maximize total value, thereby creating more for tax law to redistribute.[316] That is ultimately a public goal achieved by focusing on private transactions. Moreover, as a practical matter, many public servants working on consumer matters, such as at the FTC, are surely driven to advance consumer protection at least in part by impulses that go beyond the field's standard economic analysis. To some extent, a public priority principle therefore synthesizes the values that already drive consumer law.

A public priority principle also has prescriptive implications. By uniting the implicit goals of consumer law, it would encourage greater integration of the current intellectual and institutional divisions of labor. That reframing is relevant to both ideal design and practical implementation. Ideally, researchers

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311. Representative Katie Porter, Keynote Address at the Consumer Law Scholars Conference (Mar. 4, 2021) (notes on file with author).

312. *See id.*; Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 855 (2007) (describing the array of payday lending regulation); Light, *supra* note 287, at 201–06 (contrasting the role of efficiency in climate change compared to corporate law).

313. K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 LAW & SOC. INQUIRY 1006, 1012 (2016).

314. Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 436 (2006).

315. *Cf.*, *e.g.*, Van Loo, *supra* note 192, at 395–96 (summarizing the growth of administrative agency monitoring across industries); Christopher Robertson, *When Truth Cannot Be Presumed: The Regulation of Drug Promotion Under an Expanding First Amendment*, 94 B.U. L. REV. 545, 545 (2014)572 (discussing the Food, Drug, and Cosmetic Act as a response to collective action problems).

316. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 10 (2d ed. 1977); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).

and policymakers would recognize consumer laws as a potentially important part of designing an optimal toolkit for addressing vast social, environmental, health, economic, and political issues. Ironically, there is reason to think that the blindness to consumer law has led to inefficient policies. A foundational critique of the law and economics division of labor is that it can lead to the adoption of inefficient policies if applied blindly.[317] Taxes harm efficiency.[318] Thus, allowing markets to cause considerable distributional harms and then relying on taxes to correct the distributional problems would still create inefficiency.[319] The alternative of not letting markets cause distributional harms in the first place could, in some instances, be a more efficient option if the regulations improved efficiency—or were less inefficient than taxes.[320] That critique is even more powerful in the context of consumer law, since effective consumer law designs can increase efficiency, while addressing some portion of distributional goals that might otherwise need to be handled through efficiency-reducing taxes.[321]

As a practical matter, a public priority principle means that consumer law decision makers also should intervene as a second-best option in light of institutional shortcomings in other areas. Thus, in some ways, this public-private conception of consumer law builds on the recent proliferation of scholarship showing the shortcomings in many law and economics assumptions, both from inside and outside of law and economics.[322] That literature

317. *See, e.g.*, Ronen Avraham, David Fortus & Kyle Logue, *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125, 1130 (2004) (critiquing tax-and-transfer system for redistribution on grounds that individuals have heterogeneous preferences); Zachary Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478, 2488–90 (2014) (asserting that redistribution through equity-informed legal rules can be more efficient than redistribution through the tax code).

318. *See* Liscow, *supra* note 317, at 2480–85.

319. This point is inherent in the acknowledgement by Kaplow and Shavell that taxation involves a single distortion, rather than the double distortion involved in regulation. *See* Kaplow & Shavell, *supra* note 27, at 668–69.

320. *See* Liscow, *supra* note 317.

321. *See supra* Part I.C.

322. *See, e.g.*, Britton-Purdy et al., *supra* note 23, at 1818–23 (providing an overview and broader discussion about dominance of efficiency in legal thought); Merrill, *supra* note 300. There is a more longstanding debate about the merits of prioritizing justice, morality, or some other goal, over efficiency. *See, e.g.,* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 24 (1970) (arguing that justice should have a veto right over efficiency).

has argued that one main drawback of a division of labor is that it assumes areas of law outside of market regulation, especially tax law, will compensate for the collateral damage of efficient markets, such as extreme wealth inequality. However, the expected tax redistribution, or other compensatory laws, often do not materialize due to political gridlock.[323]

Although those arguments do not focus on consumer law, they help to show why consumer law should not ignore society's biggest threats. If the institutional division of legal authority assumes that Congress will make up for markets' environmental, health, and distributional harms outside of consumer law, but Congress fails to do so, then the current institutional design reflects a fundamentally flawed assumption. Consequently, when reality falls short and other policy avenues fail to advance the public's interests, consumer law should have the flexibility to fill the gap created by dysfunctional politics, even if other areas of law might be preferable to use in a perfect world.

