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Broadening Consumer Law: Competition, Protection, and Distribution

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BROADENING CONSUMER LAW: COMPETITION, PROTECTION, AND DISTRIBUTION

Rory Van Loo*

Policymakers and scholars have in distributional conversations traditionally ignored consumer laws, defined as the set of consumer protection, antitrust, and entry-barrier laws that govern consumer transactions. Consumer law is overlooked partly because tax law is cast as the most efficient way to redistribute. Another obstacle is that consumer law research speaks to microeconomic and siloed contexts—deceptive fees by Wells Fargo or a proposed merger between Comcast and Time Warner Cable. Even removing millions of dollars of deceptive credit card fees across the nation seems trivial compared to the trillion-dollar growth in income inequality that has sparked concern in recent decades. This Article synthesizes the fragmented empirical literature to offer a broader conception of consumer law’s place in governance. The data indicate that consumer market failures raise prices to consumers by well over a trillion dollars annually, aided by sophisticated algorithmic pricing; that this overcharge worsens economic inequality; and that consumer law, despite prominent critiques of its shortcomings, can reduce overcharge when designed well. The preliminary state of the evidence underscores the need for regulatory monitoring of markets to calibrate consumer law’s potential as a tax alternative. Redistribution is one of the government’s most basic functions, and efficiency one of the law’s guiding principles. There are strong normative foundations for making macroeconomic distribution an explicit goal of consumer law.

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INTRODUCTION

Leaders of both major U.S. political parties and multinational CEOs are looking for solutions to economic inequality.¹ Concern stems not only from an egalitarian impulse, and the imperative of reducing poverty, but from the belief that growing inequality is a threat to societal stability.² Leading proposals seek redistribution through tax law,³ in accordance with the “dominant position in tax law and policy” that redistribution should occur through

1 See, e.g., Heather Long, *Even the 1% Are Worried About Inequality*, WASH. POST, Jan. 23, 2018, at A12; Damian Paletta, *Economic Mobility Is New Flashpoint—Both Parties Agree the Opportunity Gap Is Widening, but the Proposed Solutions Are Starkly Different*, WALL ST. J., Jan. 8, 2014, at A4.

2 See, e.g., WORLD ECON. FORUM, GLOBAL RISKS REPORT 4, 6 (12th ed. 2017), http://www3.weforum.org/docs/GRR17_Report_web.pdf (surveying roughly 750 World Economic Forum stakeholders and reporting “rising income and wealth disparity” as the leading trend driving risks (emphasis omitted)); Alberto Alesina & Roberto Perotti, *Income Distribution, Political Instability, and Investment*, 40 EUR. ECON. REV. 1203, 1204 (1996) (finding that income inequality likely leads to sociopolitical instability); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 669 (2014) (arguing that economic inequality subverts democracy). The causal relationships between inequality and instability are complex and understanding is still in development.

3 See, e.g., THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 471 (Arthur Goldhammer trans., Harv. Univ. Press 2014) (2013) (“[T]he ideal policy for avoiding an endless egalitarian spiral and regaining control over the dynamics of accumulation would be a progressive global tax on capital.”); Thomas B. Edsall, *The Republican Discovery of the Poor*, N.Y. TIMES (Feb. 11, 2015), <https://www.nytimes.com/2015/02/11/opinion/thomas-b-edsall-the-republican-discovery-of-the-poor.html> (discussing Republican proposals to address inequality through tax reform).

taxes because—though taxes still cause inefficiency—taxes are seen as less inefficient than most legal rules.⁴

This Article explores another path to large-scale redistribution that—unlike increasing taxes—does not require legislation and readily improves efficiency: consumer law.⁵ In particular, many consumer protection and antitrust laws reduce the prices that people pay by removing overcharge.⁶ In an informal but intuitive sense, overcharge is the difference between actual prices and prices that would exist absent some act identified as anticompetitive—such as a monopolistic merger or deceptive sales practice.⁷ For instance, consumer protection laws have recently stopped Amazon and Facebook from charging children up to thousands of dollars in fees for in-app purchases while playing video games, and made it more difficult for banks to steer borrowers toward high-priced loans.⁸ Although the field often focuses on goals other than lowering prices, many consumer laws nonetheless lower overcharge in diverse ways, including by addressing monopoly power, preventing deception, and removing entry barriers that get in the way of full competition.

At first glance, consumer law seems an unlikely solution to be left out of distributional conversations. Scholars broadly recognize that consumer law

4 See Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667–68 (1994) (putting forth the theory that legal rules should seek to efficiently regulate, leaving distributional goals to the tax system); Chris William Sanchirico, *Tax Eclecticism*, 64 TAX L. REV. 149, 224 (2011) (calling the double-distortion approach the “dominant position in tax law and policy”). Despite this dominance, legal scholars have proposed other routes to addressing inequality. See, e.g., Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616 (2019).

5 Scholars have begun to link consumer-protection-related overcharge to inequality in a subset of markets. See, e.g., OREN BAR-GILL, *SEDUCTION BY CONTRACT* 26 (2012) (discussing distorted pricing in mortgages, cellphones, and credit cards and stating that in some cases there will be a “regressive distributional effect.”); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 64 (2008) (synthesizing the research on consumer finance); Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1311–12 (2015) (summarizing consumer finance research and concluding that a lack of consumer protection regulation regressively redistributes resources). These discussions have yet to do what antitrust scholars have—make the case that consumer protection by itself could dramatically reduce inequality.

6 Other consumer laws that influence the prices paid include government licensing, which restricts who may participate in an industry. See *infra* Section I.C.

7 Perfectly competitive prices are at marginal cost, just high enough to motivate firms to produce the equilibrium quantity and give firm owners a competitive return on investment.

8 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code) (imposing restrictions on mortgages); *FTC v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 WL10654030, at *8 (W.D. Wash. July 22, 2016); *I.B. ex rel. Fife v. Facebook, Inc.*, 905 F. Supp. 2d 989, 996 (N.D. Cal. 2012) (charging in a class action that in-app purchases by minors on Facebook, which sometimes reached in the thousands of dollars, violated consumer protection laws).

can reduce inequality by reducing both the prices that lower income consumers pay and the profits that wealthier business owners receive.⁹ Consumer law has also in recent years captured the public spotlight, between Wells Fargo opening millions of fake accounts in customers' names, and a renaissance in antitrust driven by the dominant position of technology firms such as Amazon, Facebook, and Google.¹⁰ Moreover, the economic significance of consumer markets is undeniable. Consumers spend about \$14 trillion annually on everything from laundry detergent at Walmart, to internet services from Comcast, to a new Honda Civic from the local auto dealer.¹¹ Since consumer spending makes up two-thirds of GDP, consumer law may be the single most significant area of economic regulation.¹²

Nonetheless, consumer law risks being underestimated as a tool for distribution in three main ways. First, policy makers and scholars possess limited awareness of how much consumers overpay—and thus whether the total is large enough to matter for inequality. Those who quantify consumer-protection-related overcharge tend to study single instances of a particular company charging many of its customers a small amount, such as Verizon deceptively inserting fees of about \$10 into the monthly bills for unauthorized ring tones.¹³ In contrast with the microeconomic lens of consumer law, macroeconomic tax tools dominate federal policymaking on distributional issues. Widespread alarm about inequality stems from data suggesting that the top one percent of households now earn about twenty percent of all

9 See, e.g., Oren Bar-Gill & Rebecca Stone, *Pricing Misperceptions: Explaining Pricing Structure in the Cell Phone Service Market*, 9 J. EMPIRICAL LEGAL STUD. 430, 453–54 (2012) (observing that strategically higher cellphone prices exploiting consumer psychology constitute a potentially troubling form of regressive redistribution); Einer Elhauge, Essay, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1267 (2016) (agreeing with the large number of economists who have concluded that anticompetitive pricing contributes to economic inequality); Clark C. Havighurst & Barak D. Richman, *The Provider Monopoly Problem in Health Care*, 89 OR. L. REV. 847, 848 (2011) (“Monopoly in health care markets . . . has redistributive effects that are especially burdensome for consumers.”).

10 Michael Corkery, *Wells Fargo Fined for Setting Up Sham Accounts*, N.Y. TIMES, Sept. 9, 2016, at B1; see also Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 294 (2019).

11 See Table 2.3.5. *Personal Consumption Expenditures by Major Type of Product*, BUREAU ECON. ANALYSIS, <https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey> (open “Section 2–Personal Income and Outlays” menu; then follow hyperlink to Table 2.3.5) (last updated Sept. 26, 2019) [hereinafter *Table 2.3.5*] (estimating annualized total consumer spending at \$13.9 trillion in 2018).

12 See *Household Final Consumption Expenditure, etc. (% of GDP)*, INDEX MUNDI, <https://www.indexmundi.com/facts/indicators/NE.CON.PETC.ZS> (last visited Sept. 28, 2019) (showing that Americans' household consumption spending exceeded 68% of GDP in 2016).

13 See, e.g., *Moore v. Verizon Commc'ns Inc.*, No. C 09-1823, 2010 WL 3619877, at *4 (N.D. Cal. Sept. 10, 2010) (holding plaintiffs pleaded sufficient facts based on allegations that Verizon billed and collected “millions of dollars of unauthorized charges”); *Stipulated Final Judgment and Order at 11–12*, *Consumer Fin. Prot. Bureau v. Cellco P'ship*, No. 3:15-cv-03268 (D.N.J. June 9, 2015) (requiring that Verizon pay \$70 million in refunds to overcharged customers).

income, a figure that has increased dramatically since 1980 by an amount that gives them between one and two trillion dollars more annually than they would earn if the numbers had held constant.¹⁴ It is not immediately clear to policymakers and scholars looking for ways to move over a trillion dollars around how a few dollars of overcharge per gasoline purchase, or even a few billion dollars rolled up in a given market, is worthy of attention. The observation that “[l]aw and economics should be called law and microeconomics” is particularly apt for consumer law.¹⁵

A second major challenge for understanding the importance of consumer law to inequality is uncertainty and ambiguity about the distributional impact of overcharge. Legal scholars generally agree that “market power accrue[s] primarily to shareholders and the top executives, who are wealthier on average than the median consumer.”¹⁶ However, consumer law’s emphasis is on the micro-level harms to consumers, rather than the macro-level implications of those harms. Moreover, even for those who would recognize a relationship between inequality and consumer law, there is an open question about the magnitude of consumer law’s impact on inequality. After all, middle-income households also have ownership stakes in large companies, most notably through their retirement accounts.¹⁷ In other words, even if consumer law could reduce overcharge significantly, would it reduce the amount of inequality significantly?

A final challenge remains even for those recognizing the magnitude and inequality implications of overcharge: the widespread belief that taxes are a better option. The preference for taxes is largely about efficiency,¹⁸ but even once that intellectual barrier is overcome there remains another, less well understood internal obstacle. High-profile scholarship has cast doubt on the effectiveness of consumer market regulations. The most prevalent policy tool, mandated disclosure, leads to “unintended consequences that often

14 See Thomas Piketty et al., *Distributional National Accounts: Methods and Estimates for The United States* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 22945, 2016), <https://www.nber.org/papers/w22945.pdf> (giving the rising income share of the top one percent); *Table 2.1. Personal Income and Its Disposition*, BUREAU ECON. ANALYSIS, <https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey> (open “Section 2-Personal Income and Outlays” menu; then follow hyperlink to Table 2.1) (last updated Sept. 26, 2019) [hereinafter *Table 2.1.5*] (reporting national income figures).

15 See Yair Listokin, *Law and Macroeconomics*, OXFORD BUS. L. BLOG (Feb. 10, 2017), <https://www.law.ox.ac.uk/business-law-blog/blog/2017/02/law-and-macroeconomics>.

16 Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 11–12 (2015). *But see* Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1171, 1183 (2016) (challenging arguments for more antitrust enforcement to address inequality). Nobel-prize-winning economist Joseph Stiglitz has argued that corporate rents, along with corporate governance, access to healthcare, the tax structure, and other areas, contribute to economic inequality. See JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* 92, 97 (2012).

17 See, e.g., Crane, *supra* note 16, at 1187.

18 See *supra* note 4 and accompanying text.

harm the very people it intends to serve.”¹⁹ Another approach, changing the default fees imposed on consumers unless they approve, has proven ineffectual because businesses can convince people to opt in to harmful practices—making what were supposed to be sticky beneficial defaults “slippery.”²⁰ These critiques yield valuable insights, but contribute to an influential and ultimately incomplete narrative of consumer market regulation’s “spectacular” failures.²¹

This Article addresses that underestimation by piecing together disconnected micro-level, and discipline-specific research that collectively illuminates consumer law’s macro-level impact on inequality. Along the way, it also fills several gaps crucial to the big-picture analysis. Most notably, there has been far less attention paid to consumer protection’s aggregate impact on inequality compared to antitrust. Unlike consumer protection scholars, antitrust scholars have taken a broader lens of their field across the entire economy, concluding that “[a] revived antitrust movement could play an important role in reversing the dramatic rise in economic inequality.”²²

The same basic reasoning underlying that view on antitrust applies to consumer protection laws, the violation of which can also bring considerable profits to large companies.²³ If consumers save one hundred dollars annually on their cellphone plans due to better consumer protection, that outcome has similar distributional effects as if they saved one hundred dollars through better antitrust enforcement.²⁴ To move toward a more comprehensive view of consumer law’s potential to reduce inequality that includes consumer protection—not just antitrust—this Article undertakes the first synthesis of consumer-protection-related overcharge studies scattered across various markets, including cellphones, food, and insurance.²⁵ The limited empirical research suggests that the elimination of consumer-protection-

19 Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 647, 651–65 (2011) (arguing that the widespread societal reliance on requiring businesses to provide information to people has failed, in part because people often ignore or misuse that information); see also Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1638 (2014) (“Mandating new forms of disclosure is unlikely to significantly improve outcomes when (1) the underlying contractual complexity would remain and (2) firms have strong incentives to undermine choice in response to the required disclosures.”).

20 Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1174 (2013).

21 Ben-Shahar & Schneider, *supra* note 19, at 647 (“This Article explores the spectacular prevalence, and failure, of the single most common technique for protecting personal autonomy in modern society: mandated disclosure.”). To be clear, these critiques still identify ways that consumer law might prove more successful. See, e.g., *id.* at 746–47.

22 Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL’Y REV. 235, 237 (2017); see also TIMOTHY WU, *THE CURSE OF BIGNESS* (2018).

23 See *infra* Section II.B (reviewing the literature).

24 See *infra* Part II.

25 See *infra* Part I.

related overcharge would plausibly put over a trillion dollars back into consumers' pockets.²⁶

In terms of the impact of that overcharge on consumption inequality, this Article contributes a more comprehensive treatment of the literature and an original analysis of the data. The poor and less educated are particularly susceptible to some predatory business practices, while households outside of the top one percent of earners own a disproportionately smaller percent of businesses. For these and other reasons, the preliminary data indicate that consumer overcharge has a potentially large enough regressive impact to account for a great portion of the trillion-dollar increase in inequality that has caused so much concern.

Finally, this Article shows how consumer law offers a potentially appealing alternative to taxes. As a threshold issue, consumer law does not fit into the category of distortionary laws that has contributed to legal scholars' historical overwhelming preference for tax law for distributional goals.²⁷ Consumer laws that address overcharge can make markets more competitive, and thus remove or prevent distortions.²⁸ As a result, in theory consumer law offers greater appeal than solely using the tax code to address inequality, because tax increases on the wealthy are seen as inefficient and a drag on the economy (or a distortion).²⁹ Reducing consumer overcharge is a win-win policy option because it can improve both equality and efficiency.

But consumer law must still work effectively to provide such benefits and be seen as a legitimate alternative to tax law. To address the lack of attention to consumer law effectiveness,³⁰ this Article reviews the evidence showing that well-designed consumer regulation can significantly reduce over-

26 *Id.*

27 See Kaplow & Shavell, *supra* note 4, at 667–68. A number of scholars have challenged the reliance on the tax system for addressing redistribution. See, e.g., John Brooks et al., *Cross-Subsidies: Government's Hidden Pocketbook*, 106 *Geo. L.J.* 1229 (2018); Matthew Dimick, *Should the Law Do Anything About Economic Inequality?*, 26 *CORNELL J.L. & PUB. POL'Y* 1 (2016); Brian Galle, *Is Local Consumer Protection Law a Better Redistributive Mechanism than the Tax System?*, 65 *N.Y.U. ANN. SURV. AM. L.* 525, 526 (2010); David Gamage, *How Should Governments Promote Distributive Justice?: A Framework for Analyzing the Optimal Choice of Tax Instruments*, 68 *TAX L. REV.* 1, 75 (2014); Richard L. Revesz, *Regulation and Distribution*, 93 *N.Y.U. L. REV.* 1489, 1492 (2018); Zachary Liscow, Note, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 *YALE L.J.* 2478 (2014).

28 See *infra* Section I.A (summarizing the economic theory).

29 See, e.g., Charles L. Ballard et al., *General Equilibrium Computations of the Marginal Welfare Costs of Taxes in the United States*, 75 *AM. ECON. REV.* 128, 135 (1985) (estimating that for every marginal tax dollar collected, \$0.17 to \$0.56 is lost due to tax distortions and other associated costs).

