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Ghettos Revisited: Antimarkets, Consumption, and Empowerment

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Ghettoes Revisited: Antimarkets, Consumption, and Empowerment*

David Dante Troutt[†]

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INTRODUCTION

Buying and selling more and more shapes what we are, which leads to the gangsterization of this society—of getting materials by any means necessary.¹

Thinking of American ghettos as sites of consumption may seem as unlikely as giving legal specificity to the over-worn term “empowerment;” yet both form the thesis of this Article. The law’s growing interest in inner-city economic development has forced a recognition that these persistently poor neighborhoods must be compared to middle-class urban communities. Further, the creation and maintenance of both are closely related in law to land use planning and public finance. In a related article,² I described a legal framework that provides a better understanding of ghetto underdevelopment and suggests interventions relevant to those structural aspects of what some call community empowerment theory and practice. A remaining problem, however, is the legal rootlessness of “empowerment” goals, together with the failure to consider their origins in consumption and the corresponding importance of law reforms consistent with consumer principles.

As much as the places where we live and work, consumption organizes our priorities, contributes to our notions of personal identity, and characterizes the relative well-being of our communities. It refigures real time into nanosecond acquisition—such as twenty-four hour stock trades anywhere,³ home delivery of every conceivable consumer good⁴—and even invites the lucrative commodification of ourselves⁵ and the plac-

¹ Rosalind Cummings, *Channeling Rage: A Black Scholar Offers His Vision of Priorities in Healing Racism*, CHICAGO TRIBUNE, May 20, 1993, at 3 (quoting Professor Cornel West).

² See David Dante Troutt, *Ghettos Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427 (Summer 2000) [hereinafter Troutt, *Ghettos Made Easy*].

³ See, e.g., E-trade.com <<http://www.E-trade.com>>.

⁴ Kozmo.com, for example, a New York City-based business, offers consumers home delivery of virtually any imagineable item, including junk food, music, videos, and clothing. See Kozmo.com <<http://www.kozmo.com>>.

⁵ See generally *White v. Samsung Elecs. Am., Inc.* 971 F.2d 1395 (9th Cir. 1992) (The Ninth Circuit’s somewhat controversial decision affirming game-show celebrity Vanna White’s claims asserting that an advertiser’s unlicensed use of a robot merely dressed like her that flipped game-show letters constituted her “identity” in violation of her right of publicity).

es to which we belong.⁶ We consume private goods and services and are consumed by them. We consume intangibles such as protection, privacy, and closeness to community, freeing us if they can from being consumed by danger, exposure, or isolation. In this Article, I describe the typical site of these normative consumption activities as the middle-class "metamarket,"⁷ the neighborhoods in which layers of markets coalesce in the consumer imagination to provide economic stability sustained largely by private legal ordering and public law sanction.⁸

Despite the metamarket's relevance to any notion of economic empowerment, this Article re-focuses these place-based consumer interactions on the inner-city poor and the ghetto neighborhoods—that I call "antimarkets"—where the poor struggle for economic inclusion and against marginalization. Antimarkets are places of negation where the rules and preferences of middle-class life are suspended or denied and the landscape has been systematically impoverished of the private and public resources that sustain economic stability and create wealth. Thus, they are distinguishable from metamarket neighborhoods not merely by demographics and history but also by the character and mode of consumption that regularly occurs within each. Clearly, there are aspects of consumption that easily threaten the goal of economic empowerment in ghetto communities, and there are many aspects of a middle-class model of consumption that are simply inappropriate, if

⁶ See Sam Howe Verhovek, *City Weighs Price of Its Good Name; Company Wants to Pay Dot on Map to Use Its Dot Com Label*, N.Y. Times, Jan. 1, 2000, at A12 (Halfway, Oregon, population 362, decides whether to change its name to Half.com for the year 2000 following an offer from Internet start-up company).

⁷ See Troutt, *Ghettoes Made Easy*, *supra* note 2, at 434-54. See also discussion *infra* Part I.A.1.

⁸ This observation should not imply endorsement of the claims that public law theorists sometimes make about the efficiencies of communities in which the lines between public and private goods acquisition are blurred in favor of individualized consumer choice. See, e.g., Charles M. Tiebout, *A Pure Theory of Local Expenditures* 64 J. POL. ECON. 416 (1956) (collapsing citizens into "consumer-voters" whose power of exit, like the power to shop, forces municipalities to compete for desirable residents). However, I do embrace the notion that land use law has facilitated stability for households and local markets. Although the deprivation of land use controls simultaneously defined ghetto antimarkets, land use principles of democratic participation in community decisionmaking, exclusion of certain market-eroding land usages, and comprehensive planning, all supported by important public financing of municipal services and amenities, retain their utility among contemporary strategies for the economic empowerment of antimarkets.

not deeply problematic. The first objective of this ongoing project is to identify those structural elements that differentiate metamarket from antimarket consumption and, relatedly, to identify legal principles of consumption that may empower profoundly weakened neighborhoods.

However, my thesis turns on two additional distinctions, the second of which might be stated as an irony: Can a legal norm of economic empowerment rely upon consumer law principles that themselves reflect, if not govern, the same consumption patterns that sustain racial and economic marginalization in the first place? This question arises from the distinction between consumer protection laws as we know them and consumer protections relevant to what economically disempowered communities need. Increased consumerism both inside and outside antimarkets makes unavoidable a reliance upon some articulation of consumption dynamics in the context of existing consumer law.

This is not a concession. Excesses aside, poor people and their inner-city neighborhoods are consumers of *basic* public and private goods and services in ways very similar to middle-income people and their urban communities, despite critical differences. Moreover, even the most vague notions of economic empowerment are founded upon assumptions of consumer need, choice and the exercise of personal economic autonomy. The difficulties lie in how we define consumers and consumption and what fairly may be regarded as empowering. Consumer law, however, is generally a narrow domain—to the extent that it even appears viable today. Although federal and state consumer protection statutes abound⁹ and much intellectual property and unfair competition laws include obligatory nods to consumer interests,¹⁰ legislation, litigation, and legal scholarship about the needs and rights of consumers have failed to advance much beyond the heyday of the 1970s.¹¹ Most of these laws and their rationales are concerned with either prod-

⁹ See discussion *infra* Part II.

¹⁰ For example, prevention of fraud and deception of consumers is among the interests protected by the Lanham Act's false designation of origin provisions. See 15 U.S.C. § 1125(a); *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126 (2d Cir. 1979) (holding raincoat trademarks not to be confusingly similar).

¹¹ Indeed, many legal writers implicitly characterize the 1970s as the beginning and end of governmental consumer protection.

uct safety or the fairness of specific terms in an individual transaction (e.g., applications for credit), whether they have been represented in a fair and non-deceptive fashion or should have been disclosed at all.¹² These undoubtedly have some application to antimarket economies. Yet beyond incorporating contract doctrines such as unconscionability, there is very little consumer law that recognizes the aggregate peculiarities and deprivations of low-income consumers, whether they are individuals or parts of a city. Unfortunately, legal scholarship about poor consumers is sparse, dated,¹³ or, at best, only hopeful.¹⁴

Meanwhile, individuals and neighborhoods consume, for good or for bad, in ways and on terms that signal their status relative to empowerment. This Article takes the position that much consumption in antimarket communities is both counterproductive and unfair, but may still be the basis for transformation to economic empowerment. Current modes of antimarket consumption often recycle marginalization, dispossessing neighborhoods populated largely by people of color of economic benefits enjoyed by the surrounding city and metropolitan areas of which they are an isolated part. This is a problem with strong cultural implications for any legal norm of empowerment. It raises the third and final distinction addressed by this analysis: that there is such a thing as beneficial consumption on one hand (e.g., the necessary acquisition of goods and services) and consumerism on the other (e.g., the excessive acquisition of more than we need or can afford). Though everywhere apparent, this distinction is perhaps more complicated in antimarkets, not because conspicuous consumerism is more prevalent there than in metamarkets, but be-

¹² Even a well-known consumer protection provision in the regulation of securities that prohibits insider trading, Rule 10b-5, codified at 17 C.F.R. § 240.10b-5, focuses litigants on the facts surrounding a specific transaction. See discussion *infra* Part IV.