In short, because consumer law can offer more efficient ways to address some externalities and can in other contexts make up for political shortcomings, the field should incorporate a broader set of considerations, including the environment, health, democracy, and distribution. By focusing consumer law on the bigger picture, a public priority principle can direct consumer law to intervene when efficiency or other interests dictate that it is the best way to advance societal goals, regardless of whether those goals are within the traditionally narrow purview of consumer protection.

The task of implementing a public priority principle into institutional decisions and scholarly analysis will require considerable work, and this Article only begins to sketch that broader project. How a public priority principle might concretely change the analysis would depend on the context. A threshold question is how to balance efficiency with other rationales for consumer law action. As a first step, it is helpful to recognize that the most attractive interventions will be those that bring both greater efficiency and broader societal benefits. Many interventions would qualify. For instance, mandating that electronics and car manufacturers disclose the lifetime energy costs of a product would improve efficiency and reduce negative impacts to the environment.[324] Similarly, informing consumers about the harmful

323. *See* Fennell & McAdams, *supra* note 31.

324. *See generally* BAR-GILL, *supra* note 131, at 8–10 (explaining how companies make consumers pay more to increase profits).

effects of their choice of cosmetics or food improves both markets and public health.[325] Laws that enable consumers to better compare products, such as mandated unit prices on store shelves, make markets more competitive while potentially progressively redistributing over a trillion dollars.[326] And informing people about social media disinformation promotes efficiency by allowing more informed decisions.[327]

In these contexts that already have efficiency foundations for intervention, how does a public priority principle help? At a minimum, it would add extra motivation to study, practice, and legislate. Motivation matters because Congress, agencies, law schools, and public interest law firms make decisions in the face of limited resources. Public-minded actors would be more likely to devote resources, including time and money, to consumer law if they realize its full societal importance. Attorneys general and plaintiff-side law firms might bring more consumer lawsuits if they recognize that consumer law is vital to many other public goals with stronger support.[328] The FTC and CFPB could better allocate existing resources toward rules and enforcement actions that have additional non-consumer payoffs, such as greenwashing claims.

A public priority principle could also better help Congress decide how to allocate resources. In a world in which the FTC's role in addressing climate change and public health is not recognized, granting funding allocations and rulemaking authority to that agency is a lower priority. By seeing the full public stakes for such investments, lawmakers could empower the FTC to ensure that consumers have the information necessary to avoid, say, environmentally harmful products, thereby potentially unleashing two-thirds of GDP in service of combatting climate change. Legislative gridlock at the federal level makes such reforms unlikely anytime soon, but as discussed in greater depth below, history suggests that openings will arrive at some point.

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325. Informed consumers means not only that they understand the full price of the product, but its quality—which would include health effects. *See id.*

326. *See Retail Pricing Laws*, *supra* note 36; Van Loo, *supra* note 11, at 216–17.

327. An alternative view is that social media algorithms spread viral disinformation precisely because they have mastered the art of feeding people exactly what information they want—perhaps the quintessential goal of markets. *Cf.* Hao, *supra* note 154 (analyzing the disinformation business model).

328. *See supra* Part II.A.2.

The more difficult questions surround how to handle contexts in which at least a narrow efficiency analysis of consumer law sits in tension with other goals, or at least fails to provide a clear, standalone reason for intervention. Under such circumstances, the public priority principle would suggest not dismissing consumer law immediately. Instead, the analysis should assess what is in society's overall best interests. If the externalities are sufficiently important and not being addressed elsewhere, consumer agencies should still have leeway to intervene, ideally after receiving input from agencies that are focused on those externalities. For instance, the public priority principle could justify using consumer law authority to push platforms to offer disinformation labels even if the main policy payoff is preventing pandemic deaths or reversing the decline of democracy. And the FTC or attorneys general should be able to use consumer law to push cosmetics companies to provide warning labels about cancer-causing chemicals if the FDA's failure to act reflects political gridlock rather than the updated science. Although the public priority principle ultimately requires examining proportionality, it would for practical purposes allow consumer law decision makers to give greater weight to externalities in designing and administering laws.