30 Natasha Sarin has taken a step in this direction by arguing empirically demonstrating types of intervention that can work in consumer finance. See Natasha Sarin, *Making Consumer Finance Work*, 119 *COLUM. L. REV.* (forthcoming 2019), <https://ssrn.com/abstract=3328607> (paying sustained attention to the potential of consumer financial protection to have a positive impact on consumer welfare if designed well).

charge.³¹ As a result of consumer law's magnitude, distributional impact, and effectiveness, consumer law should be considered alongside tax law as a distributional tool.³²

In terms of more concrete policy reforms, a key barrier to stronger consumer law is informational. Open empirical questions remain about the level of overcharge and its distribution within the firm and throughout the economy. Precise answers to those questions depend on something that businesses closely guard: profit and salary data.³³

Administrative agencies should remedy that informational impasse by exercising what the Supreme Court has described as the fundamental "power to get information from those who best can give it and who are most interested in not doing so."³⁴ As does the Internal Revenue Service (IRS) through mandatory tax filings, many regulators today have the legal authority to collect better information about the consequences of consumer overcharge.³⁵ Given the indications of consumer overcharge's importance, taking the next step of knowing more rests on strong intellectual grounds.

In the meantime, reformers and regulators regularly decide where to invest resources. In making those decisions, the inherent assumption is often that consumer law is not a large-scale tool for redistribution and efficiency. Yet that assumption is inconsistent with what is known. At the very least, the burden should be on those who would ignore consumer law or argue against action to justify their position. Additionally, at least in many significant markets, the working hypothesis should be that an increase in consumer law enforcement would significantly reduce inequality while making those markets work better. A broader conception of consumer law is needed, which begins with analyzing the combined impact of antitrust, consumer protection, and entry barriers on consumer spending. That expanded disciplinary lens, and a greater focus on overcharge, will facilitate the most important intellectual shift, toward integrating macroeconomic distributional foundations for intervention.

The Article is structured around the three main overcharge questions requiring better measurement. Part I considers the magnitude of overcharge by reviewing market-specific studies, ranging from financial products to goods. Part II looks at the data showing which socioeconomic groups pay more overcharge in the marketplace, and which groups earn more income after businesses take in those higher prices. Part III considers the research on whether legal interventions may reduce overcharge and examines the political feasibility of consumer law action compared to tax increases. Part IV

31 See *infra* Section III.A.

32 To be clear, the goal here is not to argue against tax reform, but instead to show another option—consumer law—offers underappreciated practical and intellectual promise.

33 See *infra* Section IV.A.

34 *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950).

35 See *infra* Part IV.

suggests the path forward, centered on regulatory monitoring of markets and a more holistic vision of consumer law's role in society.

I. THE MAGNITUDE OF OVERCHARGE

Legal scholars, political scientists, and economists have made numerous estimates of overcharge, but these studies have necessarily focused on a particular market and remain disconnected across disciplines, such as antitrust, contracts, and marketing. This Part offers the first synthesis of those empirical studies in the legal literature, and the first scholarly treatment of them aimed at obtaining a macro perspective on the total amount by which consumers overpay.

A. *The Theory: Behavioral and Informational Overcharge*

In a perfectly competitive market, which assumes consumers are informed and rational, any seller who charges higher prices without providing additional value for those higher prices would lose customers.³⁶ The loss of customers would either drive ineffective businesses out of the market, or prompt the higher-priced seller to lower prices (or increase quality) to regain customers. In this sense, perfectly competitive markets can self-regulate. Consumers demand low prices and quality goods. As a result, to remain in business, sellers must innovate, price competitively, and produce more products that people want.³⁷ Although perfect competition is an analytic tool, and not meant to describe real markets, it provides a guidepost for legal interventions under the belief that society benefits when markets move closer to it.³⁸ This Article focuses on measurable, real-world overcharge, but in theory the total overcharge is the difference between real-world prices and the lower prices that consumers would pay if markets reflected perfect competition.³⁹

Perfect competition cannot exist without rational decisions, which can be defined as those advancing consumers' interests given the choices available in the market. In reality, behavioral economics research shows that consumers instead often do not operate rationally when evaluating options. For example, many people of all educational levels rely on mental shortcuts, esti-

36 See, e.g., Bubb & Pildes, *supra* note 19, at 1602–03 (providing an overview of neoclassical economic theory and the proper role of government intervention in a market containing rational actors).

37 For an overview of these fundamental economic concepts, see N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 66–67 (6th ed. 2012).

38 See, e.g., Morgan Ricks, *Money as Infrastructure*, 2018 *COLUM. BUS. L. REV.* 757, 838 (describing rate regulation as an instance of experts seeking to make markets “mimic the pricing structure and efficient resource allocation that would prevail under perfect competition”).

39 By this definition, the baseline is the absence of some measurable influence—such as removing a business practice that currently causes consumers to pay more. In this sense, the focus here is different from those looking at surplus. See, e.g., Michael D. Guttentag, *Law and Surplus: Opportunities Missed*, 2019 *UTAH L. REV.* 607 (2019).

mate probabilities poorly, and exhibit overconfidence.⁴⁰ Companies adapt their sales and pricing practices to exploit such behavioral biases, because doing so is profitable.⁴¹

Informed consumers are also necessary for perfect competition. Perfectly rational consumers may continue to buy higher-priced, lower quality products if they are unaware of better alternatives available. As a result, sellers that offer less value can persist in the marketplace.

Thus, from an economic perspective, insufficient information and irrationality not only hurt consumers, but can also cause broader market failures. Allowing inefficient sellers to survive can harm society, creating less wealth and fewer products. Many existing consumer protection laws, and many calls for new regulation by legal scholars, aim to lessen information asymmetries and behavioral biases, in part because this foundational economic theory holds that markets function best, and society benefits most, when consumers are informed and rational.⁴² As the Supreme Court has put it, “the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress.”⁴³

B. *The Evidence: Overcharge Related to Consumer Protection*

This Section summarizes real-world evidence of overcharge rather than laboratory studies.⁴⁴ The goal in reviewing the literature is to identify all

40 See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998).

41 See, e.g., Glenn Ellison & Alexander Wolitzky, *A Search Cost Model of Obfuscation*, 43 RAND J. ECON. 417, 417 (2012) (finding firms rationally make it more difficult for consumers to ascertain price, as doing so increases profit); Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505, 506–07 (2006) (offering a model for how firms profit from shifting costs to less salient product features such as add-on printer cartridges).

42 See, BAR-GILL, *supra* note 5, at 6–9 (explaining how companies can strategically make consumers pay more and noting reforms that may address these practices); Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2220 (2012) (“[The] Dodd-Frank [Act] . . . represents the arrival of behavioral law and economics as the intellectual centerpiece of the current administration’s approach.”).

43 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

44 Laboratory research supports those field studies by examining how people respond given a set of choices and hypothetical money to spend, and indeed often indicates even higher magnitudes of overcharge. For instance, in two laboratory studies, researchers caused participants to be willing to pay 21% to over 100% more on clothing and electronics by showing them a high anchor price, such as a newspaper clipping with a high number. See Rashmi Adaval & Robert S. Wyer, Jr., *Conscious and Nonconscious Comparisons with Price Anchors: Effects on Willingness to Pay for Related and Unrelated Products*, 48 J. MARKETING RES. 355, 357–61 (2011) (concluding that showing advertisements with high anchors to subjects can increase their valuations on a range of clothing and electronics items by 20% or more). But that evidence is less persuasive because it is always possible that people act differently when spending real money in a complex world. See Alan Schwartz, *Regulating*

studies that rigorously estimate consumer overcharge.⁴⁵ However, even the most rigorous overcharge studies inevitably have limitations. As is true for much of applied economics, studies of overcharge rely heavily on assumptions about the structure of an individual market.⁴⁶ The complex nature of any sizeable market makes it impossible to obtain definitive numerical estimates of overcharge—especially when the researchers lacked access to internal business data that is rarely shared publicly.⁴⁷ Nor is the underlying economic theory definitively established, as “fundamental questions on the relevance of market power are underanalyzed, if examined at all.”⁴⁸ Scholars are still developing behavioral economics models as well.⁴⁹ Nonetheless, the academic consensus is that economics can produce meaningful insight into market dynamics such as real-world overcharge, rather than simply unverifiable theories.⁵⁰

for Rationality, 67 STAN. L. REV. 1373, 1379 (2015) (“[C]onsumers in markets may not make the same mistakes the experimental subjects make because many biases moderate or vanish with experience.”).

45 The discussion also focuses on studies quantifying the average additional amount paid—rather than simply showing that consumers make mistakes. Space constraints do not permit a full review of the vast literature about consumer behavior that does not quantify the impact—although that literature would only make the case stronger for pervasive overcharge. See, e.g., Bar-Gill & Warren, *supra* note 5, at 33–46 (reviewing the empirical data in consumer finance that consumers act irrationally); Michael D. Grubb, *Failing to Choose the Best Price: Theory, Evidence, and Policy*, 47 REV. INDUS. ORG. 303, 310–13 (2015) (surveying evidence across markets of consumer mistakes).

46 See Sanjib Bhuyan & Rigoberto A. Lopez, *Oligopoly Power and Allocative Efficiency in US Food and Tobacco Industries*, 49 J. AGRIC. ECON. 434, 435 (1998) (observing that “welfare losses are critically determined by assumptions about the modes of conduct, marginal costs, and demand elasticities” but suggesting that the “‘new empirical industrial organisation’ (NEIO) approach” approach aids in “avoid[ing] biases introduced by [these] assumptions”).

47 Asher Schechter, *The Rise of Market Power and the Decline of Labor’s Share*, PROMARKET (Aug. 14, 2017), <https://promarket.org/rise-market-power-decline-labors-share/> (observing that estimating companies’ markups is “notoriously difficult due to the scarcity of data” while reporting the views expressed in an interview of economists Jan De Loecker and Jan Eeckhout). Antitrust-related overcharge estimates face similar challenges. For mergers economists often use a difference-in-differences methodology to compare prices in control-group markets unaffected by the merger to prices—before and after—in markets affected by the merger to determine whether margins have increased anticompetitively, rather than relying on businesses’ actual cost and price data. See John Simpson & David Schmidt, *Difference-in-Differences Analysis in Antitrust: A Cautionary Note*, 75 ANTITRUST L.J. 623, 624 (2008) (discussing assumptions underlying difference-in-differences estimations). This requires locating a similar control group, such as a different geography or stores’ own brands, presumed to be unaffected by the merger. See *id.*

48 Louis Kaplow, *On the Relevance of Market Power*, 130 HARV. L. REV. 1303, 1304 (2017); see also David A. Hoffman & Michael P. O’Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 338 (2002).

49 See, e.g., Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. REV. 2 (2013).

50 Despite lacking access to firms’ internal margins, these “outside-in” studies have been published in the leading peer-reviewed economic journals and inform real-world,

To minimize omissions, the studies below were traced forward on Google Scholar in search of any subsequent contradictory empirical findings. Of course, it is possible that journals and scholars are biased towards studies demonstrating overcharge.⁵¹ The use of Google Scholar helps identify even unpublished studies, which are regularly listed online. This methodology means that the studies most likely to be missed are those in markets omitted from the estimates below—because authors may view their new studies as relevant only to those markets rather than overcharge in general, thus causing the papers to lack citations to overcharge studies in other fields.⁵² Another explanation for the lack of studies in some markets is the difficulty in obtaining data.⁵³ Given the possibility of overcharge studies in omitted markets, the review below suggests a lower bound, as many markets not mentioned presumably also have overcharge.

The real-world evidence of overcharge has varied greatly by market. Research on Medicare spending illustrates how complex financial products like insurance contribute to overcharge. Medicare spending data, unlike that of most other industries, is publicly available, thus rendering decisionmaking unusually visible. Medicare recipients have a choice among over forty prescription plans offered by private insurers. Some plans have higher monthly payments, and others higher deductibles. Two field studies have found that Medicare recipients pay about 30% more for prescriptions on average because they do not choose the best available drug plan.⁵⁴

high-stakes analyses by the world's largest companies about whether a market is profitable enough to enter. Leemore Dafny et al., *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161, 1162, 1164 (2012) (discussing how “adequate data” presents a challenge to establishing a link between health insurance consolidation and premiums because such data is “considered highly confidential,” but utilizing data from the Large Employer Health Insurance Dataset, a “leading benefits consulting firm”).

51 This bias would reflect the preference for establishing something new or significant rather than disproving or minimizing something already done.

52 This is the most likely category of omission because most studies of overcharge in one of the markets mentioned below would presumably cite or be cited by prior studies of that same market.

53 Schechter, *supra* note 47 (reporting the perspective of economists Jan De Loecker and Jan Eeckhout). Even if all data were available, academics have limited interest in replicating the same insight across similar markets—since the resulting insights would lack novelty. See Harold Pashler & Eric-Jan Wagenmakers, *Editors' Introduction to the Special Section on Replicability in Psychological Science: A Crisis of Confidence?*, 7 PERSP. ON PSYCHOL. SCI. 528, 528 (2012) (providing overview of the replicability “crisis” in empirical scholarship).

54 Jason Abaluck & Jonathan Gruber, *Choice Inconsistencies Among the Elderly: Evidence from Plan Choice in the Medicare Part D Program*, 101 AM. ECON. REV. 1180, 1189–92 (2011) (concluding that better plan choices could save individuals 30.9% of the \$1711 in prescription costs spent on premiums and out-of-pocket costs, without the difference being explainable by plan quality); Jeffrey R. Kling et al., *Comparison Friction: Experimental Evidence from Medicare Drug Plans*, 127 Q.J. ECON. 199, 201, 215 (2012) (finding consumers could have saved 30% overall by switching to the optimal prescription drug plan available, and that providing better information on plans overall saved consumers 5%).

Medicare patients are not representative of the broader population, since they are elderly.⁵⁵ But research indicates widespread difficulty in selecting optimal health, auto, and home insurance plans among all adults.⁵⁶ The challenge of predicting future scenarios; estimating deductibles, monthly payments, and copays; and other related search difficulties add hundreds, if not thousands, of dollars in costs to individuals per year.⁵⁷

Research into financial products outside of insurance has reached similar conclusions. Credit card companies have become adept at capitalizing on consumers' psychological limitations. This is one main reason why, for instance, credit card companies offer teaser rates. They know that most consumers will sign up with the intent to switch in six months after the 0% interest rate increases to 15%, but the vast majority will not do so—even if they are paying the 15% rate on a balance.⁵⁸ People are also overconfident in their ability to avoid late fees, and thus are more inclined to ignore such fees in choosing a credit card.⁵⁹ Researchers estimate that credit card companies overall charge interest rates 37% above competitive market levels by capitalizing on such behavioral shortcomings.⁶⁰ The evidence suggests that the deci-

55 See Kling et al., *supra* note 54, at 201 (estimating that the study's "sample [consisting of seniors] had larger potential savings in dollars . . . from switching to the lowest-cost plan than a national sample would have had"). Also, the baseline for that 30% overcharge is optimal choice of plans by everyone, which is unrealistic since it would mean everyone has made a perfect decision.

56 See Randall D. Cebul et al., *Unhealthy Insurance Markets: Search Frictions and the Cost and Quality of Health Insurance*, 101 AM. ECON. REV. 1842, 1842–44, 1868 (2011) (finding that search frictions alone transferred \$34 billion of consumer surplus to health insurers annually in 1997, which adjusted for inflation would amount to \$54 billion in 2018); Elisabeth Honka, *Quantifying Search and Switching Costs in the US Auto Insurance Industry*, 45 RAND J. ECON. 847, 870 (2014) (calculating that eliminating auto-insurance search costs increases consumer welfare by \$859 per person or 158% of the annual premium paid); see also Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35, 46–47 (1993) (finding in laboratory settings a 23% difference in payment for car insurance depending on whether the right to sue was framed as a default); Kangoh Lee, *Consumer Perception, Information Provision, and Regulation of Insurance Markets*, 51 J. REG. ECON. 1, 2 (2017) (finding that home owners pay \$100 more in insurance premiums for a lower deductible that is only worth \$25); Daniel Schwarcz, *Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. REV. 394, 396–97 (2014) (describing the effects of a lack of regulations promoting transparent insurance markets).

57 See Abaluck & Gruber, *supra* note 54; Kling et al., *supra* note 54.

58 See, e.g., Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967, 967 (2012) (concluding that "regulators should . . . consider limiting the ability of issuers to charge introductory teaser interest rates that are, in a sense, 'too low'").