¹³ For instance, one of a few comprehensive sources was published as the War on Poverty was being launched. See generally *THE LAW AND THE LOW-INCOME CONSUMER* (Carol Hecht Katz ed., 1968).

¹⁴ See, e.g., GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 9 (1992) (acknowledging the need for lawyers and advocates who practice in and on behalf of poor communities to learn more about consumer advocacy).

cause the need for economic empowerment—individual, group and neighborhood—is so much greater and harder to realize.

The following hypothetical illustrates some characteristics of these three distinctions—metamarket vs. antimarket consumption, legally recognized consumer protections vs. economic empowerment norms, and consumerism vs. beneficial consumption. Here are three deliberately stereotyped consumers joined yet divided in place: Lucille, Aaki, and Shawna. Lucille is the lessee of a woman's hair salon near, but not on, the main commercial strip of 125th Street in Harlem. Aaki is a single mother of two on welfare, but trying to work her way off by braiding and styling hair in one of eight booths Lucille rents for \$150 per week.¹⁵ There is no contract between them.¹⁶ Though the small shop is in a federal empowerment zone, Lucille has not been in business long enough to qualify for a microenterprise loan,¹⁷ nor does she pay payroll taxes or social security for any of her independent contractors. The shop is poorly heated and ventilated, may not meet building codes for cleanliness and fire hazards, carries no hazard insurance, and none of the hairdressers like Aaki have licenses. In contrast to Lucille and Aaki, Shawna is not a Harlem resident, but a downtown lawyer who every three weeks spends six to eight hours on a Saturday having her hair braided by Aaki at a cost of about \$100.¹⁸ Lucille has overhead costs of about \$2,000 per month and collects \$4,800 per month rent from independent contractors like Aaki. Aaki in turn nets about \$1,200 per month, after covering rent and supplies, for an annual income of \$14,400. Since nearly all transactions are "off the books," Aaki's wages represent poverty-level income that at least goes untaxed.¹⁹

¹⁵ For a stimulating analysis of the cultural dimensions embedded in black women's decisions about hair styles, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

¹⁶ See discussion *infra* Part III.

¹⁷ Even in a federal empowerment zone, smaller businesses without a three-year track record may be disqualified from commercial loans. See Abby Ellin, *A Harlem Power Zone Weakens Some*, N.Y. TIMES, Jan. 4, 2000, at B4.

¹⁸ Less labor-intensive hair styles average \$60 and take about three to four hours.

¹⁹ According to poverty guidelines issued by the Department of Health and Human Services, the poverty level for a family of three in March, 1999, was \$13,880. See Office of the Assistant Secretary for Planning and Evaluation (visited Sept. 9, 2000) <<http://aspe.hhs.gov/poverty/qppoverly.htm>>.

The problems begin with the incentives to cheat based on not easily reconcilable antagonisms built into the relationships. Lucille terminates independent contractors who fail to keep enough appointments, object to the rent, refuse to pay occasional increases, or who she suspects are trying to lure customers to their homes instead. Aaki believes she is being ripped off on the rent price, that the work environment is cramped and unsafe, and that she has no protection against slow times or abuse. As soon as she can, she vows to get out, after which Lucille will easily replace her with one of countless women in similar straits with similar skills. Shawna dislikes the physical characteristics of the setting, thinks the operation is too haphazard and time consuming, resents being separately charged for every item used on her, but knows that the more up-scale shops downtown will charge three times as much for the same service.

These three women are all consumers in the antimarket, although Shawna's presence there as a visitor from a metamarket neighborhood is voluntary, yet critical. Structural and personal factors put each at risk. Though a landlord to the hairbraiders, Lucille is a consumer of commercial space, utilities, the provision of whatever public infrastructure that makes 125th Street a viable place to open a store (e.g., public transportation, sanitation, street maintenance, etc.), as well as a residential consumer of locally available goods and services. Aaki is also a consumer of services; further, she consumes public and informal social services for herself and her family (e.g., schools, day care, public medical care) and job supplies. Shawna is a more traditional consumer of hair care services. A fire, inspection, or robbery could ruin everything for everyone; greater deterioration of local public services could keep customers like Shawna away, first effecting Aaki and eventually crippling Lucille. Lucille is at risk simply if she is audited. Aaki is at risk if she ever needed to challenge the legality of her employment terms. Shawna would have little or no recourse if she were injured getting her hair done.

Finally, the area in which these transactions and relationships occur—Harlem, Central Harlem, the 125th Street commercial strip, however it should be defined meaningfully—is also a consumer. The area consumes aggregate public goods and services used up by its businesses and residents, such as

zoning protections (or the lack thereof), fire, police, traffic, sanitation (or the lack thereof), and the allocation of benefits, amenities, and subsidies through the political process (or the lack thereof). Harlem, if we call it the geographic consumer here, stands in a different position relative to other parts of the same city with which it competes for municipal services, regulatory attention, state and federal subsidies, businesses, and so forth. Further, as an antimarket, it has necessarily experienced substantial disinvestment and redlining,²⁰ which in turn negatively impacts the options available to consumers there. The differences, then, correspond to differences in the experiences of local consumers such as Lucille, Aaki, and Shawna.

The arrangement is thus precarious for everyone and highlights myriad features of the three distinctions that guide us toward a norm of legal empowerment. First, consumption in the antimarket sediments a vulnerability that limits consumer agency and prospects for sustained economic stability. There are few formal or legally enforceable rules, questionable terms, underinsurance, limited investment capital amid hand-to-mouth small businesses, and a local labor force whose limited skills, education, and work experience reflect salient facts in the feminization of poverty and the preponderance of low-paying, no-mobility service sector work.²¹

Second, existing consumer protections are largely unavailable to the four consumers—including Harlem—either because they fail to reach these types of transactional deficiencies, cost

²⁰ See *infra* note 58 and accompanying text.

²¹ See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 39-43 (1987). These are also salient factors in the lives of many underpaid, unprotected workers in the informal wage economy, many (if not most) of whom are immigrants. For in-depth analyses of these and related issues, see generally Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179 (1994); Jennifer Gordon, *We Make The Road By Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); Laura Ho et al., *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383 (1996); Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289 (1994); Leo L. Lam, Note, *Designer Duty: Extending Liability to Manufacturers for Violations of Labor Standards in Garment Industry Sweatshops*, 141 U. PA. L. REV. 623 (1992).

too much to pursue through individual litigation, or the deficiencies themselves are collective and pre-contractual (e.g., the area effects of redlining), putting them beyond the reach of established legal claims.