To illustrate, consider again the Israeli law that required stores to make information available in machine-readable form, thereby lowering prices by around four percent.[329] That law may have been either efficient or inefficient because it both imposed transaction costs on stores to provide the information to third parties, while also helping efficiency by improving the flow of market information. Assuming the net efficiency analysis suggested the law was slightly inefficient, that would suggest not implementing the law. However, under a public priority principle, the distributional benefits could be considered. If the inefficiency of the Israeli law were less than the inefficiency of tax redistribution that would be needed to make up for the small inefficiency of the law, the law would still be allowed. Despite being inefficient through a narrow lens, it would improve overall efficiency given the need to redistribute and the alternative of more inefficient taxes. An independent consideration that the relevant consumer agency could consider in implementing such a law is addressing externalities that were not being handled elsewhere due to political gridlock, such as saving pollution that

329. *See* Ater & Rigbi, *supra* note 109, at 5.

would have otherwise been generated from driving to different stores because price comparison could instead be done online.

Finally, in some instances, a public priority principle would inform consumer law enforcers' selection of cases by showing a greater societal payoff for pursuing some kinds of cases rather than others. For some cases, a public priority principle might raise the magnitude of the remedy deemed appropriate, because the total societal costs of the harms would be more apparent. Outside of consumer law, a public priority principle might encourage agencies in other areas, such as in environmental law, to pay greater attention to consumer law mechanisms.

For such comparisons to happen, consumer laws must be considered alongside alternatives such as tax, public health, and environmental law. A public priority principle pushes policymakers toward such comparisons.

C. THE CHALLENGES OF A PUBLIC PRIORITY PRINCIPLE

Although not all challenges can be covered, two are worth considering briefly: whether a public priority principle (1) is different from the status quo and (2) can be practically implemented. As an initial matter, there is a question of whether a public priority principle is any different from a paradigm driven by the broad definition of efficiency as maximizing value.[330] By this line of reasoning, value or welfare encompasses all public interests, so a public priority principle is simply a broad efficiency priority principle.[331] Relatedly, most of the applications explored for consumer law in Part I could be classified as externalities.

Whether the public priority principle amounts to an expanded conception of efficiency as public, or instead as its own concept, is in many ways an academic distinction. However, as a matter of practice and scholarship, efficiency in consumer law is not approached in the broad manner outlined herein. Instead, efficiency is applied in a narrow manner that limits what legal

330. *See* POSNER, *supra* note 316; Coase, *supra* note 316.

331. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 4 (2002) ("The welfare economic conception of individuals' well-being is a comprehensive one [that] recognizes not only individuals' levels of material comfort, but also their degree of aesthetic fulfillment, their feelings for others, and anything else that they might value, however intangible.").

intervention is acceptable.[332] Moreover, describing the environment, health, disinformation, and other broad interests as about efficiency is at least in tension with how efficiency is viewed in consumer law analyses. Further complicating the matter, the value of preventing social media disinformation from eroding elections cannot, in any accurate manner, be quantified in economic terms.

Ultimately, this critique—and a broad view of efficiency—only validates the public priority principle. The implications of this critique would be that the goal of the consumer law analysis is incorrectly described as an economic matter, and thus similar intellectual and policy recommendations would flow as those proposed in this Article—a recognition that consumer law has significant public stakes and should be approached accordingly. Recognizing that an expanded vision of efficiency as a public priority principle should increase the likelihood of the proposed paradigm shift happening, or at least strengthen the argument for such a shift. Regardless of how it is described, legal institutions should reflect both the public and private identities of consumer law, rather than adhering to the view of consumer law as about the relations among private parties.[333]

Another concern in embracing a public priority principle is that it would greatly complicate the consumer law analysis, potentially to the point of unhelpfulness. It would mean bringing in many additional considerations. Moreover, those considerations are difficult or in some cases impossible to quantify in any

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332. *See, e.g.*, Britton-Purdy et al., *supra* note 23, at 1818–23 (summarizing the limiting effects of efficiency analyses on the law); John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 763–64 (1986) (describing how the Supreme Court, in Bates v. State Bar, 433 U.S. 350 (1977), struck down Arizona's ban on attorney advertising because of inefficiency argument—cost of consumer deception was outweighed by consumer loss of full ban on attorney advertising); *cf.* Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS. 3, 3 (2018) (emphasizing efficiency in analyzing housing supply).