59 See e.g., Wright, *supra* note 42, at 2248–49.

60 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).

sion architecture, and resulting overcharge, is also high in bank accounts,⁶¹ mortgages,⁶² and payday loans.⁶³

Insurance and financial products are particularly susceptible to overcharge because those products are inherently more complex. Complexity means consumers must process more information to understand the product and its full price. Sellers can increase decision-making complexity with long, densely worded contracts and pricing packages that require many algebraic calculations and accurate estimations to know how much a product will cost when all fees and usage charges are summed.⁶⁴ This complexity causes consumers to rely even more on simplification strategies, increasing the likelihood of suboptimal decisions.⁶⁵

Research on cellphone services shows that products less complex than finance are open to overcharge. Oren Bar-Gill and Rebecca Stone have found that choosing the optimal cellphone plan among the various bundles available requires an algebraic analysis of each plan's data allocations, overage fees, and teaser rates.⁶⁶ Such an analysis would also ideally need to make accurate predictions about the likelihood of future switching and usage, based on an individual's past behavior. Bar-Gill and Stone conclude that cellphone companies strategically add complexity to their pricing packages to profit from such consumer confusion.⁶⁷ With access to one cellphone car-

61 Willis, *supra* note 20, at 1177–78 (reporting consumers paid \$20 billion on overdraft fees in 2009 and explaining the strategic behavior financial institutions engage in to obtain them); Darrell Duffie & Arvind Krishnamurthy, Passthrough Efficiency in the Fed's New Monetary Policy Setting 5 (2016) (paper presented at the 2016 Jackson Hole Symposium of the Federal Reserve Bank of Kansas City), <https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/jh-september-8-2016-bw.pdf> (showing how banks exploit depositors' costs of search, monitoring, and attention to avoid passing through increases in Federal Reserve rates).

62 Susan E. Woodward & Robert E. Hall, *Consumer Confusion in the Mortgage Market: Evidence of Less Than a Perfectly Transparent and Competitive Market*, 100 AM. ECON. REV. 511, 515 (2010) (finding “[e]xcessive charges resulting from some borrowers’ poor understanding of the mortgage market” and concluding that the market’s exploitation of the “poorest and most confused” lenders is “inefficient” and results in “pure social loss”); Alexei Alexandrov & Sergei Koulayev, *No Shopping in the U.S. Mortgage Market: Direct and Strategic Effects of Providing Information 2* (Consumer Fin. Prot. Bureau Office of Research, Working Paper No. 2017-01, 2018), <http://ssrn.com/abstract=2948491> (estimating the average consumer would save \$300 per year by choosing the best mortgage quote, for a total of \$13 billion annually in lost savings).

63 See, e.g., Marianne Bertrand & Adair Morse, *Information Disclosure, Cognitive Biases, and Payday Borrowing*, 66 J. FIN. 1865, 1865 (2011) (reducing payday borrowing by 11% through disclosures in a field experiment); Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 SUP. CT. ECON. REV. 105, 123 (2013) (finding that “43 percent [of payday loan borrowers] failed to clear themselves from debt within two weeks of their predicted date”).

64 See BAR-GILL, *supra* note 5, at 18–19.

65 See, e.g., Jolls et al., *supra* note 40, at 1477.

66 For a review of the theory and empirics, see, for example, Grubb, *supra* note 45, at 310–12.

67 See Bar-Gill & Stone, *supra* note 9, at 453.

rier's data, they determined that the average cost to consumers from selecting the wrong plan was an 8% increase in prices paid.⁶⁸

The literature has also quantified behavioral overcharge resulting from strategically complex pricing in even more seemingly straightforward contexts. In retail gasoline, economists have estimated that if consumers had better information about prices within a one-mile radius, they could save about 5% nationwide each year.⁶⁹ Manufacturers of certain goods, such as televisions and mattresses, use different names, bar codes, or specifications to make the comparison of products across stores impractical.⁷⁰ Others price the base product (e.g., a printer) low and shift costs to less visible add-on items or replacement parts (e.g., printer ink, electric toothbrush heads, or shaver blades).⁷¹ Some of these shifted add-on prices are competed away through lower base product prices, and some cross-price subsidization may occur across consumers, but economic research shows that such add-on pricing practices ultimately lead to a higher overall price and profit equilibrium.⁷² In a separate strategy that is usually illegal, but still pervasive, retailers offer "fictitious" prices by initially listing inflated higher prices for a few days so they can later put items on sale so that the buyer assumes the "sale" price is low.⁷³ Thus, the literature suggests that markets for even seemingly "simple" consumer goods exhibit signs of overcharge due to companies' strategic manipulation of consumers' behavioral limitations.

Although these practices are widespread, academics have quantified the overcharge in only a fraction of goods markets. One of the most rigorous studies available in any market, goods or otherwise, by Glenn and Sara Ellison, looked at the online sale of essentially identical computer accessories.⁷⁴ The study is unusual because the authors had access to internal firm data about costs and margins. The data indicated that sellers were able to "obfuscate," or add decision-making complexity, through practices like lengthier descriptions or high shipping fees amounting often to as much as the price

68 *Id.*

69 See Ambarish Chandra & Mariano Tappata, *Consumer Search and Dynamic Price Dispersion: An Application to Gasoline Markets*, 42 *RAND J. ECON.* 681, 700 (2011) (estimating consumers could save 5% on gasoline by searching within a one-mile radius); see also Federico Rossi & Pradeep K. Chintagunta, *Price Transparency and Retail Prices: Evidence from Fuel Price Signs in the Italian Highway System*, 53 *J. MARKETING RES.* 407, 409 (2016) (finding that Italian consumers paid more as a result of a lack of transparency).

70 See Glenn Ellison, *Bounded Rationality in Industrial Organization*, in 2 *ADVANCES IN ECONOMICS AND ECONOMETRICS: THEORY AND APPLICATIONS*, NINTH WORLD CONGRESS 142, 157–59 (Richard Blundell et al. eds., 2006); Gabaix & Laibson, *supra* note 41, at 506.

71 Ellison, *supra* note 70, at 159; Gabaix & Laibson, *supra* note 41, at 506.

72 See Ellison, *supra* note 70, at 159–60.

73 See David Adam Friedman, *Reconsidering Fictitious Pricing*, 100 *MINN. L. REV.* 921, 922–23 (2016).

74 See Glenn Ellison & Sara Fisher Ellison, *Search, Obfuscation, and Price Elasticities on the Internet*, 77 *ECONOMETRICA* 427 (2009).

of the product itself.⁷⁵ They estimate that such practices allowed the firms to earn 6% to 9% more than otherwise would be expected.⁷⁶

When goods add additional complexity to the decision, those margins could be higher. As a start, the comparison of a large basket of goods across many stores—or the comparison of multiple lists of hundreds of search results from online sellers—makes it difficult to know which supermarkets or mass retailers offer the overall best deal.⁷⁷ Even individual items, however, can pose challenges. Consumers overestimate the likelihood of electronics breakdowns, making them more willing to pay more for warranties. Jose Miguel Abito and Yuval Salant conclude that such overestimation accounts for 37% of the price of extended warranties.⁷⁸ Brands can also influence consumer decisions. If consumers pay more for a brand due to emotional attachment to the logo, or perhaps even a desire to save time shopping, it would not necessarily be a market failure because consumers could arguably be advancing their interests with those decisions. In one study of headache remedies, however, the authors found that nonexperts bought the brand-name product, such as Bayer, at a far higher rate than experts, such as pharmacists and doctors, did.⁷⁹ Prices would decline an estimated 15% overall if

75 See *id.* at 428 (examining the effects that search obfuscation tactics have on consumers of internet retail goods).

76 See *id.* at 428–29 (concluding that the average markup on the products in the study was 12%, and the estimated equilibrium price-cost margins were between 3% and 6%).

77 See Mark Aguiar & Erik Hurst, *Life-Cycle Prices and Production*, 97 AM. ECON. REV. 1533, 1533 (2007) (finding 7%–10% savings by shopping more frequently); James Binkley, *Prices Paid in Grocery Markets: Searching Across Stores and Brands*, 47 J. CONSUMER AFF. 465, 466 (2013) (reviewing the literature finding considerable savings from comparison shopping); *id.* at 480 (finding in an empirical study that even simple within-store comparisons can save 10%); Michael Dinerstein et al., *Consumer Price Search and Platform Design in Internet Commerce*, 108 AM. ECON. REV. 1820, 1821 (2018) (using internal data to conclude that eBay could lower consumer prices by 5%–15% simply by improving its search algorithm). Additionally, such practices have been observed throughout online and offline retail, but some believe the resulting margins are higher offline. See Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 46 MGMT. SCI. 563, 563 (2000) (“We find that prices on the Internet are 9–16% lower than prices in conventional outlets”); David J. DiRusso, *The Prevalence of Product Obfuscation and Bait and Switch Tactics in Online Shopping*, 4 INT’L J. ECON. COM. & MGMT. 1, 2 (2016). It should be noted that these estimates also leave out some potential further areas of overcharge, such as deceptive advertising. See Anita Rao & Emily Wang, *Demand for “Healthy” Products: False Claims and FTC Regulation*, 54 J. MARKETING RES. 968 (2017) (documenting demand impact of false advertising); Jonathan Zinman & Eric Zitzewitz, *Wintertime for Deceptive Advertising?*, 8 AM. ECON. J. 177, 177 (2016) (“Casual empiricism suggests that deceptive advertising about product quality is prevalent”).

78 Jose Miguel Abito & Yuval Salant, *On the Relevance of Probability Distortions in the Extended Warranties Market 1* (Oct. 14, 2015) (unpublished manuscript), <https://www.econ.pitt.edu/sites/default/files/ABITO.Relevance%20of%20Probability%20Distortions.pdf> (estimating that retailers’ margins are about 46% of the price of the warranty, and that probability distortions account for 80% of profit).

79 See Bart J. Bronnenberg et al., *Do Pharmacists Buy Bayer? Informed Shoppers and the Brand Premium*, 130 Q.J. ECON. 1669, 1669 (2015).

nonexpert consumers were to adopt the buying practices of pharmacists, who are far more likely to buy the generic brand.⁸⁰ The authors conclude that many headache-relief choices result from brand-value misperception, since the products are chemically identical and experts make different choices.⁸¹

The evidence thus indicates that overcharge is significant across many markets. Consumers pay more as a result of companies' complex pricing strategies, which exploit consumers' decision-making limitations. However, even when synthesized, these studies do not immediately provide an aggregate figure for overcharge.

C. *Summing Consumer Overcharge*

Moving toward an economy-wide perspective on consumer law would require translating the above studies into a total dollar amount across the economy and adding that quantity to antitrust-related overcharge. Decades ago, scholars studied monopoly overcharge on an economy-wide basis.⁸² But market-specific studies are now understood as adding valuable precision, since market dynamics vary so greatly by product.⁸³ A figure for total overcharge would thus ideally reflect industry-specific studies.

One challenge with obtaining an aggregate figure is how to handle the many markets that scholars have yet to quantify directly. To obtain an aggregate figure despite only a subset of markets studied, it would be necessary to assume either that unstudied markets have no overcharge or that unstudied markets exhibit similar levels of overcharge as related markets. Each of those paths has flaws.

Using studied markets to extrapolate to related unstudied markets is necessarily speculative. Indeed, even obtaining a market-specific figure

80 See *id.* at 1684, 1698, 1699 tbl.3 (2015) (estimating that consumers would save 22% on average by moving to store-brand alternatives across 240 categories of food, drink, and health items); Grubb, *supra* note 45, at 309 (noting that Bronnenberg et al. estimate that overall consumer expenditures would fall by 15% if all consumers behaved like pharmacists).

81 See Bronnenberg et al., *supra* note 79, at 1669.

82 See, e.g., William S. Comanor & Robert H. Smiley, *Monopoly and the Distribution of Wealth*, 89 Q.J. ECON. 177, 180 (1975) (providing aggregate figures for monopoly overcharge across the economy); Irene Powell, *The Effect of Reductions in Concentration on Income Distribution*, 69 REV. ECON. & STAT. 75, 75, 81 (1987) (examining the manufacturing sector and concluding that market concentration likely made only a minor contribution to income inequality). Powell's study ignored overcharge related to consumer protection in general, and behavioral economics in particular.

83 See BAR-GILL, *supra* note 5, at 249 (“[T]o fully understand the dynamics of contract design and the potential role of legal intervention, a market-specific analysis is required.”); Richard J. Sexton & Nathalie Lavoie, *Food Processing and Distribution: An Industrial Organization Approach*, in 1 HANDBOOK OF AGRICULTURAL ECONOMICS 863, 912–13 (Bruce L. Gardner & Gordon C. Rausser eds., 2001) (noting that early aggregate studies of monopoly pricing were appropriately criticized on many levels, most importantly because they inferred market power from accounting data and made broad assumptions about pricing behavior across many different markets).

already involves extrapolation. For example, Oren Bar-Gill and Rebecca Stone conclude that if their 8% overcharge figure for cellphone plans at a single carrier were extrapolated “onto the entire U.S. population of cell phone users,” it would amount to about \$12 billion annually in lower consumer surplus.⁸⁴ An assumption that cable or internet pricing produces similar results would be unreliable because even related markets exhibit some unique dynamics.

However, the alternative of assuming that unstudied markets have no behavioral overcharge is unrealistic because the firms in unstudied industries pervasively adopt pricing strategies established elsewhere as leading to overcharge. For instance, airlines and hotels shift the overall price paid to less salient fees for baggage check, internet access, and on-site parking.⁸⁵ Comcast and Time Warner offer complex options with various teaser rates and multidimensional pricing depending on internet speed, number of television channels, and so on.⁸⁶ The more plausible inference would thus be that those similar pricing strategies produce some level of overcharge in these unstudied industries, as predicted by economic theory overall, and as shown empirically in related industries.

The challenge then becomes how to obtain even a rough sense of the magnitude, which is valuable for forming a preliminary perspective on whether behavioral overcharge is worth investing scarce academic and government resources. One approach comes from antitrust, even though most antitrust scholars avoid quantifying the aggregate overcharge in a given industry.⁸⁷ In surveying empirical studies of the effect of mergers on prices, Lina Khan and Sandeep Vaheesan have used an extrapolation methodology to conclude that “[t]he aggregate wealth transfer effect from pervasive monopoly and oligopoly power is likely, at a minimum, hundreds of billions of dollars per year.”⁸⁸ They reach this number by looking at studies of individual mergers in subindustries and then providing the various amounts of antitrust-related overcharge that would result at different levels of assumed overcharge, such as 5%–25%.⁸⁹

Extrapolations based on behavioral overcharge adds up quickly if overcharge percentages are assumed to reflect existing subindustry studies. Consumer finance and insurance alone amount to over \$2 trillion in

84 Oren Bar-Gill & Rebecca Stone, *Mobile Misperceptions*, 23 HARV. J.L. & TECH. 49, 96–97 (2009).

85 See, e.g., Grubb, *supra* note 45 (reviewing the literature on pricing effects); Van Loo, *supra* note 5 (showing the pervasiveness of behavioral pricing strategies in goods markets).

86 See, e.g., Alina Tugend, *All-in-One Telecom Packages: The Savings Don't Come Simple*, N.Y. TIMES, Feb. 16, 2008, at C1 (explaining telecom pricing structures).

87 Most legal scholars asserting a large connection between antitrust and inequality do not quantify the effect, in part because most of the studies are of individual mergers (a more micro-level analysis) rather than of entire industries. See, e.g., Baker & Salop Kleiner et al., *supra* note 16.

88 See Khan & Vaheesan, *supra* note 22, at 236.

89 *Id.* at 246–50, 246 tbl. 1.

expenditures annually.⁹⁰ The estimated overcharge percentages in consumer finance ranged across industries and included 37% in credit cards and 30% in Medicare insurance selection.⁹¹ Adopting a range of 20%–35% would amount to between \$400 billion and \$700 billion in overcharge for finance and insurance.⁹² Assuming a 5%–10% range to cover the 6%–9% overcharge for retail goods from the most rigorous study in that sector, by Ellison and Ellison, would add \$172–\$286 billion in overcharge annually.⁹³ Assuming that gasoline and related energy goods incur 5% overcharge, and telecommunications pricing practices add 5%–10%, would add another \$27–\$39 billion annually.⁹⁴ Overcharge extrapolations from these industries would, depending on the assumed percentage, produce an aggregate figure ranging from \$599 billion to \$1.025 trillion.

These four industries amount to only a fraction of consumer spending, leaving about \$9 trillion in consumer spending yet to be considered, in categories ranging from motor vehicles to gym memberships.⁹⁵ Moving toward a figure for these other sectors would require more speculative assumptions. But if it turned out those other sectors had a 5%–10% level of overcharge, it would add another \$443–\$887 billion, putting the aggregate extrapolated overcharge at between a trillion and almost two trillion dollars.⁹⁶

The actual figure could be higher or lower. Some sectors of consumer spending may have negligible overcharge, such as the highly competitive res-

90 Consumer spending on financial and insurance products totals about \$2.6 trillion annually. See CTRS. FOR MEDICARE & MEDICAID SERVS., NATIONAL HEALTH EXPENDITURES 2017 HIGHLIGHTS 2 (2017), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/highlights.pdf> (estimating private health insurance premiums as \$1.1 trillion in 2016); *Facts + Statistics: Industry Overview*, INS. INFO. INST., <https://www.iii.org/fact-statistic/facts-statistics-industry-overview> (last visited Aug. 28, 2019) (estimating property and casualty insurance spending as \$558 billion annually); *Table 2.1*, *supra* note 14 (listing interest payments as \$299 billion annually); *Table 2.4.5. Personal Consumption Expenditures by Major Type of Product*, BUREAU ECON. ANALYSIS, <https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey> (open “Section 2-Personal Income and Outlays” menu; then follow hyperlink to Table 2.4.5) (last updated Sept. 26, 2019) [hereinafter *Table 2.4.5*] (listing financial services spending as \$661 billion annually). These figures sum to \$2618 billion.