Third, and into a cultural thicket, is the matter of beneficial consumption versus consumerism. The centrality of hair care among black consumers, like the ingestion of fast food by most Americans, is culturally complicated and beyond question here. However, whether its meaning is limited to highly individualistic style preferences or expanded into a comprehensive map of potentially empowering commerce in antimarkets may determine whether a hair salon is just a hair salon or a culturally rich source of wealth-creating relationships.²² The perhaps subtle point is that, beyond appearances, many of the basic formal and informal exchanges in antimarkets that currently implicate only self-interested consumerism may be transformed into economically empowering consumption.

But that is ultimately a legal praxis question dependent first upon an articulation of what the empowerment norm means in law. My analysis builds upon the three distinctions. Part I reviews the ingredients and mechanics of the metamarket/antimarket dichotomy, focusing on the different content and meaning of the collective consumption patterns of each. Part II then analyzes a limited array of relevant consumer laws and related legal principles toward an understanding of their application to a legal norm of empowerment. Concluding that current consumer protection laws are not well designed for empowerment, I deduce from them three principles that are applicable to a norm of economic empowerment: disclosure, equality, and fairness. Missing, however, are access, accommodation, and remediation. Combined, these principles help to define the legal norm of economic empowerment as a condition of agency capable of bringing about self-support, stability, and growth through the ownership and control of economic resources. Part III analyzes that norm within prevailing pronouncements of economic empowerment and the problematic distinction between consumerism and beneficial consumption. I recommend a third possibility, which I demon-

²² See generally Caldwell, *supra* note 15.

strate in Part IV through two examples: lawyering for consumer education and a hypothetical model for investment called "The Community Unit Investment Trust."

I. THE FIRST DISTINCTION: METAMARKETS, ANTIMARKETS AND COMMUNITY CONSUMPTION

A. *The Creation and Character of Metamarket and Antimarket Communities*

In comparative context, the antimarket is the otherness to economic places of autonomy and vitality in the city. It is the place of anti-norm activity and identity, just as the middle-class metamarket is the site of normality.²³ In isolation, however, we understand the antimarket as a post-industrial ghetto characterized by high rates of joblessness, family dislocation, infant mortality, crime and drug abuse,²⁴ housing instability and vulnerability to displacement,²⁵ minimal, but expensive, capital²⁶ and extremely limited personal wealth holdings,²⁷ high prices for low-quality consumer goods routinely offered through informal or underground market activity,²⁸ unconventional and expensive lending sources and banking surrogates,²⁹ poor public services and institutions,³⁰ virtual political irrelevance,³¹ and isolation from information net-

²³ See Troutt, *Ghettoes Made Easy*, *supra* note 2, at 448-50.

²⁴ See WILSON, *supra* note 21, at 20-29.

²⁵ See Michelle Adams, *Separate and Unequal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 424-30 (1996).

²⁶ See Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1465, 1466 (1994).

²⁷ See generally MICHAEL SHERRADEN, *ASSETS AND THE POOR: A NEW AMERICAN WELFARE POLICY* (1991) (analyzing data on asset trends among U.S. poor).

²⁸ See generally Arthur J. Jacobson, *Symposium: The Informal Economy: The Other Path of the Law*, 103 YALE L.J. 2213 (1994).

²⁹ See David Dante Troutt, *How the Poor Still Pay More*, in THE THIN RED LINE: HOW THE POOR STILL PAY MORE 62-70 (1994) [hereinafter Troutt, *Poor Pay More*].

³⁰ See Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 754 (1993).

³¹ See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 453 (1990).

works amid the concentration effects of persistent household poverty.³² The antimarket is primarily black, yet often Latino.

The purpose of a metamarket/antimarket dichotomy, however, is to replace the analytical limitations of an isolated perspective of the ghetto with a descriptive paradigm that re-positions it alongside middle-class neighborhoods within the city as a whole. It is impossible to explore consumption outside a comparative context and even harder to posit a legal norm of empowerment without evaluating the dynamic by which some communities and their consumers are empowered by certain modes of beneficial consumption. Therefore, this Section begins with a brief overview of how the law followed governmental and private actors in creating the metamarket and its functional antithesis, the ghetto antimarket. The analysis revolves primarily around land and land use law because, prior to the stable entrenchment of a current consumerism, the spaces within the urban metropolis had to be rationally ordered and segregated.³³

1. Making Metamarkets

Central to the claim of the contemporary metamarket's normalcy is the assertion that land use law and policy beginning in the early twentieth century was (and remains) designed to facilitate the stability of middle-class "ideal" structures.³⁴ The primary, but not exclusive, land use planning device was zoning, whose goals of segregating spaces within the city on the grounds of state-delegated police power and local democratic decisionmaking were endorsed most emphatically in the seminal case of *Village of Euclid v. Ambler Realty*.³⁵ In *Euclid* and many subsequent state cases,³⁶ courts

³² This is a term fairly attributable to sociologist William Julius Wilson's thesis regarding the cumulative layering of disadvantage that occurs in areas populated disproportionately by households in extreme poverty. See, e.g., WILSON, *supra* note 21, at 58.

³³ See generally M. CHRISTINE BOYER, *DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING* (1983) (deconstructing the history of the urban planning movement in U.S. cities before and after the turn of the century).

³⁴ Troutt, *Ghettos Made Easy*, *supra* note 2, at 434-36.

³⁵ 272 U.S. 365 (1926).

³⁶ See, e.g., *Duffcon Concrete Products, Inc. v. Borough of Cresskill*, 64 A.2d 347, 350 (N.J. 1949) (taking judicial notice of facts showing concrete mixing at

were not only sanctioning the urban planning movement's efforts to rationally organize rapidly developing polyglot confluences of commerce, industry, and class-stratified residential areas, they were also re-ifying the shape and pattern of ideals associated with the American middle-class "good life." These ideals or, more broadly, ideal structures, included the preference for single-family detached dwellings and against rental housing,³⁷ community control over the character and aesthetic feel of residential areas where families raised children,³⁸ and comprehensive planning for convenience amenities, such as household goods and services and recreation facilities, but against noxious or undesirable uses, such as factories.³⁹ All of these ideals were enshrined by judicial decisions that pressed a particular model of order and stability, whose obvious and necessary goods were defined (if indirectly) by the people themselves.⁴⁰ The bottom-line objective of these ideals working together with law and other institutions of the public and private sectors was (and is) the preservation and growth of property values—that is, community and individual wealth accumulation.⁴¹ The primary norm underlying these decades-long developments was exclusion—physical, economic, ethnic, and, most importantly, racial.⁴²

issue in residential town could be performed more suitably in other nearby municipalities); *Flora Realty and Inv. Co. v. City of Ladue*, 362 Mo. 1025, 1036 (1952) ("Any intrusion of smaller lots into such an area will have the effect of materially impairing the value of the buildings already constructed The zoning ordinance has tended to stabilize and preserve the value of the property in the several districts."); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 109, 341 N.E.2d 236, 241, 379 N.Y.S.2d 672, 680 (1975) ("The primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's available land.").

³⁷ See *Euclid*, 272 U.S. at 394-95; see also generally Edward H. Ziegler, Jr., *The Twilight of Single-Family Zoning*, 3 J. OF ENVTL. L. 161 (1983).

³⁸ See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

³⁹ See Dubin, *supra* note 30, at 746.

⁴⁰ See, e.g., *Duffcon*, 64 A.2d at 350 (total exclusion of industry); *Lionshead Lake, Inc. v. Township of Wayne*, 89 A.2d 693, 697 (N.J. 1952) (minimum residential floor space requirements).

⁴¹ See generally Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift*, 30 U. RICH. L. REV. 1011 (1996).

⁴² Advocating a cultural or anthropological reading of space in modern society, David Sibley describes these facets of exclusion as "mapping."