333. Although this conjures the classification of areas of law as either public law or private law, that is not the point here. That classification can go either way with consumer law, depending on which criteria are used to determine public or private, and what is emphasized in analyzing those criteria. If one uses the criterion of who the parties are in the relationship, consumer law is more private law. If one uses the criterion of whether the harm is of a public or private nature, the classification becomes more difficult to make, because even advancing efficiency has a public purpose in terms of maximizing societal wealth. But more to the point of this Article, consumer law implicates a number of harms that are generally seen as more public in nature. *See supra* note 300.

rigorous manner. It is not clear, for instance, how to fully quantify the lives saved by better health or a cleaner environment. A related concern is that once the door is opened to consider public interests, decision makers face the difficult and arguably subjective task of deciding how to choose among those interests. In contrast, a narrower efficiency analysis that ignores externalities avoids the risk of introducing highly subjective value judgments about which public interest to prioritize.

There is no easy solution to this problem, and it is true that a more holistic analysis of consumer law's goals is difficult to execute. As a threshold observation, however, it is not clear why simplicity should be prioritized over accuracy and comprehensiveness, especially when the societal stakes are so high. But even if it were acknowledged that simplicity is an important criterion in selecting an analytic framework, adopting a narrow version of efficiency in consumer law does not necessarily avoid this challenge. The various interests implicated by consumer law are already pursued in the same legal system, they are simply advanced in a piecemeal manner. In other words, the complexity and impracticability of the current dispersed approach to consumer market regulation is simply hidden, or ignored, because the various actors involved operate in silos. Their analyses are still merging in the same marketplace, even if in an uncoordinated manner.

More importantly, if the consumer law efficiency analysis ignores externalities, then it is incomplete, and rests on a value judgment that unaddressed externalities are less important than the set of consumer interests prioritized. Such an efficiency analysis would face the same challenge as a public priority principle: How does it justify its decision to ignore externalities? And how does it justify the use of less efficient policy tools when consumer law could achieve some of the same goals more efficiently?

Nor should it be overlooked that the definition of efficiency itself is messy. There is considerable disagreement about how to implement efficiency analyses, and what value should be maximized.[334] Legal scholars and economists already have developed various tools, such as complex-systems theory, to deal with the challenge of connecting various sub-systems within an economic analysis.[335] Thus, while there are certainly clarity benefits to

334. See Kennedy, *supra* note 308, for an early summary of some of these debates.

335. *See, e.g.*, Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1100 (2021) (developing the concept of equity as meta-law).

having a narrow focus compared to a broader public priority principle, the degree of that added clarity must not be exaggerated by failing to see that efficiency is vulnerable to related critiques. If a comprehensive economic analysis considers all externalities, as the broader economic analysis of efficiency is supposed to do, it will face similar challenges of an extremely complex analysis that must choose among competing values. The analytic framework must be useful, but also should not be chosen based on an illusion of objectivity and completeness, or by sacrificing important societal interests.

CONCLUSION

Despite its potentially substantial contributions to society's biggest problems, consumer law has traditionally remained buried in big-picture policy conversations. That state of affairs has its roots in the common law, which failed to distinguish between consumers and businesses. Legal scholarship and institutions have further contributed to the obfuscation of consumers, perpetuating the field's disregard in careers, research, and lawmaking.

A recognition of the field's diverse societal implications is an important first step toward larger shifts. Institutionally, consumer law would benefit from greater prominence, including in congressional committees and an administrative agency whose resources and authority reflect the field's importance—perhaps even an executive department. Intellectually, consumer law needs a new paradigm that embraces what has too often been the overarching but obscured goal of consumer law: promoting the public interest.

A public priority principle would serve not to bury law and economics, but to reinvigorate it. In theory, efficiency is a broad enough concept to embrace public interest as the ultimate goal, and arguably was always intended that way. But a heavily microeconomic emphasis on a narrow version of efficiency has helped push consumer law into silos and obscurity.

One of the principal benefits of a public priority principle would thus be to contribute to a more holistic frame for consumer law. Analytically and institutionally integrating the various interests implicated in consumer law would no doubt be challenging. At a minimum, there are benefits in conceptually recognizing consumer law's many dimensions—the environment, the economy, distribution, health, democracy, and beyond. Outside of the law, consumers are already seen as central to business and

the economy. It is time that they also feature prominently at the center of the legal architecture.