91 See *supra* notes 54–60 and accompanying text.

92 Calculated as $0.2 * \$2 \text{ trillion} = \400 billion , and $0.35 * \$2 \text{ trillion} = \700 billion .

93 See *Table 2.4.5*, *supra* note 90 (listing consumer expenditures as totaling \$2.86 trillion in 2017 for food purchased for home consumption, furnishings and durable household equipment, recreational goods, other durable goods, clothing and footwear, and other nondurable goods excluding pharmaceuticals). Calculated as $0.06 * \$2.86 \text{ trillion}$.

94 See *Table 2.4.5*, *supra* note 90 (putting gasoline and other energy products at \$308 billion in 2017, and communication services at \$236 billion). Calculated as $0.05 * \$308 \text{ billion} = \15 billion ; $0.05 * \$236 \text{ billion} = \12 billion ; and $0.1 * \$236 \text{ billion} = \24 billion .

95 See *id.* (providing breakdowns for consumer spending).

96 This figure is reached by adding 5% of \$10 trillion (which amounts to \$500 billion) to the figures mentioned above for retail goods and finance, of \$400 billion in overcharge for finance and insurance, and between \$172 billion and \$257 billion in overcharge annually.

restaurant industry. Others could have significantly more than the assumed amounts, such as telecommunications. Also, the level of overcharge in a given industry will fluctuate over time. There are signs that in recent decades business markup of profits (above costs) has increased, and one explanation for that trend is overcharge.⁹⁷

It is also worth noting that many limitations in the existing literature lead to underestimations of consumer overcharge. Returning to the case of cellphone-plan choices, the actual decision facing consumers is more complex than the one Bar-Gill and Stone quantified. To find the best deal, consumers must choose among the plans offered by various carriers, not simply by one carrier. As a result, the actual overcharge may be significantly more than what Bar-Gill and Stone found if, for instance, T-Mobile offers lower-priced plans for comparable quality than the carrier they studied. Without industry-wide data, overcharge estimates may not fully capture the level of complexity faced by consumers and thus may underestimate the magnitude of overcharge.

To expand the concept of consumer law overcharge even further, legal interventions that could reduce anticompetitive prices go beyond mergers and consumer protection, and include many laws that provide entry barriers or related limits. For instance, about 25% of occupations are protected by state licensing laws, ranging from hair stylists to doctors, and the number is growing rapidly.⁹⁸ Although some licensing benefits consumers, economists' rough estimate of the aggregate impact of licensing restrictions is that they raise consumer prices by 15%, or over \$226 billion annually,⁹⁹ a figure described by Aaron Edlin and Rebecca Haw Allensworth as "[c]onservative."¹⁰⁰ Consumers may pay hundreds of billions of dollars more from real estate zoning, excess intellectual property, state-granted territory monopolies to auto dealers, and various other forms of governmental overcharge.¹⁰¹

97 See Susanto Basu, *Are Price-Cost Markups Rising in the United States? A Discussion of the Evidence*, 33 J. ECON. PERSPECTIVES 3 (2019) (reviewing the market-level studies suggesting rising markups and raising questions based in part on macroeconomic factors).

98 See Morris M. Kleiner & Evgeny Vorotnikov, *Analyzing Occupational Licensing Among the States*, 52 J. REG. ECON. 132, 134 (2017).

99 See Morris M. Kleiner, *Occupational Licensing: Protecting the Public Interest or Protectionism?* 2–3 (W.E. Upjohn Inst. Emp't Research, Policy Paper No. 2011-009, 2011), http://research.upjohn.org/cgi/viewcontent.cgi?article=1008&context=UP_policypapers (figure adjusted for inflation to 2018 dollars).

100 Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1102 (2014) (describing the Kleiner and Krueger estimates as "[c]onservative").

101 See Rory Van Loo, *Consumer Law and Inequality* (Mar. 15, 2016) (unpublished Ph.D. dissertation, Yale Law School) (on file with author) (summarizing estimates of government overcharge, including from tariffs and price minimums); see also Daniel A. Crane, *Tesla and the Car Dealers' Lobby*, REGULATION, Summer 2014, at 10, 12–14 (discussing car dealerships).

In summary, considerable limitations in access to private business data prevent strong conclusions about the level of overcharge in large portions of the economy. But the preliminary empirical literature available indicates that the total consumer-protection-related overcharge across the economy is large scale. That conclusion is appropriate even if overcharge is assumed to exist only in the few sectors studied, in which hundreds of billions of dollars in overcharge may exist annually. The existence of similar pricing practices in other sectors that have yet to be quantified means that the total could be considerably more. Consumer protection laws that reduced overcharge would thus constitute a micro-level legal intervention relevant to macroeconomic conversations, since they give consumers potentially tremendous savings.¹⁰² Assuming scholars are correct that antitrust and entry barriers have similarly large effects, the case becomes even stronger that macroeconomic policymakers should consider consumer laws more closely.

II. THE DISTRIBUTIONAL IMPACT OF OVERCHARGE

Academics broadly support policies that make markets more efficient.¹⁰³ For this reason alone, the magnitude of overcharge implicated by the previous section would prove attractive to those seeking to create new regulations, remove anticompetitive laws, or enforce existing rules. Given widespread concerns about economic inequality, a meaningful link between overcharge and inequality should elevate consumer law further. This Part reviews the evidence on whether reducing overcharge would lessen inequality. Overcharge can influence distribution in terms of both what consumers spend and what they earn.

A. Spending on Overcharge

One way to think about how reducing overcharge affects consumers' spending is as a discount coupon that is good everywhere overcharge exists. For a household taking home and spending \$100,000 annually, a reduction of 10% overcharge across all that the household spends would amount to getting \$10,000 worth of discounts throughout the year. That would be good news for all consumers, but from an inequality standpoint it raises the question of whether some households would get a larger discount on their spending. Assuming that the reduction in overcharge were applied "need blind,"

102 See *infra* Section IV.B (discussing macroeconomic implications).

103 See, e.g., MANKIW, *supra* note 37, at 11–13 (illustrating the important role in economic theory that regulation plays in well-functioning markets); ROBERT PITOFSKY ET AL., TRADE REGULATION 2 (6th ed. 2010) (“[T]here is . . . a widely shared view that private interests operating in free markets, and unchecked by effective government antitrust rules, will harm efficiency and consumer welfare”); 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, 631 (1979) (concluding that the strongest justification for regulation exists when “imperfect information has produced noncompetitive prices and terms”); Barry C. Lynn, *Killing the Competition*, HARPER’S MAG., Feb. 2012, at 27, 32 (discussing the broad support for efficiency-improving laws).

in other words without seeking to prioritize any particular group, low- and middle-income consumers could still benefit more if they pay more than their share of overcharge. In other words, middle-income consumers might save 15% of all they spend while wealthy consumers save 5%.

Surprisingly few studies answer the question of who pays more overcharge—a narrower and more nuanced question than whether “the poor pay more” overall.¹⁰⁴ And sellers in most industries do not collect salary information directly from their customers. The main exception is in consumer finance, partly because financial institutions check salary to determine creditworthiness. Researchers in this industry have consistently found that wealthier and more educated consumers are better able to avoid overcharge.¹⁰⁵ Moreover, the consequences of this difference may be large. Those without a college education pay an average of \$1000 more in mortgage broker fees.¹⁰⁶ And consumer protection on credit cards has disproportionately benefited borrowers with low credit scores in terms of deceptive fees, from which it can be inferred that those with low credit scores pay a disproportionate amount of such fees.¹⁰⁷ Since behavioral overcharge on financial products is one of the largest single categories of overcharge that has been rigorously quantified,¹⁰⁸ the fact that lower-income consumers systematically pay considerably more for financial products alone indicates at least one substantial lever for behavioral overcharge influencing inequality.

Outside of finance, the evidence is less comprehensive. Jerry A. Hausman and J. Gregory Sidak concluded that “the poor and less educated” pay higher overcharge for long-distance phone calls in part because they are more susceptible to predatory practices.¹⁰⁹ In their study of cellphone choices, Bar-Gill and Stone did not have access to customers’ salaries. Nonetheless, they found that a subset of consumers disproportionately paid more.

104 DAVID CAPLOVITZ, *THE POOR PAY MORE* (1963).

105 See, e.g., MICHAEL S. BARR, *NO SLACK* 8 (2012); Sumit Agarwal et al., *Regulating Consumer Financial Products: Evidence from Credit Cards*, 130 Q.J. ECON. 111, 112 (2015); Bar-Gill & Warren, *supra* note 5, at 64–69; Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 HARV. J. ON LEGIS. 1, 1 (2008) (“This Article demonstrates empirically that credit card rewards programs are funded in part by a highly regressive, *sub rosa* subsidization of affluent credit consumers by poor cash consumers.”); Willis, *supra* note 20, at 1178.

106 See Woodward & Hall, *supra* note 62, at 513.

107 See Agarwal et al., *supra* note 105, at 111 (estimating that following CARD Act regulation consumers with FICO scores below 660 saved 5.3% of borrowing costs compared to average savings of 1.6% for those with higher credit scores); Scott T. Nelson, *Private Information and Price Regulation in the US Credit Card Market* (July 2019) (unpublished manuscript), <https://economics.mit.edu/files/14225>.

108 See *supra* notes 58–63 and accompanying text.

109 Jerry A. Hausman & J. Gregory Sidak, *Why Do the Poor and the Less-Educated Pay More for Long-Distance Calls?*, 3 CONTRIBUTIONS TO ECON. ANALYSIS & POL’Y, no. 1, art. 3, 2004, at 2 (concluding low-income and less educated consumers pay more than affluent and better educated consumers for long-distance phone calls due to anticompetitive factors, either from susceptibility to predatory practices or greater geographic exposure to monopoly power).

Although the overall average price increase was 8%, an estimated 42,500,000 Americans paid 20% more monthly on their cellphone bills as a result of choosing the wrong plan.¹¹⁰ The authors concluded the disproportionate burden of mistaken choices indicates “a potentially troubling form of regressive redistribution.”¹¹¹

What is known about this subset of consumers who are particularly susceptible to overcharge beyond finance? In their seminal piece showing that manufacturers shift much of the costs of printers to the more hidden price of ink cartridges, Gabaix and Laibson conclude that less “sophisticated” consumers are particularly susceptible.¹¹² One field study looked at the likelihood that consumers would switch insurance plans upon searching for information and concluded that “higher educated people use available health plan information more effectively than lower educated people.”¹¹³

Scholars researching gender and racial disparities in consumer law have produced indirect evidence of regressive overcharge. In one field experiment, women who called an auto repair shop for work on a car received higher price quotes for describing the same exact work needed.¹¹⁴ Another field experiment showed how car dealers attempt to overcharge African Americans and women for buying new cars, and informal interviews suggest that dealers target uninformed consumers who are disproportionately lower income and less educated.¹¹⁵ Charging women and African Americans more on average will have regressive effects, because those groups earn less on average than other groups.¹¹⁶ Behavioral overcharge in other categories of retail goods and services has not received sufficient distributional attention to draw even preliminary conclusions.¹¹⁷

110 See Bar-Gill & Stone, *supra* note 9, at 432.

111 Bar-Gill & Stone, *supra* note 84, at 55.

112 See Gabaix & Laibson, *supra* note 41, at 511.

113 See Lieke Boonen et al., *Switching Health Insurers: The Role of Price, Quality and Consumer Information Search*, 17 EUR. J. HEALTH ECON. 339, 349 (2016).

114 Meghan R. Busse et al., *Repairing the Damage: The Effect of Price Knowledge and Gender on Auto Repair Price Quotes*, 54 J. MARKETING RES. 75, 76 (2017).

115 See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 835, 854 (1991) (describing how auto salespeople target “suckers” in disadvantaged communities by offering inferior prices to those offered to other consumers). Because these studies look at the prices offered, rather than ultimately paid, it is less clear whether those strategies succeed. In one follow-up study attempting to infer race from national data, no difference in final price paid was found. See Pinelopi Koujianou Goldberg, *Dealer Price Discrimination in New Car Purchases: Evidence from the Consumer Expenditure Survey*, 104 J. POL. ECON. 622 (1996). Aside from difficulties in identifying race, the study also was unable to differentiate whether for the same price paid one car may have had more features, such as air conditioning. See *id.*

116 See Anthony C. Infanti, *Tax Reform Discourse*, 32 VA. TAX REV. 205, 221 (2012).

117 The question of whether low-income consumers pay more has been studied but is a different question from who pays more overcharge. Consumers may pay more at competitive prices for convenience, for instance. The literature on who pays more is, in any case, inconclusive. For a review and discussion, see, for example, Van Loo, *supra* note 5, at 1357–59.

The data limitations of these studies make it difficult to eliminate the possibility that some wealthy consumers pay considerably more in overcharge, at least in some categories. For instance, anticompetitive practices that make it more time-consuming to shop, such as arranging the Amazon search results to put the best deal on page four, would affect groups with the least amount of time—or who value their time the most.¹¹⁸ Over recent decades, higher-income earners began to work longer hours.¹¹⁹ In theory, ultrawealthy households could pay additional behavioral overcharge either because they care less about price, have less time, or value their time more. Many low-income households, such as single working parents, would face similar time constraints.

Additionally, there is considerable variation in the products that different income groups purchase. As some scholars point out, wealthier consumers are more likely to buy expensive products, such as luxury automobiles, gem-quality diamonds, and high-end art.¹²⁰ If overcharge levels are unusually high in such high-end subcategories, the elimination of overcharge in their larger categories—such as all automobiles—could disproportionately benefit the wealthy. Moreover, it is possible that the evidence available points mostly to overcharge harming the poor because academics are less interested in overcharge paid by the rich.

Beyond direct studies of inequality, several inferences can be made from other data sets. Differences exist also across categories of consumer goods. For instance, the lowest-income households, those earning less than \$20,000 annually, spend 2.9% of their budgets on telephone expenditures, compared to 1.7% for the highest-earning households.¹²¹ Eliminating the 8% over-

118 See Elizabeth A. Harris, *The Social Showroom: Retailers Seek Online Partners to Put Products Where People Can See Them*, N.Y. TIMES, Nov. 27, 2013, at B1 (reporting on pricing practices such as switching out bar codes).

119 See DANIEL MARKOVITS, *THE MERITOCRACY TRAP* 3–5 (2019); Orazio Attanasio et al., *The Evolution of Income, Consumption, and Leisure Inequality in the United States, 1980–2010*, in *IMPROVING THE MEASUREMENT OF CONSUMER EXPENDITURES* 100, 104 (Christopher D. Carroll et al. eds., 2015) (discussing time-use surveys indicating that low-educated households spend “much more time in leisure relative to their highly educated counterparts”); Peter Kuhn & Fernando Lozano, *The Expanding Workweek? Understanding Trends in Long Work Hours Among U.S. Men, 1979–2004*, at 1–2 (Nat’l Bureau of Econ. Research, Working Paper No. 11895, 2005).

120 See Crane, *supra* note 16, at 1204 (pointing out that these categories may have anti-trust-related overcharge). Additionally, in some of these subcategories, it is particularly difficult to quantify overcharge in some more likely to be purchased by ultrawealthy consumers, such as high-end art, in which the status of the products sold is part of what the buyer seeks. See Young Jee Han et al., *Signaling Status with Luxury Goods: The Role of Brand Prominence*, J. MARKETING, July 2010, at 15, 15.

121 This figure is for the highest-income group available in the federal data, which are households earning over \$150,000 annually. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, TABLE 1110. DECILES OF INCOME BEFORE TAXES: ANNUAL EXPENDITURE MEANS, SHARES, STANDARD ERRORS, AND COEFFICIENTS OF VARIATION, CONSUMER EXPENDITURE SURVEY, 2014 (2014), <https://www.bls.gov/cex/2014/combined/decile.pdf>. As another example, a significantly higher portion of their expenditures on categories such as food, which

charge from mistaken cellphone-plan choice would thus disproportionately benefit low-income consumers,¹²² even if they are equally represented in the subcategory most susceptible to behavioral overcharge.¹²³

Despite considerable heterogeneity and data limitations, several points in support of overcharge's impact on inequality are worth emphasizing. First, high-income consumers spend a lower percentage of what they take home, since they invest or save a larger portion. One of the leading studies concludes that the highest-earning one percent of households save 51% of their after-tax income, while middle-income earners save about 11%, and the bottom fifth of households save 1%.¹²⁴ Based solely on this difference, an equal reduction of all consumer overcharge would disproportionately benefit low- and middle-income households as a percentage of their income since those households spend much larger portions of their income annually.

Second, the heterogeneity of spending across product categories offers several benefits to consumer law as a policy instrument. That variability in spending allows authorities to prioritize addressing certain categories of overcharge that disproportionately harm low-income consumers. For example, regulators might focus their efforts on food and cellphone overcharge, where low-income consumers spend a greater share of their budget.¹²⁵ Finally, the few direct studies available suggest that lower-income consumers disproportionately pay for overcharge.¹²⁶

B. *Earning Income from Overcharge*

In addition to altering consumer spending, overcharge can shift the distribution of income. The top-level inquiry requires determining which groups earn income when a firm receives extra revenues from overcharge. This raises a threshold subissue: whether the overcharge is even profitable for the firm. A company earning \$100 million in overcharge from deception might spend \$99 million annually researching how to deceive consumers into paying more, leaving little overcharge profit that could become income.¹²⁷ In that instance, overcharge is unlikely to influence income inequality substantially. In the alternative, the company might need to spend almost noth-

makes up 16% of their budget, compared to the highest-earning households, who spend about 10.5% of their annual budget on food. *Id.*

122 This is as a percent of their income. For the 8% figure, see Bar-Gill & Stone, *supra* note 9, at 453.

123 *Cf. id.* at 453 (estimating that one in six overpay by 20%).