There is a history of imaginary geographies that cast minorities, "imperfect" people, and a list of others who are seen to pose a threat to the dominant group in society as polluting bodies or folk devils who are

My characterization of the now-ordinary results of these processes as metamarkets reflects and rejects the now-ordinary assumption that these outcomes were produced by free market forces. That cannot be so, despite occasional exhortations to the contrary. Whatever impetus set these trends in motion—the real estate industry, local commercial elites, the will of the people acting through governmental decisionmaking, or the will of the people acting through voluntary organizations—their maintenance could not be achieved without regulatory intervention. Indeed, zoning regulation itself is intervention in free markets.⁴³ But the economic resources available to realize metamarket ideals came from both public and private sources. For every dollar of wealth accumulated through private ordering, such as racially restrictive covenants or the vigilance of homeowner associations,⁴⁴ countless more are owed to judicial decisions upholding discriminatory planning rules,⁴⁵ the convergence of racially discriminatory federal lending guidelines created by the real estate lobby,⁴⁶ or the segregative and dislocating effects of federal-local governmental policies, such as urban renewal⁴⁷ or the siting and administration of public housing.⁴⁸ Far from a free market, these forces combined to limit the opportunities of many Americans in order to promote the welfare first of the wealthy and soon after of a burgeoning, overwhelmingly white middle class.⁴⁹ The “markets” that these consumers sought and found, therefore, reflect

then located ‘elsewhere’ Thus, values associated with conformity or authoritarianism are expressed in maps that relegate others to places distant from the locales of the dominant majority.

See DAVID SIBLEY, *GEOGRAPHIES OF EXCLUSION* 49 (1995).

⁴³ See Haar, *supra* note 41, at 1019.

⁴⁴ See generally EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNERS ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* (1994).

⁴⁵ See Dubin, *supra* note 30, at 749-56 (discussing cases).

⁴⁶ See MCKENZIE, *supra* note 44, at 22, 27, 63 (discussing the Homeowner Loan Association Underwriting Manual and its influence on discriminatory lending guidelines promulgated by the Federal Housing Administration).

⁴⁷ See generally MARTIN ANDERSEN, *THE FEDERAL BULLDOZER* (1964).

⁴⁸ See generally Gerald E. Frug, *The Geography of Community*, 48 STAN. L. REV. 1047 (1996); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PENN. L. REV. 1285 (1995).

⁴⁹ See, e.g., Peter Abeles, *Planning and Zoning*, in ZONING AND THE AMERICAN DREAM 134 (Charles M. Haar & Jerold S. Kayden eds. 1989) (describing zoning as primarily a middle-class framework).

a variety of public and private interventions to secure the stability of psychological and cultural notions of the self expressed through both the landscape and the opportunities it could facilitate.⁵⁰ Hence, they are more than neighborhood markets; they are "metamarkets" of an exclusive American dream consumed by and benefiting many.

Equally important to an understanding of metamarkets for the purposes of legal strategies in inner-city economic development is the identification of what kind of law is now relevant there.⁵¹ In contrast to antimarkets, discussed below, metamarkets are places governed mainly by private ordering and commercial transactions.⁵² This point is made more stark in Part II, where established principles of consumer law demonstrate the primacy of private law even in attempting regulation.⁵³ When we think of middle-class neighborhoods and the laws that predominate there, we are steeped in a world of condo and home sales financing, over-the-counter purchases, and a host of intangible necessities, such as insurance availability. These are classic categories of consumption. However, even when we view the non-private, public finance related legal activity in metamarket places—the property tax basis for school financing, the provision of highways, public transportation, sanitation, and other public services—we see a similar consumption dynamic. As Charles Tiebout long ago indicated, the middle class effectively exercises its power to exit as consumer leverage over public and private goods and services.⁵⁴

2. Making Antimarkets

Nothing could be more different in ghettos, which is the starting point to recognizing them as antimarkets. Consumer power over public and private goods and services is severely limited for persistently poor people isolated in poor places. Exit is not available for renter families in need of affordable hous-

⁵⁰ See *infra* notes 72-73 and accompanying text; cf. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1858 (1994) (describing this result as "the political geography of space").

⁵¹ See Troutt, *Ghettos Made Easy*, *supra* note 2, at 477-78.

⁵² See discussion *infra* Part II.

⁵³ See discussion *infra* Part II.

⁵⁴ See generally Tiebout, *supra* note 8.

ing and mired in joblessness, concentrations of resource-poor households around them, and physical environments devoid of land use planning reflective of local decisionmaking. Many scholars persuasively ascribe both *de jure* and *de facto* segregation dynamics to the ghetto's lack of community control, investment capital, and unregulated, unstable environments for families with children.⁵⁵ Although the analytic power of these studies is beyond dispute, legal analyses concerned with economic empowerment demand comparisons to metamarkets.

Rational planning and the wealth- and citizenship-enhancing attributes of zoning never inured to ghettos, the repositories of metamarket negation, which ensured their vulnerability as excluded places. Generally, poorer, predominantly black neighborhoods of American cities were indeed zoned (often overzoned), but not with the implicit objective of stabilizing social and economic outcomes for local families.⁵⁶ Rather, zoning came to the ghetto to facilitate industrial and commercial interests or, as in so much of urban renewal and even contemporary urban redevelopment, to clear space attractive to middle-class professionals and their "good ratables."⁵⁷ Deliberate redlining by banks in collusion with the federal government effectively subordinated the hopes of working-class families from homeownership and business development, which in turn signalled risk and rejection by other geographically sensitive commerce, such as insurance companies and retail.⁵⁸ Excluded from income- and wealth-producing opportunities that were becoming routine for most working Americans and cut off politically from influential public officials, ghetto neighborhoods were easy targets for further destabilizing land use policies that impeded economic development, encouraged deterioration, and concentrated struggling families in increasingly isolated zones of deprivation and metropolitan irrelevance.

What made most ghettos antimarkets, then, was their exclusion from metamarkets and the beneficial consumption of

⁵⁵ See generally DOUGLASS MASSEY AND NANCY DENTON, *AMERICAN APARTHEID* (1994).

⁵⁶ See Dubin, *supra* note 30, at 757-64.

⁵⁷ See NORMAN WILLIAMS, JR., *AMERICAN LAND PLANNING LAW* 293-96 (1988 Revision).

⁵⁸ See, e.g., *City of Compton v. Bunner*, 243 Cal. Rptr. 100, 106 (Cal. 1988) (challenging insurance redlining permitted by state statute).

public and private goods and services they sustain. However, just as metamarket stability may become self-sustaining by vigilant protection of institutional arrangements and membership requirements, the character of antimarkets can become self-executing as low-income consumers and neighborhood vendors construct alternative ways to survive. Underground market activity, such as drug buying and selling, is well chronicled as a central economic power over ghetto "markets." But formal and informal economic activity prevalent in ghettos also cements antimarket status. The proliferation of check cashing outlets, rent-to-own stores, and home repair lending are all examples of lawful economic activity that is at least nominally regulated pursuant to state or national requirements. However, because they only flourish in the absence of banks and other more conventional (and competitive) modes of financing, their exorbitant rates and terms often reflect more about the marginalized commercial environment and the profits available there than the risk profiles of their low-income customers.⁵⁹ Relatedly, informal economic activity, such as day care, unlicensed personal services, and day laboring, provide many benefits to low-income consumers and workers. But they do it without the safeguards of minimal state standards of care, product safety oversight, or employee health benefits.⁶⁰

A critical point here in contrast to metamarket activity is that economic activity in antimarkets produces for both households and their communities little stability and negligible wealth. To the extent that economic empowerment can be described by some combination of agency and capacity, wealth through asset ownership is its material signifier. According to Melvin Oliver and Thomas Shapiro:

Wealth signifies the command over financial resources that a family has accumulated over its lifetime along with those resources that have been inherited across generations In this sense the command over resources that wealth entails is more encompassing than is income or education, and closer in meaning and theoretical significance to our traditional notions of economic well-being and access to life chances.⁶¹

⁵⁹ See, e.g., Troutt, *Poor Pay More*, *supra* note 29, at 64-70 (describing the relationship between banks and check cashing centers and summarizing data).

⁶⁰ See *supra* note 21.

⁶¹ MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A*

The staggering disparities in wealth (e.g., net financial assets) between blacks and whites⁶² as a result of the simultaneous development of metamarkets and antimarkets affect economic empowerment in further ways. Michael Sherraden concludes that the benefits of wealth include an alternative source of support for household economic stability in the event of an unforeseen crisis, promotion of long-term financial planning, and greater incentives to political participation.⁶³ Most household wealth is contained in or derives from homeownership and the growth of property values over time.⁶⁴ As home prices doubled and tripled during the 1970s,⁶⁵ people born between 1929 and 1938 accumulated more wealth at a greater rate than other age cohorts as their earnings accrued during the strongest periods of economic growth.⁶⁶ These homeownership opportunities were created for some and denied to others primarily by New Deal governmental lending programs and supports.⁶⁷ In addition, as judicial land use policies favoring exclusionary zoning assisted wealth formation for millions of American families in metamarkets, it directly marginalized those living in antimarkets.

For poor consumers with minimal incomes, no wealth, and little interaction with stabilizing public and private institutions, the laws governing in antimarkets are unsurprisingly public. In contrast to the private ordering that dominates legal relationships in metamarket communities, the lives and livelihoods of most antimarket consumers revolve around public law bureaucracies (e.g., public assistance agencies, public hospitals, and schools) and court-ordered outcomes (e.g., family and hous-

NEW PERSPECTIVE ON RACIAL INEQUALITY 2 (1995).

⁶² For example, the authors found a critical difference between poor whites and blacks of all income groups: the former (with incomes under \$11,611 in 1987) had a home-ownership rate of 47.3%, compared to 27.4% for poor blacks (and 40.8% for moderate-income and 45.4% for middle-class blacks). *See id.* at 109. Overall, among households with no financial assets at all in 1987, 61% were black, 54% were Hispanic and only 25% were white. *See id.* at 86.

⁶³ *See* SHERRADEN, *supra* note 27, at 149-65.

⁶⁴ *See* OLIVER & SHAPIRO, *supra* note 61, at 64. In 1988, for example, home equity accounted for 43% of median household assets. *Id.*

⁶⁵ *See id.* at 108.

⁶⁶ *See id.* at 75.

⁶⁷ *See* Troutt, *Ghettos Made Easy*, *supra* note 2, at 439-41.

ing court decrees and criminal justice sentencing). The resulting quality of a life made public by dictates from without has critical implications for how one conceives of consumption and the sources of empowerment.⁶⁸

B. *Contrasting Implications: The Content and Feel of Consumption in Metamarkets and Antimarkets*

1. Consumption and Consumerism in Comparative Perspective

The above analysis gives primacy to land use law and public finance considerations in creating the foundation for both metamarkets and antimarkets. Though new suburban-type communities are still being developed within and without the boundaries of U.S. cities,⁶⁹ land use law is arguably less central to the maintenance of metamarkets today.⁷⁰ In contrast, antimarket transformation may benefit from utilizing many of the same land-use devices that enabled metamarket development but were denied to ghettos during most of the twentieth century. For example, comprehensive planning with citizen input, re-zoning to exclude new incompatible uses and the elimination of noxious and often hazardous facilities remain available as community-building interventions in antimarket neighborhoods. Yet the limitations of built environments within the city remain quite real, rendering land use law an important but complementary vehicle of effective

⁶⁸ See *infra* Part I.B.2.

⁶⁹ See Todd S. Purdom, *Los Angeles Tests Its Limits in Quest to Grow*, N.Y. TIMES, Feb. 13, 2000, at A1, A32 (describing various housing developments in cities throughout the northwest Los Angeles County basin, despite fears of suburban sprawl and environmental erosion, and quoting County Supervisor Zev Yaroslavsky on why single-family detached homes are sought instead of vertical developments: "People don't want to live in skyscrapers like New York [O]nce you've lived in a single-family house with your own backyard, you're basically not interested in moving back to what amounts to a Holiday Inn-like existence.").

⁷⁰ See generally Haar, *supra* note 41.

advocacy.⁷¹ Therefore, how consumerism and collective consumption differ between metamarkets and antimarkets is the focus of this Section.

The term "consumerism" suggests a problem with consumption; it implies that there is such a thing as good or beneficial consumption and an excess beyond some reasonable threshold. Consumers and consuming communities can somehow go too far. Our economic indicators generally respond well to heightened consumption, so the problem with excess must lodge in a different place, such as the collective social effects of personal spheres. David Sibley notes, for example, that "[w]e can see that the imperative of accumulation under capitalism has made developed societies centres of consumption within the global economy, and the way in which consumption is promoted, the process of 'want creation'. . . contributes to purified identities and feelings of abjection in relation to the 'other.'"⁷² This reading implies a problem in the sociology of spatial relations between groups, norm/anti-norm, or places, metamarket/-antimarket. But the problem may also be internal when, for instance, consumption encourages one's withdrawal from community interests. "[T]he never-ending invitations to consume further the privatization of the family, which is closed off from the outside world."⁷³

These concerns about consumption patterns and their meaning for community certainly implicate a broader notion of consumption than discrete arms-length transactions for specific goods or services. Yet, they still may not aptly describe the problem of *increasing* consumerism. Other scholars document consumerism quantitatively by reference to the multiplicity of new and emerging outlets to buy more and more things. Thus, Celia Lury notes that evidence of consumerism may be seen in factors such as the following: increased availability and range

⁷¹ This is also true of metamarket landscapes, which are more fixed in place and now enjoy a more or less self-executing dynamic of stability that relies on principles of exclusion and consumerism. David Sibley might amend these observations with a caveat about how those built environments themselves reinforce disabling differences. "We can envision the built environment as an integral element in the production of social life, conditioning activities and creating opportunities according to the distribution of power in the socio-spatial system." SIBLEY, *supra* note 42, at 76.

⁷² *Id.* at 77.

⁷³ *Id.* at 78.

of consumer goods, the more numerous aspects of human exchange available through the market (including housing and public education), the expansion of shopping as a leisure pursuit, increased ways to shop (e.g., the Internet), increased importance of the packaging and advertising of goods, and competitive displays of credit amid the declining opprobrium of debt.⁷⁴

Law has no such problem with consumerism and easily applies itself to these kinds of exchanges when they go bad. Although consumer laws, discussed in Part II, implicitly view consumer activity through the lens of individual transactions, consumption relevant to how communities achieve economic stability is much broader than that. It includes not only individual household consumer purchases for, say, retail goods but also a neighborhood's consumption of public services (such as schools),⁷⁵ development subsidies (such as highway funds),⁷⁶ zoning protections,⁷⁷ and the like. After all, these are the ingredients of metamarkets that must remain either stable or improve if the area is to retain its middle-class character.⁷⁸ These are also goods and services subject to regional scarcity, so that allocations to one area may stabilize quality-of-economic-life expectations for its businesses and residents while limiting the ability of less influential areas to receive such benefits in proportion to their needs.⁷⁹ Consumption at this level of analysis does not always conform to clear contractual arrangements in which a neighborhood receives consideration for something of value; that is, its pure transactional character is sometimes diluted by the political competition for resources within the state, region, or locality,⁸⁰ putting it beyond the reach of conventional consumer laws.