124 See Karen E. Dynan et al., *Do the Rich Save More?*, 112 J. POL. ECON. 397, 416 tbl.3 (2004). Other studies of households by wealth have found similar disparities in savings rates, but different overall savings rates. See Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, app. tbl.B44, (2010), <http://gabriel-zucman.eu/files/SaezZucman2016QJEAppendix.pdf>.

125 See *supra* note 121 and accompanying text.

126 See *supra* notes 105–09 and accompanying text.

127 Similarly, if it were more expensive to operate businesses in concentrated industries, that could mean some of the concentration overcharge was lost to higher costs.

ing to earn that \$100 million in overcharge. It could, for instance, simply copy a competitor's complex pricing scheme.

The issue of overcharge profitability depends on internal firm expenditures. Behavioral overcharge no doubt requires companies to invest in marketing. They must develop complex pricing structures and search for vulnerable customers, among other expenditures.¹²⁸ Although data about such expenditures are rarely publicly available, a number of empirical analyses have used outside-in methods to estimate the proportion of overcharge that is profitable. For instance, Bar-Gill and Ryan Bubb found that regulations reducing credit card companies' behavioral overcharge lowered profits proportionally.¹²⁹ In the market for headache-relief drugs, Bronnenberg and his coauthors estimate that more informed consumers "would reduce the variable profits of the national headache remedy brands by half, equivalent to 19 percent of total expenditure."¹³⁰ A study of insurance similarly concluded that most behavioral overcharge is profit.¹³¹ These examinations and others, both theoretical and empirical, indicate an academic consensus that firms profit substantially through overcharge.¹³²

Although widespread unprofitable overcharge is unlikely, from the perspective of whether to regulate, unprofitable overcharge would make a *stronger* case for regulatory intervention.¹³³ Whereas higher business profits

128 See, e.g., Susan E. Woodward & Robert E. Hall, *Diagnosing Consumer Confusion and Sub-Optimal Shopping Effort: Theory and Mortgage-Market Evidence*, 102 AM. ECON. REV. 3249, 3255 (2012) ("Mortgage brokers dissipate the anticipated margin from confused borrowers by spending effort and other resources trying to find these customers.").

129 See Bar-Gill & Bubb, *supra* note 58, at 999–1000 (finding that after the Credit Card Accountability Responsibility and Disclosure Act of 2009 forced down hidden fees, industry revenue and profitability declined by comparably large amounts). This measure would leave out the up-front expenditures to develop the practices that are thereafter purely profitable.

130 Bronnenberg et al., *supra* note 79, at 1675.

131 See, e.g., Lee, *supra* note 56, at 12–13 ("[T]he gain of insurers' profits due to overinsurance are in proportion to the extent of overinsurance.").

132 See, e.g., Cebul et al., *supra* note 56, at 1843; Glenn Ellison, *A Model of Add-On Pricing*, 120 Q.J. ECON. 585, 589 (2005) ("Perhaps the most important contribution of this paper is that it identifies a reason why the joint adoption of add-on pricing can raise equilibrium profits."); Grubb, *supra* note 45, at 318 (reviewing the literature showing that, in equilibrium, firms' efforts at obfuscation result in consumer confusion and sustained profits); Lee, *supra* note 59, at 2 ("[O]verestimation of the probability of loss . . . increases insurers' profits . . ."); Donald Ngwe, *Fake Discounts Drive Real Revenues in Retail* 20 (Harvard Bus. Sch., Working Paper No. 18-113, 2018), http://www.hbs.edu/faculty/Publication%20Files/fictitious_pricing_current_02060238-0856-447d-9eda-5987a7788eb8.pdf (concluding that fictitious pricing offers "a potentially powerful driver of demand that is virtually costless to produce and adjust"). *But see* Crane, *supra* note 16, at 1187–88 (questioning the profitability of overcharge related to antitrust).

133 Unprofitable overcharge could exist for a number of reasons, such as cross-subsidization (some customers' profits are used to lower the price to other customers). Another possibility is that all companies must spend money to deceive consumers even though the companies then still earn little profit because they compete vigorously at the misperceived price. Any company attempting to save money by not investing in deception might then be

at least have the advantage of providing an additional incentive to start a new business, unprofitable overcharge would mean that companies are simply spending more to charge higher prices—in other words, that they are unnecessarily inefficient and wasteful. Given the broad support for policies that increase efficiency, the more overcharge that is wasted, the stronger the case for great societal benefits derived from intervening to reduce overcharge.

Even if policymakers were operating under the assumption that overcharge is profitable, they must consider which groups benefit from the additional profit. Overcharge is subject to the power struggle among owners, labor, and management. Senior executives or other employees could capture such excesses as income, and some portion could reach owners through dividends or other means.¹³⁴

Although consumer protection scholars have yet to explore the issue in any depth,¹³⁵ antitrust scholars have mostly concluded that antitrust-related overcharge contributes significantly to income inequality because shareholders and senior management capture excess profits.¹³⁶ Daniel Crane offers a different perspective, arguing that “[c]ontrary to the assumption that shareholders and senior managers are capturing virtually all of the monopoly rents obtained by corporations, the evidence suggests that a significant amount of rent sharing occurs within the firm.”¹³⁷ If so, overcharge might not increase income inequality, as middle- and lower-income workers would also earn higher incomes from it. Einer Elhauge believes Crane’s argument is inconsistent with the empirical literature, and instead concludes “that anticompetitive practices increase economic inequality.”¹³⁸

The challenge with evaluating the merits of these conclusions is that much of the evidence in recent years is inferential. Some direct empirical studies from decades ago, on which Crane relies, conclude that broad sharing of monopoly rents occurs.¹³⁹ But recent studies have underscored the difficulty in answering that question, and the institutional dynamics of distribution have changed considerably over the past several decades. Households in the top one percent dramatically increased their share of national income

perceived as offering a worse price or product, even if consumers would be wrong in that conclusion. Again, the theory and evidence suggest overcharge is profitable, but the possibility of unprofitable overcharge in some contexts cannot be ruled out.

134 Profits retained by the firm could, for instance, increase the value of the ownership share, which could then be sold for what amounts to personal income for the owner.

135 Some scholars have, in passing, recognized a potential connection. *See, e.g.,* Bar-Gill & Stone, *supra* note 9, at 454 (“[R]edistribution occurs when carriers profit from consumer mistakes if shareholders tend to be richer than consumers.”); Van Loo, *supra* note 5, at 1359 (concluding that a lack of consumer protection in retail goods may increase the income gap).

136 *See supra* note 16 and accompanying text.

137 *See* Crane, *supra* note 16, at 1192.

138 Elhauge, *supra* note 9, at 1293; *see also* Baker & Salop, *supra* note 16, at 4 (concluding that antitrust influences income inequality); Khan & Vaheesan, *supra* note 22, at 235–36 (concluding that monopolies and oligopolies contribute to income inequality).

139 *See* Crane, *supra* note 16, at 1192 (summarizing the literature).

between 1980—when they earned about 10% of all income—and 2010, when they earned over 20% of all income.¹⁴⁰ That period also saw a large jump in executive pay.¹⁴¹ Labor unions helped nonmanagerial employees to capture monopoly profits for higher wages in the past.¹⁴² But unions have declined over that timeframe, leaving only about six percent of private sector employees unionized today.¹⁴³ Moreover, business organizations have become far leaner, most notably by designing more efficient processes and leveraging technologies to remove excess workers, in what many saw as the “streamlining of bloated America [].”¹⁴⁴ In light of these drastic shifts in industrial organization, studies of monopoly rent distribution in the 1980s and even the 1990s are of limited relevance today, and it is likely that lower-level employees’ bargaining power has diminished in recent decades, making them less able to capture overcharge.

The case for higher-income employees capturing a large portion of anticompetitive pricing is intuitively persuasive, but indirect. Senior executives and managers are two of the largest categories of employees in the top one percent.¹⁴⁵ Executive pay has risen along with income inequality. The average CEO in the S&P 500 earned forty times the average worker in 1980, but three hundred fifty times the average worker in 2013.¹⁴⁶ Executives have also steadily increased the share of their firms’ net income that they earn, with the top five executives’ share of net profits rising from 7% to 10% between 1993 and 2003 alone.¹⁴⁷ Scholars have argued that rent extraction contributes to this growth in executive pay,¹⁴⁸ and have developed theoretic-

140 See PIKETTY, *supra* note 3, app. tbl.S8.2, <http://piketty.pse.ens.fr/files/capital21c/en/pdf/supp/TS8.2.pdf>.

141 See *infra* note 146 and accompanying text.

142 See Robert Smiley, *Firm Size, Market Power and the Distribution of Income and Wealth: A Survey*, in THE ECONOMICS OF FIRM SIZE, MARKET STRUCTURE AND SOCIAL PERFORMANCE 90, 98 (John J. Siegfried ed., 1980) (“[I]t appears likely that workers do share somewhat in monopoly rents, if only through the unionization effect.”); cf. Elhauge, *supra* note 9, at 1294–95 (reviewing the literature).

143 See News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members—2016, at 1 (Jan. 26, 2017), <https://www.managementmemo.com/files/2017/02/BLS-2016.pdf> (“Public-sector workers had a union membership rate (34.4 percent) more than five times higher than that of private-sector workers (6.4 percent).”).

144 Thomas W. Joo, *Legislation and Legitimation: Congress and Insider Trading in the 1980s*, 82 IND. L.J. 575, 594 (2007) (noting common views on the subject).

145 See Jeremy White et al., *The Top 1 Percent: What Jobs Do They Have?*, N.Y. TIMES (Jan. 15, 2012), <http://www.nytimes.com/packages/html/newsgraphics/2012/0115-one-percent-occupations/>.

146 Alex Edmans & Xavier Gabaix, *Executive Compensation: A Modern Primer*, 54 J. ECON. LITERATURE 1232, 1235 (2016).

147 See Lucian Bebchuk & Yaniv Grinstein, *The Growth of Executive Pay*, 21 OXFORD REV. ECON. POL’Y 283, 284 (2005) (finding that the top five executives in publicly traded companies increased their average share of their companies’ net income from 6.6% in 1993–1995 to 9.8% in 2001–2003).

148 See Lucian A. Bebchuk, et al., *The CEO Pay Slice*, 102 J. FIN. ECON. 199, 200–01 (2011); Bebchuk & Grinstein, *supra* note 147, at 284.

cal models linking managerial power and pay.¹⁴⁹ But they have yet to link executive pay to overcharge empirically in any definitive manner.

Moving beyond executive pay, others have begun to present broader empirical evidence on the connection between rents and inequality. The authors of one study concluded that their analysis “suggests that the distribution of rents may have become increasingly skewed, with an increasing share going to high-wage workers.”¹⁵⁰ Arthur Sakamoto and ChangHwan Kim recently showed that as margins increase in manufacturing and finance, managers and professionals capture the gains but other workers do not.¹⁵¹ But without knowing whether these margins are due to overcharge or superior firm performance, it is possible that more profitable firms simply pay their more talented workers more.¹⁵²

The evidence that wealthy owners capture an inordinate amount of overcharge is stronger than the evidence for wealthier employees. Households in the top one percent of earners own most of business equity, between 55% and 60%.¹⁵³ Thus, whatever portion is distributed to owners would on average contribute to income inequality.¹⁵⁴ Although the progressive income redistribution from reducing overcharge would be less immediate and direct than on the spending side, in theory, reducing overcharge should over time increase the income earned by workers outside the top one percent.

C. Summary of Inequality and Overcharge

The issue of precisely how much overcharge increases inequality remains open, because that question is so complex and depends on data that is not available. It would be a mistake, however, to ignore the empirical studies and theory in forming a perspective. What then would be the best working hypothesis moving forward?

On the spending side, lower-income consumers are likely less insulated from overcharge for two main reasons. First, they are more vulnerable to significant categories of overcharge—particularly related to finance. Second,

149 See Lucian Arye Bebchuk, et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 754 (2002) (proposing an analytical model that views compensation decisions through the lens of managerial power and influence).

150 Jae Song et al., *Firming Up Inequality*, 134 Q.J. ECON. 1, 6 (2019).

151 See Arthur Sakamoto & ChangHwan Kim, *Bringing Productivity Back In: Rising Inequality and Economic Rents in the U.S. Manufacturing Sector, 1971 to 2001*, 55 SOC. Q. 282, 295–97 (2014); Donald Tomaskovic-Devey & Ken-Hou Lin, *Income Dynamics, Economic Rents, and the Financialization of the U.S. Economy*, 76 AM. SOC. REV. 538, 551 (2011).

152 See Holger M. Mueller et al., *Within-Firm Pay Inequality*, 30 REV. FIN. STUD. 3605, 3632 (2017) (concluding that differences in managerial talent, not rent seeking, explain why higher income workers earn more in high-margin firms).

153 See Arthur B. Kennickell, *Ponds and Streams: Wealth and Income in the U.S., 1989 to 2007*, at 2–3, 78–79, fig.A5a (Fed. Reserve Bd., Finance and Economics Discussion Series No. 2009-13, 2009) (calculating business owned directly and indirectly such as through retirement accounts).

154 See *supra* note 132 and accompanying text. Of course, there would be variation by companies and industries, depending on ownership composition.

they spend considerably more of their income. Moreover, in the absence of evidence to the contrary, it would make more sense to assume that overcharge in the markets yet to be studied would produce similar regressive results in light of the theory, indirect evidence, and deployment of related behavioral pricing tactics. The working hypothesis should thus be that reducing overcharge would benefit low- and middle-income consumers the most in terms of savings on spending. Even without that assumption, however, what is currently known provides sufficient evidence of a meaningful connection between overcharge and income level in a significant subset of consumer spending.

Additionally, if the scholars who believe that antitrust-related overcharge and entry barriers also contribute to income inequality are correct—which the research overall suggests—consumer-protection-related overcharge should as well.¹⁵⁵ But that raises the question of the potential magnitude of consumer law's impact on inequality. For the sake of illustration, consider a static accounting simulation in which senior managers split all overcharge equally with owners—many of whom are middle-income earning households, through stock ownership. Under that assumption of split internal distribution between managers and owners, removing a trillion dollars in overcharge from the economy would lower the share of income earned by the top one percent of households from about 20% today to about 15%.¹⁵⁶ Those numbers are, however, heavily influenced by the assumptions made. Using the same basic simulation, if it is instead assumed that senior managers capture 75% of the overcharge within the firm, and the overall level of overcharge reduced is \$1.5 trillion, the share of income earned by the top one percent falls to 11%.¹⁵⁷

To put these hypothetical numbers in perspective, the dramatic increase in inequality that originally prompted global leaders' and Occupy Wall Street protesters' concerns about inequality in the first place was that in the early 1980s the top one percent of households earned close to 12% of all income, but that share had since shot up to about 20%.¹⁵⁸ Thus, under basic assumptions consistent with the preliminary research available, removing overcharge could even return income shares to close to their most evenly distributed

155 See, e.g., Edlin & Haw, *supra* note 100 (linking occupational licensing to inequality).

156 There are multiple ways to conduct such a simulation. These figures are based on tracing the overcharge payments through the economy using federal spending, income, and ownership data. See Van Loo, *supra* note 101. This 15% figure rests on core assumptions that most of this trillion dollars in overcharge is profitable in the sense of increasing margins; that senior executives rather than mid- and low-level employees capture a meaningful portion as income before distribution to ownership; and that the remaining overcharge becomes income for households in proportion to their overall share of business ownership, a substantial portion of which goes to middle-income and even affluent households outside the top one percent. *Id.* The static approach contrasts with a dynamic model, discussed below.

157 *Id.*

158 See *supra* note 14 and accompanying text.

levels in the past century.¹⁵⁹ Moreover, those income adjustments are separate from the spending side, which would put large sums of money put back into all consumers' pockets—and presumably into low- and middle-income consumers' pockets at disproportionate rates.

The static simulation that produced these illustrative figures ignores many variables, such as total annual household expenditures, employment levels, prices, inflation, market size, education levels, and savings rates. A more dynamic simulation that included these and other factors could go either direction, but based on economic theory that broader set of factors would be expected to show even greater economic gains from reducing overcharge.¹⁶⁰ Still, since it is not possible with existing data to produce a rigorous estimate of how consumer law affects income inequality, even a static simulation helps to inform the question of whether consumer law merits examination by those who are looking to reverse the rise in income inequality in recent decades.

It is also worth noting that one leading study has concluded that business markups over marginal-cost pricing increased from about 21% in 1980 to 67% by 2018.¹⁶¹ A historical narrative of overcharge causing inequality is not central to, or necessary for supporting, this Article's argument. But as I have argued elsewhere, companies' ability to engage in behavioral overcharge has increased significantly due to sophisticated pricing algorithms and quantitative insights into consumers.¹⁶² Industry concentration has also by many accounts steadily risen over time. A plausible inference, and hypothesis worth testing, is that increases in businesses' ability to obtain overcharge contributed to the growth in income inequality.¹⁶³ If true, the possibility of lowering inequality through consumer law becomes even more worthy of exploration.