⁷⁴ See CELIA LURY, CONSUMER CULTURE 29-36 (1996).

⁷⁵ See *infra* notes 87-91.

⁷⁶ See *infra* notes 82-86 and accompanying text.

⁷⁷ See discussion *supra* Part I.A.

⁷⁸ According to Professor Frug, these are also the stuff of "privatized conception[s] of city services." Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 42 (1998).

⁷⁹ *Id.* at 40-45.

⁸⁰ See Briffault, *supra* note 31, at 401 (describing activist local decisionmaking among municipalities that "heightens the market-like features of interlocal relations").

Nevertheless, this spatial aspect of consumption (neighborhood consumption of both public and private goods and services) is central to any project on community economic development. In dollar terms alone, these benefits shape the economic landscape perhaps more than any strictly defined set of consumer purchases. Determinations about which area gets what form the bedrock of a viable consumer infrastructure⁸¹ on which neighborhood metamarkets are built—and by which antimarkets are marginalized.

Two examples, public goods acquisition generally and public education specifically, demonstrate the different ways in which metamarket and antimarket communities consume public resources. Both are fundamentally political.

As for public goods, Sheryll Cashin has shown that “state fiscal politics is middle class politics”⁸² because, when it comes to public goods such as highway maintenance, state hospitals, medical centers, and parks, jobs-producing general expenditures are highly susceptible to the disproportionate political influence of outer-ring suburban jurisdictions.⁸³ The trend is particularly acute when, because of increased decentralization of decisionmaking authority, states enjoy discretion over budgetary allocations.⁸⁴ According to Cashin:

Empirical evidence . . . suggests that, when states have discretion regarding allocations of resources—allocations that typically recur in the context of state budget processes—middle class suburban interests predominate and, at least on a per capita basis, urban citizens receive a substantially smaller share of state resources Hence, state political processes may be overvaluing the desires of certain suburban jurisdictions, which wield disproportionate political influence or, alternatively, state political majorities are simply rationally maximizing public benefits for themselves.⁸⁵

⁸¹ By “consumer infrastructures,” I am referring to defined sets of basic public and private goods and services that can be quantified and compared by and across neighborhoods within a given city, such as health care, banking and credit services, and food shopping. For an analysis comparing the experiences of low- and middle-income consumers in Los Angeles and Oakland, Calif., see generally Troutt, *Poor Pay More*, *supra* note 29.

⁸² Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 584 (1999).

⁸³ See *id.* at 584-86.

⁸⁴ See *id.* at 585.

⁸⁵ *Id.* at 585-86.

This is consumption of scarce public goods, including those originally intended for antimarket consumers.⁸⁶

As for school finance:

[E]ducation is perhaps the most important consumer good people ever acquire, not only for themselves but also for their children. Education is considered the road to advancement, for the poor as well as the rich: the better the education, the better the job and, as a result, the better the quality of life . . . Education simply becomes a product everyone acquires individually, with each family trying to obtain the very best product it can get.⁸⁷

The psychic commodification of education of which Jerry Frug writes represents "products" acquired both individually and collectively, in the spatial aggregate, and depends upon many factors that have led at least a few state courts to recognize that systems of school finance may create "an unconstitutional wealth-based classification in [their] effect[s] on certain school districts."⁸⁸ Under state districting statutes, the most important factor is boundary location, since a substantial portion of most public funding for education is based on local property taxes.⁸⁹ The resulting disparities between education in tax-rich versus tax-poor districts are reflected not only in basic quantitative measures such as per-pupil expenditures but also in the quality of educational "inputs" such as programs, books and other resources that have incalculable effects on learning environments.⁹⁰

⁸⁶ Regarding welfare reform under the Clinton Administration's Personal Responsibility Act, Cashin notes that "the range of activities that qualify for TANF [Temporary Assistance to Needy Families] funding is so broad that TANF dollars can be reallocated away from providing direct income support to welfare recipients[,] leaving welfare recipients . . . particularly exposed to the preferences of state politics in times of recession." *Id.* at 563.

⁸⁷ Frug, *City Services*, *supra* note 78, at 45.

⁸⁸ Skeen v. Minnesota, No. c7-88-1954, slip op. at 66-67 (Minn. Dist. Ct. Wright County Dec. 17, 1991), *cert. granted*, No. c5-92-677 (Minn. May 1, 1992). See, e.g., *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971) (finding that financing systems that "make[] the quality of a child's education a function of the wealth of his parents and neighbors" violate the California constitution's equal protection clause); *Sheff v. O'Neill*, 678 A.2d 1267, 1289 (Conn. 1996) (holding state districting statute violates the state constitution's prohibition of segregated schools).

⁸⁹ See David Dormont, *Separate and Unequal: School District Financing*, 11 LAW AND INEQUALITY 261, 271-72 (1992).

⁹⁰ *Id.* at 281-82. These spatialized wealth-based differences do not rise to the

In effect, a circular phenomenon evolves: The richer districts—those in which property lots and houses are more highly valued—have more revenue, derived from taxing land and homes, to fund their public schools. The reputation of the schools, in turn, adds to the value of their homes, and this, in turn, expands the tax base for their public schools. The fact that they can levy lower taxes than the poorer districts, but exact more money, raises values even more; and this, again, means further funds for smaller classes and for higher teacher salaries within their public schools.⁹¹

2. How Environments Condition Economic Access

These disparities in consumption patterns and entitlements between metamarket and antimarket communities affect not only the structure of applicable consumer law (as we will see in Part II) but also how consumers think about what they and their communities deserve. As consumers, metamarket residents clearly accept (unconsciously or not) that certain neighborhood amenities, goods and services accrue to middle-class status.⁹² Several studies of middle-class consumers in the West suggest that a “consumer attitude,” whose main reference point is the market, pervades thinking about status mobility, individualizing public life and constructing

level of federal Equal Protection violations because, as the Supreme Court held in comparing the 12:1 disparity in per-pupil expenditures between Texas' Edgewood and Alamo Heights school districts, education is not deemed a fundamental right under the U.S. Constitution. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

⁹¹ JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 121 (1991). In a classic example of education as a spatialized consumer good, Kozol describes how homebuyers in New York City's suburbs (where per-pupil expenditures in 1987 generally doubled expenditures in city schools) study a state compilation called “Statistical Profiles of Public School Districts”—much to the delight of realtors. *See id.* at 120-21. Sadly, the inequalities between resources to middle and low-income students is not dependent on municipal boundaries. Kozol cites a report by the Community Service Society, which found that “[t]he poorest districts in [New York City] get approximately 90 cents per pupil from [discretionary] legislative grants, while the richest districts have been given \$14 for each pupil.” *Id.* at 98. The report's “conspiracy of effect” that Kozol quotes suggests not only that parents conceive of education as a consumer good but also that some state legislatures conceive of *students* as consumer goods, with some worth funding and others not worth the fiscal and political resources.