In short, although more study is needed to estimate the magnitude and scope, policymakers and enforcement authorities must make decisions based

159 See Piketty et al., *supra* note 14 (providing longitudinal data on income distribution).

160 Based on economic theory, simulating a broader set of factors should indicate greater overall gains from reduced overcharge, such as a faster-growing economy due to higher consumer spending. A more comprehensive analysis would presumably over time also indicate even higher reductions in inequality as the effect of accumulated wealth is considered—which provides greater income in future years. See Van Loo, *supra* note 101.

161 Jan De Loecker et al., *The Rise of Market Power and the Macroeconomic Implications* 53 (Nov. 22, 2018) (unpublished manuscript), <http://www.janeckhout.com/wp-content/uploads/RMP.pdf> (noting that overcharge may be large and estimating that the markup above competitive level (marginal cost pricing) has increased from about 21% in 1980 to 61%). But see Mark Bils et al., *Resurrecting the Role of the Product Market Wedge in Recessions*, 108 AM. ECON. REV. 1118, 1136 (2018) (producing findings consistent with no trend in price-cost markup).

162 See, e.g., Van Loo, *supra* note 5 (discussing firms' rising ability to earn overcharge).

163 There are surely various structural causes of, and potential solutions to, rising inequality. See Robert C. Hockett & Saule T. Omarova, *Private Wealth and Public Goods: A Case for a National Investment Authority*, 43 J. CORP. L. 437, 438 (2018).

on the facts available—even if that decision is not to act. Based on the data available, it would be sensible to conclude that consumer protection can be a powerful vehicle for achieving distributional goals because it directly addresses two types of inequality—in spending and income. Either one of these alone is already meaningful. Yet they have a cumulative effect. In light of the existing research on the size of overcharge and its distributional effects, the most empirically informed working hypothesis is that correcting consumer overcharge would significantly lessen consumption inequality. That starting point is the opposite of the one often adopted by policymakers and even scholars—that the relationship is unworthy of attention.

III. CONSUMER LAW'S POTENTIAL TO REDUCE OVERCHARGE

Given the theory and preliminary evidence suggesting that overcharge is large and has a big impact on equality, intervention should appeal to policymakers who believe that regulation would work. This Part explores the available evidence and political path forward.

A. *Assessing Whether Consumer Law Works*

Generations of scholars have warned of the risks and documented the failures of consumer market regulation.¹⁶⁴ The intention of such warnings was not necessarily to discourage regulation. Nonetheless, there has been less sustained attention to the promise of consumer market interventions. To adopt an informed perspective, it is necessary to have a fuller sense of its potential rewards alongside those well-documented risks.

A common concern is that market regulation can end up harming those whom lawmakers intended to help. In a classic qualitative study of regulating slum housing markets on behalf of the poor, Bruce Ackerman articulated the fear that “landlords who are required to improve their properties to code standards will simply pass on the added costs to their tenants by increasing rents or . . . will abandon the properties entirely, thereby depriving tenants of even sub-code accommodations.”¹⁶⁵ Similar reasoning surfaces in arguments about payday loans because banning them could deprive vulnerable populations of valuable access to credit.¹⁶⁶ The law and economics literature has formalized and expanded on those concerns, showing how excess or ill-advised regulation can hurt the economy by reducing market efficiency or

164 See, e.g., Michael Barr et al., *The Case for Behaviorally Informed Regulation*, in *NEW PERSPECTIVES ON REGULATION* 25, 42 (David Moss & John Cisternino eds., 2009); George J. Stigler & Claire Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 *J.L. & ECON.* 1 (1962).

165 See Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *YALE L.J.* 1093, 1095 (1971).

166 The evidence on this question is mixed. See, e.g., Angela Littwin, *Testing the Substitution Hypothesis: Would Credit Card Regulations Force Low-Income Borrowers into Less Desirable Lending Alternatives?*, 2009 *U. ILL. L. REV.* 403 (2009); Paige Marta Skiba, *Regulation of Payday Loans: Misguided?*, 69 *WASH. & LEE L. REV.* 1023, 1024 (2012).

weakening small businesses.¹⁶⁷ This broader category of hard regulations also faces resistance for being paternalistic because it restricts choices.¹⁶⁸

Partly due to the intellectual and political resistance, policymakers in recent decades have turned to lighter forms of regulation that preserve choice and instead “nudge” people toward better outcomes.¹⁶⁹ For instance, workers who want to save for retirement often do not enroll in retirement plans. Instead of mandating that all workers have a 401(k) plan, lawmakers can increase participation by requiring employers to make enrollment in a 401(k) the default unless a worker opts out.¹⁷⁰ These reforms leverage the insights of behavioral law and economics, “broadly regarded in recent years as among the most promising and exciting new developments in public policymaking theory and practice.”¹⁷¹ The intellectual appeal of behavioral economics stems from the hope that insights into “the actual cognitive frameworks . . . of choice-making individuals will provide a sounder foundation than neoclassical economics can for the design of legislation and regulation.”¹⁷² The political appeal lies in the possibility of intervening without restricting choice, and thus allowing lawmakers “to have [their] cake and eat it too.”¹⁷³

The explosion in what may be broadly described as behavioral interventions has led to two high-profile critiques that have dampened enthusiasm for what had been consumer law’s most politically promising path to regulation. One is that businesses can adapt easily to the new mandates. Lauren Willis argued that defaults are “slippery” if businesses can convince the consumer to opt into the harmful behavior.¹⁷⁴ Willis used the example of checking-account overage fees, which are incurred when the customer attempts to withdraw more money than is available in the account—even if the customer

167 See, e.g., Jason Scott Johnston, *The Freedom to Fail: Market Access as the Path to Overcoming Poverty and Inequality*, 40 HARV. J.L. & PUB. POL’Y 41, 45 (2017) (arguing that consumer financial regulations hurt small businesses and increase inequality); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 807 (1975) (concluding that public regulation is a larger source of public costs than private monopoly).

168 Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1161 (2003) (referencing “the straightforward insistence that, in general, people should be free to opt out of specified arrangements if they choose to do so”).

169 See, e.g., *id.* at 1162 (“Libertarian paternalism is a relatively weak and nonintrusive type of paternalism, because choices are not blocked or fenced off.”).

170 *Id.* at 1159–60.

171 See Bubb & Pildes, *supra* note 19, at 1595.

172 *Id.*

173 Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1212 (2003). It should be noted that some interventions labeled nudges provide an alternative choice that is “meaningless for people who do not have the cognitive or motivational resources needed to overcome the nudge,” which “cannot ever be truly libertarian nudges.” Gregory Mitchell, *Libertarian Nudges*, 82 MO. L. REV. 695, 698 (2017).

174 Willis, *supra* note 20.

is just a penny short.¹⁷⁵ Overage fees had often led to surprise and accidental charges of thirty dollars or more that could pile up with each purchase.¹⁷⁶ Rather than banning the fees, however, Congress passed legislation requiring banks to gain customer permission before enrolling them in the fee-heavy plan, with the default being that the bank would simply deny the withdrawal.¹⁷⁷ That mechanism responded to behavioral research suggesting that people rarely changed the default, and thus defaults were “sticky.”¹⁷⁸ Willis concluded that the legislation proved less effective because bank sales representatives convinced large numbers of customers—especially those who were low income—to opt in by exploiting confusion and calling the overage fee programs by names such as “Account Protector.”¹⁷⁹

The second highly influential critique of consumer regulation is Omri Ben-Shahar and Carl Schneider’s argument that “mandated disclosure repeatedly fails to accomplish its ends.”¹⁸⁰ After demonstrating how the average consumer is inundated with mandated disclosures throughout the day, from the milk carton nutrition label to the end-user license agreement on computer software, they give numerous examples of how consumers often do not read or understand the disclosures, and those that do read the disclosure often react differently than how policymakers intended.¹⁸¹ Ryan Bubb and Richard H. Pildes point out an irony in all of these disappointments: for the reasons that behavioral economics identifies—people often act irrationally—many of the policies animated by excitement about behavioral economics are doomed to fail because they still rely on people to make good decisions.¹⁸²

Perhaps in light of those limitations, many policymakers have sought disclosures for automated assistants rather than people, what can be seen as the rise of the digital regulator.¹⁸³ The idea is that an online tool can remove

175 *Id.* at 1174.

176 *Id.* at 1175–76.

177 *See id.* (discussing how fees were often large relative to the amount withdrawn).

178 *See id.* at 1161 (“The particular mechanisms that give defaults power can be divided into three classes: transaction barriers, judgment and decision biases, and preference formation.”).

179 *Id.* at 1182 (quoting *Standard Overdraft Services: Are You In?*, SOVEREIGN BANK, <http://www.sovereignbank.com/personal/promotions/sovereign-account-protector.asp> (last visited Sept. 11, 2013).; *id.* at 1184 (outlining how financial institutions respond strategically to regulations in ways that undermine regulatory intent).

180 *See, e.g.*, Ben-Shahar & Schneider, *supra* note 19, at 665 (“The great paradox of the Disclosure Empire is that even as it grows, so also grows the evidence that mandated disclosure repeatedly fails to accomplish its ends. We proffer several kinds of evidence of that failure. First, disclosers do not always provide, and disclosees do not always receive, information. Second, disclosees often do not read disclosed information, do not understand it when they read it, and do not use it even if they understand it. Third, mandated disclosure does not improve disclosees’ decisions.”).

181 *Id.* at 664–65. Ben-Shahar and Schneider saw the most potential in smart disclosures aimed at sophisticated intermediaries, such as price-comparison engines. *Id.* at 746–47.

182 Bubb & Pildes, *supra* note 19, at 1595.

183 Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1268–70 (2017).

the human error by processing and simplifying the disclosed information—such as price, product data, and reviews—and thereby regulate overcharge.¹⁸⁴ However, smart disclosures have also proven to be more complex and involved than its designers realized because, among other challenges, humans still must decide which digital helper to use and must process its advice effectively despite potential bias.¹⁸⁵ Additionally, entrepreneurs launching proconsumer online tools have faced considerable regulatory and anticompetitive obstacles.¹⁸⁶ These many real failures and disappointments of behavioral economics are important to recognize but do not mean consumer law as a whole is ineffective.

Instead, these complications indicate that empirics are needed to settle whether consumer law can achieve its desired effects. Since most of these critiques arose during the early period of applying new interventions, they did not incorporate many rich empirical studies that required several years to develop. A review of that evidence follows.

Although scholars have often provided theoretical support for market-specific interventions as a result of the problem they identify,¹⁸⁷ the most important literature to consider is that studying real-world interventions. In 2007, the Italian Parliament approved a law requiring large electronic signs along the highways showing the prices of all nearby gas stations.¹⁸⁸ One study found that this single intervention lowered prices and reduced profit margins by 20%.¹⁸⁹ Price transparency mandates in the German market similarly produced a 13% decrease in gas stations' margins following pricing signs.¹⁹⁰ Because gasoline is fungible, it presents a more straightforward decision-making context and is more conducive for consumers to process disclosures and for policymakers to design interventions. However, similar interventions work in other contexts.

Supermarkets involve a less straightforward decision context, given the many different goods that shoppers must compare to figure out which store to visit.¹⁹¹ An Israeli law passed in 2015 required stores to release their price

184 *Id.* at 1275.

185 *See, e.g., id.* at 1289–90; *see also* Christopher G. Bradley, *Fintech's Double Edges*, 93 *CHI-KENT L. REV.* 61, 62 (2018) Matthew A. Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 *CHI-KENT L. REV.* 3 (2017); William Magnuson, *Regulating Fintech*, 71 *VAND. L. REV.* 1167 (2018).

186 *See* Rory Van Loo, *Digital Market Perfection*, 117 *MICH. L. REV.* 815, 815 (2019).

187 By one account, for instance, “savings from imposing even moderately more intense shopping on all U.S. credit card borrowers would be \$36 billion per annum.” Victor Stango & Jonathan Zinman, *Borrowing High Versus Borrowing Higher: Price Dispersion and Shopping Behavior in the U.S. Credit Card Market*, 29 *REV. FIN. STUD.* 979, 981 (2016).

188 Rossi & Chintagunta, *supra* note 69, at 408.

189 *Id.* at 409.

190 Felix Montag & Cristoph Winter, *Price Transparency Against Market Power* 3 (Aug. 6, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3256476> (finding that mandatory price disclosure in the German petrol market decreased retail margins by about 13%).

191 *See supra* note 77 and accompanying text.

and product information in machine-readable form.¹⁹² The law enabled entrepreneurs to launch online price-comparison tools that many shoppers used to decide where to buy.¹⁹³ Within a few years, scholars concluded that the legislation had reduced retail prices by 4%–5%.¹⁹⁴

Examinations of even more complex decision contexts have produced comparable results. Recall the study finding that Medicare patients pay 30% more due to their inability to select the best plan given the options available.¹⁹⁵ Researchers sent a letter with personalized information clarifying patients' Medicare prescription plan options to some consumers, and compared the subsequent choice of plans to a control group that received a similar letter without the choice-selection help.¹⁹⁶ The group that received the helpful information saved 5% on average due to more optimal decisions.¹⁹⁷

Other field experiments corroborate the possibility of information improving choice in complex spending contexts. In one, researchers obtained the unusual cooperation of one of the largest nationwide payday lenders to run a field experiment in seventy stores across eleven states, and then to receive follow-up information about the customers four months later.¹⁹⁸ They tested various disclosures, including providing the total cost to the borrower over the course of two months and comparing the annual interest rate of over 400% to the typical credit card rate of under 30%.¹⁹⁹ They found that those groups exposed to lenders' most powerful intervention reduced their payday loan borrowing by 11%.²⁰⁰ Another study concluded that a government website with information about medical procedures lowered the costs of medical procedures by 11%.²⁰¹

Taken as a whole, the empirical research suggests that well-designed behavioral interventions can significantly reduce consumer overcharge.²⁰² These potential savings, though meaningful, do not reflect the total savings made possible by disclosures. Most are based only on a single type of intervention, such as sending a letter with clarifying information, or only mandating price disclosure in machine-readable form. A combination of behavioral interventions could produce a larger impact. The design of disclosures in

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

193 *See id.*

194 *Id.*

195 *See* Abaluck & Gruber, *supra* note 54, at 1190.

196 *See* Kling et al., *supra* note 54, at 199.

197 *See id.*

198 Bertrand & Morse, *supra* note 63, at 1867 (specifying that permission was obtained from the customers before sharing their information).

199 *Id.* at 1865–66.

200 *See id.* at 1865.

201 Zach Y. Brown, *Equilibrium Effects of Health Care Price Information*, 101 *REV. ECON. & STAT.* 699, 699 (2019).

202 *Cf.* Quinn Curtis, Andrew Hayashi & Michael A. Livermore, *Tacking in Shifting Winds: A Short Response to Bubb and Pildes*, 127 *HARV. L. REV. F.* 204, 209 (2014) (“[T]he capacity of well-designed choice-preserving policies to increase welfare when carefully applied.”).

the studies could also be improved for greater impact. The letter sent to Medicare patients, for instance, was not developed through an iterative process and systematic testing of which framing is most likely to get the patient's attention and cause the desired behavior. Well-designed combined interventions could offer even more dramatic consumer savings.

Of course, companies might respond to the interventions by adapting their behavior, potentially undermining disclosure's efficacy. The studies examining the impact of sending a letter to Medicare patients or of posting information through a cooperative payday lender do not reveal the ultimate consumer savings after the seller has adjusted its practices. However, some of the studies do cover strategic business responses: those quantifying average market prices over the span of several years, such as the European laws requiring gasoline highway signs or the Israeli supermarket digital disclosures.²⁰³

Most of the discussion thus far on effectiveness has addressed behavioral interventions, or those relying on digital intermediaries, because those are the politically most-supported type of consumer law. It is worth noting that more direct prohibitions of behavior would be expected to produce even larger magnitudes of reduction in overcharge. For instance, in studying the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, scholars have found that the parts of the Act that imposed hard limits on fees had a far stronger impact than the Act's disclosures.²⁰⁴

Moreover, companies cannot always adjust following hard bans to simply pass on the lost revenues to consumers. Three studies by economists of the CARD Act of 2009, which restricted credit card interest-rate hikes and fees, and imposed disclosures in the monthly bill, show that the law transferred billions of dollars of surplus from financial institutions to consumers without the companies making up their lost revenues by raising prices or enacting new fees elsewhere.²⁰⁵ Thus, although scholars are correct to point out that consumer laws have sometimes failed to achieve the desired effectiveness, the

203 See Rossi & Chintagunta, *supra* note 69; *supra* note 192 and accompanying text.

204 See Agarwal et al., *supra* note 105, at 111.

205 Agarwal et al., *supra* note 105, at 111, 115 (estimating a nearly \$12 billion transfer of surplus from businesses to consumers and concluding that within the immediate two years following CARD Act regulations, credit card companies did not make up lost fees by moving those fees elsewhere); Bar-Gill & Bubb, *supra* note 37, at 999–1000 (“Overall, through our data, we saw . . . no substantial increases in other credit card rates and fees to compensate for the consequent loss in fee revenue [from the CARD Act regulations]. Our findings are corroborated by the fall in interest and fee revenues reported by credit card issuers over the period.”); Nelson, *supra* note 107 (finding surplus increases for consumers came at the expense of lender profit following the CARD Act); see also Aluma Zernik, *Overdrafts: When Markets, Consumers, and Regulators Collide*, 26 GEO. J. ON POVERTY L. & POL’Y 1, 3–4 (2018) (remarking that annual percentage rates that consumers pay on overdraft fees in Israel and the United Kingdom are “less than a tenth of the rates in the United States” due in large part to more significant consumer-oriented regulations in Israel and the United Kingdom).

evidence suggests that well-crafted consumer law interventions can succeed in reducing consumer prices even in the face of adaptation by businesses.

These studies all speak to the potential to reduce overcharge, and most directly to the possibility of transferring surplus from businesses to consumers. However, most do not measure the impact of that reduction on inequality—a problem that has a ready solution discussed below.²⁰⁶ Nonetheless, studies of the CARD Act did find that consumers with lower credit scores—who also have lower average incomes—benefited most from the legislation.²⁰⁷

Additionally, the research speaks to that distributional question indirectly. Numerous studies above found that companies' profit margins decreased due to the interventions.²⁰⁸ In an immediate sense, that reduction in profits should reduce income inequality given that owners are overall wealthier than consumers.

In terms of which income groups benefit most from the disclosures, the research is limited. Borrowers without a college education responded disproportionately to payday loan disclosures in terms of lowering their dependence on such loans.²⁰⁹ However, it is possible that in some contexts those with higher education would be more capable of processing the disclosures.²¹⁰ Whether or not the poor benefit more than other groups from interventions, they still benefit,²¹¹ and may overall still have the most to gain if the interventions are targeted at the practices and spending categories that affect them the most.²¹²

Despite the evidence that less-educated consumers may benefit more from interventions, even if well-educated consumers benefit more the interventions could still reduce inequality. Low-income consumers have long been the top priority for consumer protection, but they are not the only group of concern in an era of skyrocketing income inequality. By some accounts, the squeezing of the middle class is what defines the new “gilded” age—the real gap that has emerged is between the ultrarich, those earning millions of dollars per year, and everyone else.²¹³ When masses of protestors took to the streets of New York in 2011 for Occupy Wall Street, a large portion of households referred to in the “we are the 99%” slogan were, statisti-

206 See *infra* Section III.B.

207 See Agarwal et al., *supra* note 105; *supra* note 105 and accompanying text.

208 See *supra* note 205 and accompanying text.

209 Bertrand & Morse, *supra* note 63, at 1867. A possible explanation for this is that better-educated consumers are already performing some of the analyses and research that the law could provide through disclosures.

210 Ben-Shahar & Schneider, *supra* note 19, at 742; *cf.* Boonen et al., *supra* note 113, at 349 (“[S]earching for information has a stronger impact on the switching propensity of higher than lower educated people . . .”).

211 See, *e.g.*, Boonen et al., *supra* note 113, at 349.

212 See *infra* Part IV.

213 See Saez & Zucman, *supra* note 124, at 523 (concluding that the decline in share of the bottom 90% is driven by the middle class).

cally speaking, college educated.²¹⁴ Indeed, the main driver of the explosion in income inequality is the ascendancy of the ultrawealthy—those in the 99.9th percentile.²¹⁵ A consumer law reform affecting the bulk of consumers, but mostly those outside the ultrawealthy, may thus reduce income inequality where it has taken the biggest hit in recent decades.

To reiterate, many of the critiques raised about consumer law interventions are still valid. Consumer regulations sometimes miss their mark in costly ways. And there is evidence that in some cases, businesses are able to offset regulation-driven losses in one area by increasing costs on other products.²¹⁶ This Section's thesis is not that consumer law is always the answer, or works more often than not.²¹⁷ Rather, there is strong evidence that consumer law can have a significant positive impact, and the examples of its failures indicate merely how not to design those interventions. For instance, Natasha Sarin has concluded that consumer finance interventions targeting nonsalient fees are more likely to succeed.²¹⁸

More importantly, if policymakers adopt an empirically informed perspective, they can already have a sense of the magnitude of how much consumer law interventions might reduce overcharge and benefit society. Light interventions have substantially reduced prices when designed well, and offer particular promise when aimed at digital intermediaries. Even the 4%–5% savings from the Israeli supermarket context, if applied to spending on U.S. goods, would amount to between \$114 and \$143 billion in savings.²¹⁹ Although it is still unknown how much overcharge exists in many categories, 5% savings applied across all consumer spending would amount to almost \$700 billion of surplus transferred from businesses to consumers.²²⁰

Put simply, even behavioral interventions have potential to dramatically redistribute wealth and reduce prices for all consumers. If the political will exists for harder interventions—such as banning specific deceptive practices—overcharge reductions could prove considerably greater in some

214 According to the 2018 Census Report, approximately 32.25% of Americans above the age of eighteen have earned a bachelor's degree or higher. *Current Population Survey (CPS)*, U.S. CENSUS BUREAU, <https://www.census.gov/cps/data/cpstablecreator.html?#> (last visited Mar. 12, 2019).

215 See generally Piketty et al., *supra* note 14.

216 See, e.g., Vladimir Mukharlyamov & Natasha Sarin, *The Impact of the Durbin Amendment on Banks, Merchants, and Consumers* 3 (Univ. of Pa. Law Sch., Faculty Scholarship, Paper No. 2046, 2019), https://scholarship.law.upenn.edu/faculty_scholarship/2046 (finding that banks offset losses from the Durbin Amendment by increasing fees on other products, such as checking accounts).

217 Technical and social constraints should be leveraged alongside legal constraints. See Christopher G. Bradley, *The Consumer Protection Ecosystem: Law, Norms, and Technology*, 97 DENV. L. REV. (forthcoming 2019), <https://ssrn.com/abstract=3349190>.

218 See Sarin, *supra* note 30.

219 See *supra* note 194 and accompanying text.

220 Calculated as 0.05 * \$13.9 trillion. See Table 2.3.5, *supra* note 11 (estimating annualized total consumer spending at \$13.9 trillion in 2018).

spending categories.²²¹ When cast against that promising backdrop of consumer law, the insightful nuances of prominent critiques should not be taken as evidence that redistribution should be left to more predictable tax transfers. Instead, those critiques can serve the goal that many of their authors intended: informing the path forward for designing dependable consumer laws.²²²

B. *Political Economy*

Is it realistic to address distribution through consumer law in a deregulatory era? Regulation restricting behavior is generally unpopular, while the idea of “freedom of choice” has broad appeal.²²³ Large businesses and wealthy individuals exert considerable influence on Congress.²²⁴ It is difficult to imagine new federal legislation increasing consumer law regulation anytime soon.

On the other hand, taxes are unpopular as well. The law and economics framework rests on the assumption that tax redistribution will make up for problematic inequality created by laws. But that expected tax redistribution often never arrives due to the “*political* impediments that must be surmounted to achieve welfare-maximizing distributive results.”²²⁵ Consumer law should thus not be left out of distributional conversations solely based on its lack of popularity, any more than taxes should.

Moreover, at least among economists there is little doubt that consumer regulation is necessary for efficient, well-functioning markets.²²⁶ By removing market distortions, consumer laws advance the ideals of free markets. The Sherman Antitrust Act has been deemed a “super-statute” reflecting fundamental American values that transcend the four corners of the statute.²²⁷

221 In finance and insurance, in particular, the overcharge estimates suggest significantly higher magnitudes. See *supra* Section I.B.

222 See, e.g., Ben-Shahar & Schneider, *supra* note 19, at 651 (“We believe commentators and lawmakers must instead undertake the intellectually burdensome and politically painful work of tailoring solutions to problems.”); Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1316 (2015) (“[P]erformance-based regulation should be undertaken as a purposeful experiment, one that promises to be a bridge to more efficacious forms of consumer law.”).

223 Bubb & Pildes, *supra* note 19, at 1594.

224 See, e.g., JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS 54–56 (2010); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1446 (2016).

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

226 See MANKIW, *supra* note 37, at 11–13 (illustrating the important role in economic theory that regulation plays in well-functioning markets); PITOFSKY ET AL., *supra* note 103, at 2 (noting the “widely shared view that private interests operating in free markets, and unchecked by effective government antitrust rules, will harm efficiency and consumer welfare”).

227 William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216, 1231–32 (2001).

If competitive consumer markets are viewed as an alternative to either new or existing taxes, it is plausible that consumer law could be seen as the better of two undesirable centralized alternatives.

Additionally, taxes have one real lever for action: new legislation. In contrast, consumer law offers diverse political avenues. Many consumer protection laws currently on the books, such as those prohibiting fictitious pricing, would reduce overcharge but are not enforced.²²⁸ The Federal Trade Commission (FTC) could arguably fight excess prescription drug prices through antitrust law.²²⁹ Public officials in all fifty states, and private plaintiffs can bring many consumer lawsuits, including for unfair and deceptive acts, which are broadly defined so as to include many practices that lead to overcharge.²³⁰ State authorities can also supervise their occupational licensing boards more closely to curtail anticompetitive licenses.²³¹ Although both tax law and regulation face political resistance, consumer law does not depend on legislation to improve distribution.

IV. TOWARD MACRO CONSUMER LAW

The potential for consumer law to reduce considerable regressive overcharge raises the ultimate question of the path forward. The clearest initial step is for administrative agency leaders, advocates, attorneys general, and even consumers themselves to leverage the full power of the law to reduce companies' ability to anticompetitively raise prices. To determine the appropriate level of intervention, policymakers need to build stronger evidentiary foundations. A shift in the normative foundations for intervention would further strengthen the consumer law framework.

A. *Monitoring Overcharge*

The first step is to exercise governmental authority to access business data that will give a fuller picture of the scale and distributional impact of overcharge. The private data collected would inform the conceptual shift toward more macro analysis of consumer law. In an immediate sense, the goal would be to expand the quantitative analysis to integrate a broader set of factors relevant to the full societal impact of any given intervention.

Although observers may debate whether the current evidence is sufficient to expand regulation, the bar for collecting information is lower as a

228 See Friedman, *supra* note 73, at 922, 933.

229 See Harry First, *Excessive Drug Pricing as an Antitrust Violation*, 82 ANTITRUST L.J. 701, 705 (2019); see also D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 791 (2013) ("Scholars have estimated the U.S. cartel detection rate between 13 and 17 percent.").

230 See, e.g., Prentiss Cox et al., *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 41 (2017); Van Loo, *supra* note 5, at 1369–72.

231 William M. Sage & David A. Hyman, *Antitrust as Disruptive Innovation in Health Care: Can Limiting State Action Immunity Help Save a Trillion Dollars?*, 48 LOY. U. CHI. L.J. 723, 735, 750 (2017).

matter of law and policy.²³² Scholars have characterized quality information as the “lifeblood” of good governance.²³³ By some accounts, “[p]erhaps the most important and least intrusive aspect of any mechanism for regulating human conduct is collecting information on the need for the regulation.”²³⁴

The key federal regulators able to act on overcharge, the Consumer Financial Protection Bureau (CFPB) and FTC, have expansive information-collection authority that would help to quantify more accurately the level of overcharge and its distributional implications.²³⁵ If that authority comes up short for any given desired analysis, or if regulators prove reluctant to use it, Congress could grant additional authority or mandate minimum information collection, as it has repeatedly throughout history to ensure safety, stabilize the financial system, and protect the environment.²³⁶ However, legislation is unnecessary for a significant uptick in overcharge monitoring and analysis.²³⁷

232 By analogy, in criminal law, the bar is also lower for a criminal search than for a conviction. This analogy is loosely informative, by showing the relative difference between exercising the power to collect information and the power to use that information to prosecute those suspected of wrongdoing. However, the standards for criminal law collection of information and prosecution are both higher than the standards for civil law. The impetus for government information collection often comes from journalists, academics, or other third parties alerting authorities of the need to know more. The prototypical example of this is Upton Sinclair’s *The Jungle*. See Roger Roots, *A Muckraker’s Aftermath: The Jungle of Meat-Packing Regulation After a Century*, 27 WM. MITCHELL L. REV. 2413, 2413–14 (2001).

233 Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 277 (2004) (“Information is the lifeblood of regulatory policy.”); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1423 (2011) (“Good information is the lifeblood of effective governance.”) (making “the commonplace observation—so obvious that it ought to be uncontroversial—that many public decisions turn on some form of predictive judgment, such that a decisionmaker’s choice does and should depend on the quality and content of the information available to her”).

234 Thomas O. McGarity & Karl O. Bayer, *Federal Regulation of Emerging Genetic Technologies*, 36 VAND. L. REV. 461, 474 (1983).

235 On the extensive authority of the CFPB, and the underutilized authority of the FTC, see Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 VAND. L. REV. 1563 (2019).

236 See Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369 (2019) (reviewing the historical provision of monitoring authority).

237 Although the idea here is to conduct more regular analyses, the FTC and CFPB have demonstrated their capabilities by conducting one-off, significant market-wide studies of other topics. See, e.g., CONSUMER FIN. PROT. BUREAU, LEVERAGING TECHNOLOGY TO EMPOWER MORTGAGE CONSUMERS AT CLOSING 11 (2015), https://files.consumerfinance.gov/f/201508_cfpb_leveraging-technology-to-empower-mortgage-consumers-at-closing.pdf; FED. TRADE COMM’N, PATENT ASSERTION ENTITY ACTIVITY 37–38 (2016), https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf (compelling companies to provide nonpublic information to study patent competition).

Companies possess troves of data relevant to filling the informational gaps identified throughout this Article. They continually run experiments to see whether their profits go up when they introduce behavioral pricing practices.²³⁸ They have historical data about which employees—whether the chief executives or low-level staff—received raises following increases in profits.²³⁹ And in “a world where every action we take can be observed, recorded, analyzed, and stored,” businesses know a great deal about their customers’ wealth even without directly asking.²⁴⁰ That abundance of private data could furnish regulatory insights into the distributional consequences of consumer law.

Although the bar for collecting information is lower than for intervening in markets, it still requires justification. I have previously discussed in greater depth the normative foundations for regulatory collection of information, as well as the need to adopt constraints and weigh its drawbacks.²⁴¹ In brief, businesses incur costs in supplying regulatory information, and the government expends resources processing it.²⁴² The burden of data collection could be lessened in many ways, such as by statistically sampling only a few companies’ data in a given market at any point in time, and perhaps returning to the same market every few years. The privacy risks must also be weighed should regulators collect consumers’ personal data.²⁴³ The design of the monitoring program can minimize such privacy risks, however, and existing laws already constrain regulatory use of personal data—even holding individuals criminally liable for misuse.²⁴⁴

Personal data is not necessary to make significant strides toward a macro perspective on consumer law, since many markets lack any rigorous overcharge studies and in previously studied markets a decade or longer often passes without a rigorous estimate. Thus, while the benefits and drawbacks of varying levels and types of monitoring must be weighed, even occasional modest increases in data collection would advance understanding considerably.

238 See Van Loo, *supra* note 5, at 1331 (providing evidence of large-scale experimentation to increase prices); cf. Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014) (surveying sellers’ abilities to track, study, and monetize online behavior).

239 See, e.g., JAMES MANYIKA ET AL., MCKINSEY GLOBAL INST., *BIG DATA: THE NEXT FRONTIER FOR INNOVATION, COMPETITION, AND PRODUCTIVITY* 6 (2011) (surveying uses of data).

240 Justin Brookman, *Protecting Privacy in an Era of Weakening Regulation*, 9 HARV. L. & POL’Y REV. 355, 355, 358–60 (2015) (summarizing the vast array of information that businesses have); Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REG. 547, 565–66 (2016) (explaining how businesses purchase or create customer scores that give great weight to estimated wealth).

241 Van Loo, *supra* note 235.

242 These costs include monetary costs to businesses of providing information and the trade secrets of the business.

243 G.S. Hans, *Curing Administrative Search Decay*, 24 B.U. J. SCI. & TECH. L. 1, 2–3 (2018).

244 See Van Loo, *supra* note 235.

Moreover, the FTC already implements safeguards in collecting sensitive profit-related data for its antitrust analyses, as does the CFPB in analyzing evidence of racial discrimination by lenders.²⁴⁵ The Equal Employment Opportunity Commission annually collects salary information from most businesses nationwide in anonymized format to detect discrimination.²⁴⁶ The IRS holds sensitive personal information and business profit data in nonanonymized forms.²⁴⁷ Thus, precedents exist for creating a successful data-collection regime of valuable private business information that protects privacy and minimizes burdens on industry.

The need to weigh costs and benefits and work out many design details should not obscure the overall feasibility of information collection compared to other interventions. The available evidence of overcharge's societal impact—in terms of inequality and efficiency—should satisfy the lower bar for collecting relevant information, even if there is disagreement about whether that evidence currently justifies heightened intervention.