⁹² *See infra* Part III.B.

identity, the content of relationships, and the perceptions of events through consumer activity.⁹³

Compared to the experience of their counterparts in metamarket neighborhoods, the colloquialism "ghetto shopping" goes to the heart of critical, legally measurable differences in the way antimarket residents assimilate consumption. "Ghetto shopping" refers to the experience of shopping in a retail establishment in which prices are higher for inferior products and consumers have little or no likely recourse to a refund, exchange, or warranty when the product goes bad. It also refers to the common indifference, suspicion, and hostility with which low-income customers are met in stores, public agency offices, and hospitals;⁹⁴ the routine barrier of bullet-proof glass that separates consumers from check-cashing clerks and the high-decibel exchange of words, which cannot easily penetrate; the anticipation of late sanitation services that clutters sidewalks with trash; the poor infrastructure repair that leaves streets dark and more dangerous at night;⁹⁵ and even the wariness toward police and fire fighters.⁹⁶

The half-serious term "ghetto shopping" comprehends a range of price and quality of goods disparities as well as consumer expectations about credit terms, counter service, treatment by service providers, and neighborhood physical maintenance. More profoundly, it is further evidence of the marginalization that low-income consumers internalize as they exchange resources within a sparsely regulated economic environment premised on obvious and pervasive disrespect. Unlike middle-income urban and suburban consumers, low-income consumers' distal relationship to public goods allocations at the

⁹³ See Lury, *supra* note 74, at 49, 50, 233.

⁹⁴ Jonathan Kozol quotes high school students of color in low-income parts of Bronx, New York, as being well aware of what they can expect of their schools and other public services as subordinated consumers. "Hey, it's like a welfare hospital! You're getting it for free," says Alexander. "You have no power to complain." Kozol, *supra* note 91, at 105.

⁹⁵ See, e.g., *Ammons v. Dade City*, 594 F. Supp. 1274, 1301 (M.D. Fla. 1984) (Equal Protection challenge to history of Jim Crow services disparities).

⁹⁶ Cf. *Baugh v. City of Milwaukee*, 823 F. Supp. 1452 (E.D. Wis. 1993) (alleging municipal discrimination in fire and building inspections of residences in low-income black area).

state and federal levels makes knowledge and self-interested advocacy of the larger needs of their antimarket communities difficult at best.⁹⁷

Low-income consumers are therefore conditioned to expect a hard time during economic exchanges, particularly within antimarkets and even where the acquisition of a good does not appear transactional on its face, such as their pattern of experiences with public services. These patterns become even more relevant in Part II, in which I discuss consumer laws and principles that may reach these economic relationships and, I argue later, should help to constitute a legal norm of both household and neighborhood economic empowerment in antimarket communities.

II. THE SECOND DISTINCTION: CONSUMER LAW PRINCIPLES AND THE EMPOWERMENT NORM

Having set out the broad characteristics that distinguish antimarkets from metamarkets and the ways that consumption bears directly upon community economic empowerment objectives, this Part explores major consumer law principles that might inform a legal norm of economic empowerment. I acknowledge a certain irony about my premise: Ghetto residents and their neighborhoods should be thought of as consumers entitled to the same empowering consumer law protections as all consumers, yet the central distinction between antimarkets and metamarkets is that the former do not follow the economic rules that undergird consumer law. Calls for economic empowerment among antimarket consumers must therefore hurdle systematic exclusion if empowerment as a goal has anything to do with greater economic incorporation with the metropolitan areas to which these consumers belong. Thus, this Part looks at consumer law principles through the prism of that stifling irony and evaluates what is missing, not necessarily for strict legal enforcement, but for a legally articulable basis of empowerment.

The limitations of conventional legal precepts first require some clarification. As we will see, much of consumer law focus-

⁹⁷ Cf. Cashin, *supra* note 82, at 585-86 (discussing suburban voter vigilance on distribution of public funds).

es on individualized transactions, both in terms of bringing claims and devising remedies. A basic contract model underlies most textbook categories of consumer harm, such as fair advertising, abuses in the formation of contracts, access to credit, collection practices, and price and interest-rate regulation,⁹⁸ in order to promote norms of freedom and efficiency within conventional markets. While relevant, these safeguards do not present the only way to see problems of consumption. These protections assume the primacy of meaningful consumer choice, which itself assumes choice. They assume that "market failures"⁹⁹ can be corrected through minor, equitable adjustments in contract performance litigated by individual consumers against private vendors. They do not, therefore, assume the harsh economic realities of the inner-city poor.

Instead, consumption dynamics within the antimarket context demonstrate a reflexive relationship between community well-being and the welfare of individual households, often blurring the lines between public and private spheres to marginalizing effect. As I discussed in Part I, consumption relationships in the ghetto are more sensitive to social and cultural forces than in metamarkets.¹⁰⁰ As the hair salon

⁹⁸ See generally JOHN SPANOGLE ET AL., *CONSUMER LAW: CASES AND MATERIALS* (2d ed. 1991).

⁹⁹ I am not comfortable with ascribing market failure to antimarkets because of these connotations and its capacity to minimize the problems of antimarkets and, more importantly, the urgency of empowerment. However, Professor Jean Braucher's description of market failure as a basis for FTC regulation is compelling.

The concept of market failure may be used to justify policing contracts for unfairness. "Market failure" is a label that can be used to describe a situation as involving too little knowledge and perhaps too little rationality as well. Posner is not the only one who uses the term "market failure" to obscure the necessity of value choices in the policing of contracts. The liberal need to use the "market failure" label, with its reassuring overtones of scientific classification, stems from the fact that liberalism is in general comfortable with the market as an instrument of social choice and uncomfortable with the idea of social choice through government "regulation." The FTC's analysis of unfairness, for example, begins with the assumption that ordinarily the market best serves consumers' interests; the agency justifies regulation in terms of "market failure."

Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349, 380 (1988) (hereinafter Braucher, *Defining Unfairness*). See also Paul H. Brietzke, *Urban Development and Human Development*, 25 IND. L. REV. 741, 763-67 (1991).

¹⁰⁰ Although this is probably an under-emphasized observation in most personal

hypothetical in the Introduction suggests,¹⁰¹ there is more informality and less beneficial regulation. Many low-income people have little experience with formal contracts and, among blacks in particular, a long history of mistreatment that breeds distrust.¹⁰² Fairness for many is often counterposed not only with the possibility of getting a bad deal, but with being the victim of discrimination.¹⁰³ As a result, the vagaries of place—the geographic environments in which a deal goes down—are rarely, if ever, comprehended by consumer laws.

Therefore, the discussion below tracks consumer laws that roughly comprehend three broad principles: disclosure, equality, and fairness. The final section analyzes them in the context of typical antimarket consumer transactions and, before reaching some conclusions about the ingredients of a legal norm of economic empowerment, finds them lacking three essential normative considerations: access, remediation, and accommodation.

contracts, it is particularly acute in transactions involving racial outsiders. See, e.g., Black D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 69-70 (1998) ("[T]he very act of bargain formation, i.e., discreet individuals searching out bargains to maximize the gain, represents an interpersonal dynamic that automatically implicates subjective notions such as judgment, information processes, bias, opportunism, and discretion.").

¹⁰¹ See *supra* Introduction.

¹⁰² See, e.g., Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 5-6 (1995) ("Instead of being the vehicle by which ideals of liberty, equality, and autonomy could be fostered, the courts and dominant constructions of contract law became the means by which African-Americans became inalienably disempowered; outsiders to the system of justice and equitable economic opportunity.").