This information collection would enable a more comprehensive estimate of the total overcharge paid by consumers in a given market, and perhaps all of consumer spending. Reaching such an aggregate figure requires combining antitrust, consumer protection, and reforms to excess governmental entry barriers. Although these three categories of laws are sometimes compared and contrasted in doctrinal discussions, they are quantitatively mostly compartmentalized.²⁴⁸ Ellison and Ellison's study of online computer-accessory sales demonstrates the type of methodology that combines the impact of diverse types of overcharge on a single purchase, because they looked at overall markup above the competitive price—again, with the unusual cooperation of a firm willing to share private cost and sales data.²⁴⁹ However, Ellison and Ellison explicitly sought to omit antitrust-related issues by focusing on a market with many different competitors, and thus to calculate only behavioral and informational overcharge.²⁵⁰

245 See, e.g., *FTC Will Conduct Study of Generic Drug Competition, Seeks Input on Data Collection*, 79 Antitrust & Trade Reg. Rep. (BNA) No. 1979 (Oct. 13, 2000) (discussing FTC approaches to data collection); CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS: SUMMER 2013, at 18–19 (2013) (detailing practicing for fair lending analyses).

246 See *What You Should Know About EEOC's Proposal to Collect Pay Data*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, (2016), https://www.eeoc.gov/eeoc/newsroom/wysk/proposal_pay_data.cfm. The privacy implications of collecting such data would need to be worked out, and anonymization has limits. Again, none of this is to say that privacy is a nonissue, just that it is a solvable one if the purpose of information collection is sufficiently important.

247 See Adam B. Thimmesch, *Tax Privacy?*, 90 TEMP. L. REV. 375, 383 (2018).

248 This combination would have the additional benefit of lessening the chances of double counting overcharge related to consumer protection and antitrust if, for instance, monopolies are more capable of earning overcharge related to consumer protection.

249 See Ellison & Ellison, *supra* note 74, at 428–29 (estimating the total overcharge earned by a firm, and assuming that given the number of competitors all of the overcharge was related to behavioral pricing).

250 See *id.*

To understand the implications of overcharge, regulators could add many other variables to the analysis. Examining how lower overcharge would influence income, employment rates, inflation, and other factors would paint a fuller macroeconomic picture. The different categories of consumer law, and various measures of overcharge's effects, present a menu of analytic options available to regulators.

Macro analysis of consumer law could be implemented in varying ways, but ultimately needs to be performance based in the sense of measuring the intervention's impact on overcharge market-wide.²⁵¹ Ater and Rigbi's estimate of the impact of the Israeli statute mandating grocery store digital price disclosures is an example of moving toward a macro performance-based assessment, because it looks at the total price decrease witnessed across the entire market.²⁵²

Each factor added moves to a more comprehensive analysis, but also one that is more complex, resource intense, and potentially imprecise. However, these limitations are by no means prohibitive. To minimize any illusion of precision, for instance, the macro estimates should be accompanied by clear statements of methodological limitations.²⁵³ Indeed, similar downsides are present in many other macroeconomic analyses, such as for tax distribution and Federal Reserve interest-rate adjustments, yet the government still makes important decisions based on inevitably uncertain analyses.²⁵⁴ The FTC and CFPB have groups filled with economists that could undertake these analyses, or ideally a centralized macroeconomic institution could support all regulators' distributional analyses.²⁵⁵

251 The idea here would be strengthened by building on Lauren Willis' proposal for performance-based consumer law, in which the regulator measures the firm's progress toward a particular goal—such as reduced borrower confusion. See Willis, *supra* note 222, at 1312–13 (“Field-testing of each firm’s customers would assess whether consumers understand the key costs and risks of the transactions in which they are engaged.” (footnote omitted)). Rather than focusing on a particular firm’s performance, as Willis proposes, a macro-level analysis measures the performance of a given regulatory intervention. And whereas Willis’s approach analyzes the micro-level transactions between a given firm and its customers, a macro perspective examines the economy-wide impact of a policy intervention.

252 See *supra* note 192 and accompanying text.

253 See Michael J. Graetz, *Paint-by-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 613 (1995) (discussing how to minimize the illusion of precision in tax distribution analyses).

254 See, e.g., Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 534–35 (1995) (describing tax law execution challenges, including inaccuracy, unresponsiveness, and fraud); Graetz, *supra* note 253, at 613 (discussion of the illusion of precision that sometimes results from analyses of the implications of tax plans); Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261, 1300 (2012) (discussing experts in economic analyses); Christopher Tarver Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 189 (2010).

255 Cf. YAIR LISTOKIN, LAW AND MACROECONOMICS 202 (2019) (proposing a law and macroeconomics institution to ensure that “administrative agencies follow[] expert eco-

To be clear, the idea is not to replace careful localized studies with macro-level analysis. To the contrary, macro consumer law analysis emphasizes obtaining the data to conduct micro-level overcharge studies in more markets. The immediate goal is to *lessen* decisionmakers' current big-picture imprecision about consumer law by connecting continued vital studies of specific markets with macro-level ramifications.

B. *Making Distribution an Explicit Goal*

A macro approach illuminates new rationales for consumer law intervention. As Yair Listokin has argued, the law in diverse arenas insufficiently engages in macroeconomic analyses.²⁵⁶ He observes that considering the broader macroeconomic climate might lead to different legal outcomes.²⁵⁷ For instance, in times of recession, legal decisions should consider how to increase aggregate demand, such as by forgiving student loans and lowering utility rates even if such policies would not make economic sense at other times.²⁵⁸

Listokin does not engage with consumer overcharge. In theory, consumer law interventions that reduce overcharge should not need macroeconomic normative grounds because they have independent microeconomic efficiency grounds. However, this Article suggests that the law—whether as written or as enforced—does not prevent large levels of overcharge, possibly due to lobbying, insufficient information, a lack of awareness of the magnitude, or other reasons. The reduction of overcharge is thus another path to increasing aggregate demand during recessionary times because it would redistribute spending power from wealthier consumers to middle- and low-income consumers.²⁵⁹ Lower-income consumers have a higher propensity to spend an incremental dollar,²⁶⁰ meaning that reducing overcharge would raise spending and thereby reduce cyclical unemployment associated with inadequate aggregate demand.²⁶¹ Moreover, consumer law may stimulate demand in a way that is more attractive from a market perspective than adjusting utilities rates or forgiving student loans because reducing overcharge has the potential to improve markets.

Putting recessionary contexts aside, a macro perspective could still provide the foundations for consumer law intervention where a more micro-level

omic advice"); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1339 (2013) (proposing review of agency inaction).

256 See LISTOKIN, *supra* note 255.

257 See *id.* at 175–80.

258 *Id.* at 187–89.

259 It would also redistribute from businesses to consumers.

260 See, e.g., STANDARD & POOR'S RATINGS SERVS., HOW INCREASING INCOME INEQUALITY IS DAMPENING U.S. ECONOMIC GROWTH, AND POSSIBLE WAYS TO CHANGE THE TIDE 3 (2014) (concluding that inequality hinders growth, partly because low- and middle-income consumers spend a larger portion of what they earn).

261 This relationship requires a number of assumptions, including that suppliers will stay in the market after prices decrease.

analysis would not. Increasing efficiency is one of the strongest and most broadly supported rationales for intervening in markets.²⁶² However, the consumer welfare efficiency analysis is driven by a micro-level analysis of a given market that considers factors such as price, quantity, and demand. In that traditional analysis, a consumer law intervention that might be efficiency neutral or slightly inefficient with respect to the market in question would be disfavored, absent other considerations.

Through a more macro lens, however, even interventions that the traditional analysis identifies as having no efficiency benefits could still overall prove economically desirable. First, inequality can harm the economy by holding back growth—even outside of recessionary periods, such as during secular stagnation.²⁶³ Again, one reason for that relationship is that wealthier households spend less of their money, so that the greater the percent of national income that they earn, the less is spent overall in the economy.²⁶⁴ Inequality may also harm long-term growth by producing “a less-educated workforce that can’t compete in a changing global economy.”²⁶⁵ Consumer laws that would reduce inequality can thus strengthen economic growth.

Second, for a full analysis of the efficiency implications of a given consumer law intervention it would be necessary to consider the alternative of using an inefficient tax system. Consider a consumer law intervention that either had no effect on efficiency—as traditionally analyzed—or whose efficiency consequences were too difficult to determine. Such an intervention would not immediately find support in the traditional analysis. If that same intervention would reduce inequality, however, it may still increase efficiency by lessening the need for tax redistribution.²⁶⁶

To extend this logic a step further, consumer law interventions that might appear inefficient based on a traditional analysis could overall prove efficiency improving. The micro-level inefficiency of the consumer law would need to be compared to the macro-level efficiency improvements. The additional taxes, or government spending to address unemployment, that result from inequality could overall harm efficiency more than an inefficient consumer law intervention that reduced inequality.²⁶⁷ In that case, there would be an efficiency justification for an intervention that would have otherwise seemed inefficient from a micro-level perspective.

262 See *supra* Section I.A.

263 See STANDARD & POOR’S RATING SERVICES, *supra* note 258 (discussing the effect of inequality on growth). Secular stagnation is a long-run version of a recession that holds back growth and output.

264 See *id.* at 3.

265 *Id.*

266 For a related and broader argument about factoring in the inefficiency of tax in deciding how to address inequality, see Liscow, *supra* note 27.

267 On considering government spending on unemployment in the context of bankruptcy law decisions of whether to liquidate a firm, see Zachary Liscow, *Counter-Cyclical Bankruptcy Law: An Efficiency Argument for Employment-Preserving Bankruptcy Rules*, 116 COLUM. L. REV. 1461, 1462 (2016). Many efficient laws are regressive. See Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018).

It bears emphasis that the primary justification for regulating consumer overcharge already exists and is well supported: to correct the market failures that lead to the higher prices. But a macro-level analysis also helps in prompting consumer law action on that basis. Lawmakers and regulators are continually deciding how to allocate scarce public resources, including which of many bills to pass or how many dollars to allocate to which administrative agencies. With a fuller perspective on consumer law's economic implications, policymakers would have extra motivation to draft more vigorous consumer laws and fortify administrative agencies.²⁶⁸ They could start with the type of legislation that scholars have already found to work—extending the CARD Act's restriction of nonsalient fees to other markets, adopting a U.S. version of the Israeli retail goods statute, or perhaps going further to mandate nationwide price transparency.²⁶⁹ Congress would ideally also strengthen the FTC's rulemaking authority.²⁷⁰

Macro analyses can also inform the allocation of scarce public resources. Currently, Congress allocates far fewer funds to consumer regulators than to other issues. For instance, the IRS has over 75,000 employees and the Food and Drug Administration (FDA) over 18,000.²⁷¹ The two main regulators in charge of consumer protection employ far fewer, with the CFPB at about 1600 employees and the FTC at 1100—despite the latter having broad antitrust and consumer protection responsibilities.²⁷² The CFPB and FTC do not necessarily require the same number of personnel as the FDA and IRS. But since legislators currently make such decisions without a full sense of consumer law's impact they may be allocating resources to consumer regulators at levels that harm the economy considerably.

A macro view would also help to prioritize enforcement actions and private lawsuits that would have the greatest collective benefits. Regulators have great discretion in deciding how to allocate their resources, and when to take action.²⁷³ Moreover, both the FTC and the CFPB already have a mandate that allows them to consider the vulnerability of the party harmed, and micro-level distributional issues are at the normative core of consumer pro-

268 Many substantive legal reforms could improve distribution. See, e.g., Ramsi A. Woodcock, *Big Data, Price Discrimination, and Antitrust*, 68 HASTINGS L.J. 1371, 1377 (2017) (exploring antitrust options for redistribution).

269 See Van Loo, *supra* note 186, at 872–74 (calling for laws that allow digital intermediaries to access an array of price, product, and personal data to help consumers); cf. Saul Levmore & Frank Fagan, *The End of Bargaining in the Digital Age*, 103 CORNELL L. REV. 1469 (2018) (arguing for “mandated disclosure of past prices, and occasionally settlements, where these have been negotiable”).

270 Congress restricted the FTC's rulemaking in the 1980s. FTC Improvements Act of 1980, Pub. L. No. 96-252, § 15, 94 Stat. 374, 388 (codified at 15 U.S.C. § 57b-1 (2018)).

271 U.S. Office Pers. Mgmt., *Employment Cubes*, FEDSCOPE, <https://www.fedscope.opm.gov/employment.asp> (last visited Feb. 13, 2019).

272 *Id.* This leaves out the Antitrust Division at the Department of Justice.

273 See, e.g., Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 947 (2017) (discussing enforcement discretion); *supra* notes 229–30 and accompanying text.

tection.²⁷⁴ In deciding among many possible activities that would advance their missions, they and public attorneys at the state and local level can use their discretion to consider distributional factors. Even without engaging in complicated macroeconomic analyses, authorities could already begin to focus on certain categories of spending already demonstrated to have regressive distributional effects, or that comprise a disproportionately higher percent of low- and middle-income households' budgets.

This Article has in some ways hewed more closely to traditional economic motivations for intervention than has other scholarship on consumer law and inequality. Khan and Vaheesan argue that antitrust should “be reoriented away from the current efficiency focus.”²⁷⁵ On the other hand, they emphasize that their “argument is not that antitrust should embrace redistribution as an explicit goal, or that enforcers should harness antitrust in order to promote progressive redistribution.”²⁷⁶ Perhaps because micro-level distribution is already imbedded in consumer law, observers rarely call for consumer protection to explicitly pursue progressive distribution. In contrast, the point here is that retaining the focus on economics and efficiency—but expanding the inquiry to recognize how inequality may hurt spending and efficiency—provides a normative basis for consumer law and its enforcers to embrace redistribution as a goal.

Of course, for many the mobilization of the law to combat inequality does not need an economic justification, and others have argued for leveraging the law to reduce inequality for noneconomic reasons, such as fairness.²⁷⁷ But for those unconvinced by moral arguments, it should be

274 Daniela Caruso, *The Baby and the Bath Water: The American Critique of European Contract Law*, 61 AM. J. COMP. L. 479, 492 (2013) (“Systematic market failures and systematic redistributive problems are the bread and butter of behavioral law and economics.”); Richard Hynes, *The Social Costs of Credit Reporting Errors*, 11 J. L. ECON. & POL'Y 329, 331 (2015) (“A normative analysis of the regulation of credit reporting must account for distributional consequences as well as the incentives of the industry participants to produce accurate reports”); Sandeep Vaheesan, *Resurrecting “A Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 648 (2017) (discussing administrative discretion related to distribution).

275 Khan & Vaheesan, *supra* note 22, at 238; *see id.* (proposing moving antitrust “toward a broader understanding that aims to protect consumers and small suppliers from the market power of large sellers and buyers, maintain the openness of markets, and disperse economic and political power”).

276 *Id.*

277 The idea that the law should look beyond economic rationales to embrace distributional matters has deep roots. *See, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); K. Sabeel Rahman, *From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age*, 35 YALE L. & POL'Y REV. 321 (2016). Nor are economics and fairness distinct. *See, e.g.*, Robert Hockett, *Putting Distribution First*, 18 THEORETICAL INQUIRIES L. 157, 224 (2017) (stating that it is incumbent to “take distribution seriously” and that maximizing efficiency inevitably requires assumptions about distribution); Michael J. Meurer, *Fair Division*, 47 BUFFALO L. REV. 937, 939 (1999) (aiming to “promote legal scholarship that incorporates fairness into the economic analysis of law”).

concerning that the failure to consider distributional factors likely causes lawmakers to write, and regulators to enforce, in ways that fail to bring consumer law's full economic benefits to society. "Correcting market failures," "improving the functioning of government," and "removing distributional unfairness" are three well-established justifications for regulation.²⁷⁸ By adopting an explicit distributional goal and offering an institutional alternative to tax, consumer law would rest on stronger normative foundations.

CONCLUSION

Consumer law scholarship and reforms typically focus on a narrow context, such as consumer financial protection or monopolistic prescription-drug pricing. Those careful studies and laws have laid the foundations for bringing consumer law into dialogue with more macro-level policy issues. The preliminary data suggest that overcharge is in the trillions and its elimination would have a meaningful progressive impact, possibly bringing income inequality close to its lowest level over the past hundred years.

However, efficiency-improving consumer protection need not hurt the wealthy in the long run. Everyone is a consumer, and thus with lower overcharge all households could purchase the same products for less. Additionally, more efficient markets and less inequality would grow the economy, meaning that those who own businesses may ultimately be better off by earning a smaller portion of a larger pot of income. The possibility of a more stable society also appeals to all income groups. Given the upside of more competitive markets, it is not inconceivable that those who prioritize equity, and those who prioritize efficiency, may agree on consumer law reforms that could in the long-term benefit rich and poor alike.

The first step toward such a consensus is to understand the big picture with greater precision. Ideally, that analysis would fold antitrust, consumer protection, and other procompetitive reforms—such as reducing entry barriers—together into a holistic analysis of consumer overcharge. Rather than continuing to allow incomplete data to obscure one of the most pressing issues of our time, agencies should take the routine step of exercising administrative authority to monitor overcharge.

A better understanding of overcharge is timely because in the wake of growing concern over inequality, political leaders are increasingly designing distributional policies. The default choice for redistribution, tax law, no doubt has institutional advantages in terms of the straightforward nature of the transfer. But it also has drawbacks, including inefficiency and political stalemates. A fuller institutional comparison would prove valuable. Instead of making that comparison, policymakers operate on the default assumption that distributional planning should ignore consumer law, and that consumer

²⁷⁸ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS 4 (2003), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf> (putting forth guidelines for regulatory analysis under President George W. Bush).

law should proceed without considering macro-level distribution. Those important assumptions are too important to leave as impressionistic rather than empirically informed.