¹⁰³ See generally Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (demonstrating that retail car dealerships systematically offered substantially better prices on identical cars to white men than they did to blacks and women); Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183, 205 (1994) ("One undeniable consequence of the ravages of racial discrimination in this society is that disproportionately large numbers of minority citizens have neither the economic means (resulting in a 'lack of voluntariness') nor the access to education (resulting in a 'lack of knowledge') needed to avoid hard bargains in many cases.").

A. Disclosure and Equality: The ECOA and the TILA

Disclosure of credit terms, the largest area of consumer protection beyond product safety laws, is primarily governed by two federal statutes, the Equal Credit Opportunity Act (the "ECOA") and the Truth-in-Lending Act (the "TILA").¹⁰⁴ The nominal purpose of the ECOA is to provide accurate information to and about consumers involved in credit transactions and to prohibit credit discrimination on the basis of race, color, religion, national origin, sex, or marital status.¹⁰⁵ The ECOA covers creditors who "regularly extend or arrange for the extension of credit, including banks, finance companies, department stores, credit card issuers, loan brokers, and assignees . . . as well as savings and loan associations."¹⁰⁶ The ECOA broadly protects consumers in conventional credit markets by creating private rights of action against creditors who might use the information disclosed by prospective borrowers in a credit application to discriminate.¹⁰⁷ Thus, it protects against misuse of the consumer's voluntary disclosure of personal information and requires disclosure by the creditor of its decision and supporting reasons within thirty days of receipt of a completed application.¹⁰⁸

¹⁰⁴ The ECOA is codified at 15 U.S.C.A. § 1691 (West 1999). The TILA is codified at 15 U.S.C.A. §§ 1601-1667 (West 1999). Both fall under the umbrella of the Federal Consumer Protection Act of 1968, see 17 AM. JUR. 2d §§ 1-3 (1990). See also the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 and implementing regulations at 16 C.F.R. §§ 700-702.

¹⁰⁵ See 17 AM. JUR. 2d § 169; 15 U.S.C.A. § 1691. See also Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1465, 1471 (1994) [hereinafter Taibi, *Banking, Finance, and Community Economic Empowerment*].

¹⁰⁶ 17 AM. JUR. 2d § 170.

¹⁰⁷ Although the Board of Governors of the Federal Reserve System is responsible for promulgating regulations to carry out the purposes of the Act, see 17 AM. JUR. 2d § 171, the Federal Trade Commission has enforcement authority, see 15 U.S.C.A. § 1691(c) (2000).

¹⁰⁸ See 15 U.S.C.A. § 1691(d). See also *Newton v. United Cos. Fin. Corp.*, 24 F. Supp. 2d 444, 457 (E.D. Pa. 1998) (holding that substance governs over form and because borrowers were not timely informed of the lender's counteroffers to their home improvement loan requests, the lender violated the ECOA). The *Newton* court also stated that "under the ECOA there are three distinct kinds of action a creditor might take, each triggering a notice requirement: approval, a counteroffer, and an adverse action." *Id.* at 459. The ECOA defines "adverse action" as a "denial or revocation of credit, a change in the terms of an existing credit arrangement,

Underlying these disclosure protections is the assumption of equality—that all applicants be treated equally at least regarding immutable characteristics and receive the same information. Thus, in theory, disclosure functions to guarantee equality as a byproduct of procedural fairness.

Similar consumer equality concerns underlie disclosures made pursuant to the TILA. Congress' interest in disclosure under the TILA was aimed at enhancing economic stabilization and competition among various financial institutions by allowing all consumers to make informed use of credit.¹⁰⁹ The TILA focuses on disclosures related to finance charges and the annual percentage rate of interest.¹¹⁰ Consumers (and consumption) are narrowly defined under the TILA to include only "the party to whom credit is offered or extended [where the party] is a natural person, and the money, property or services which are the subject of the transaction [are used] primarily for personal, family, or household purposes."¹¹¹ The TILA covers only certain creditors.¹¹² The main remedy available to consumers is rescission of the transaction until midnight of the

or a refusal to grant credit in . . . substantially the terms requested." 15 U.S.C.A. § 1691(d)-(b); *see also* Jochum v. Pico Credit Corp. of Westbank, 730 F.2d 1041, 1044-45 (5th Cir. 1984) (holding that the lender's failure to provide written notice with specific reasons to borrower for denial of the loan was a violation of the ECOA as it was an adverse action by the lender); 17 AM. JUR. 2D § 183.

¹⁰⁹ *See* 15 U.S.C.A. § 1601(a). Congress stated that the purpose of this Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." *Id.*

¹¹⁰ *See, e.g.,* Edwards v. Your Credit, Inc., 148 F.3d 427, 432 (5th Cir. 1998) (holding that a lender is required to disclose three pieces of information to the borrower under the TILA: the amount financed, the finance charge, and the annual percentage rate).

¹¹¹ 15 U.S.C.A. § 1602(h).

¹¹² Covered creditors are defined as persons who both (1) regularly extend, whether in connection with loans, sales of property or services, or otherwise, consumer credit that is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required; and (2) to whom the debt is initially payable. *See id.* at § 1602(f). Thus, for example, secondary mortgage buyers, unknown to the debtor, have no similar duty of disclosure under the Act.

third business day following consummation or the delivery of the information,¹¹³ although civil damages are also available.¹¹⁴

Disclosure is an obvious pre-condition to economic empowerment, particularly with respect to wealth-implicating transactions such as credit.¹¹⁵ In the abstract, both the ECOA and the TILA are important legal tools for antimarket consumers because they provide an enforceable framework to prevent discrimination against the vulnerable and, through repetition, educate lower-income consumers about the risks and requirements of long-term financial relationships affecting their households. Accurate disclosure of relevant terms is, according to the FTC, the antidote to consumer deception.¹¹⁶

The problems with both Acts, however, mainly have to do with practical enforcement by debtors either unaware of violative practices or unable to afford the legal costs associated with battling smaller claims.¹¹⁷ More importantly, the prevalence

¹¹³ See 15 U.S.C.A. § 1635. See also *Mitchell v. Security Inv. Corp. of Palm Beaches*, 464 F. Supp. 650, 653 (S.D. Fla. 1979) (finding consumer could claim both rescission and double damages where loan documents for home improvement were defective); 17 AM. JUR. 2D § 118. But see *Weber v. Langholz*, 46 Cal. Rptr. 2d 677, 680 (Cal. 1995) (holding that since Ms. Weber borrowed the money to make investments in coins, the loan was not personal and she could not exercise right to rescission after she sold the property to a third party). In addition, if the credit transaction is secured by the borrower's principal dwelling, the borrower may rescind the loan agreement up to three years after the date of consummation of the transaction, or upon sale of the property, whichever comes first. See 15 U.S.C.A. § 1635(f). See also *Beach v. Owen Fed. Bank*, 523 U.S. 410, 415-19 (1998) (holding that borrower could recover actual damages for the overstated amount of the monthly payment and finance charges, but could not rescind the contract after the three-year statute of limitations had expired).

¹¹⁴ These may include actual damages, penalties, attorney's fees, and costs. See 15 U.S.C.A. § 1640.

¹¹⁵ Low-income consumers are especially vulnerable to credit scams that flow from non-disclosure of key terms because their access to conventional credit is often extremely limited. Thus, many creditors can bundle unrequested products into an ordinary short-term installment loan, thus violating several federal statutes at once. See, e.g., *In re The Money Tree, Inc.*, File No. 932-30231996, FTC LEXIS 726 (Nov. 20, 1996) (providing loans to low-income consumers in amounts between \$150 and \$400, The Money Tree, Inc. required the additional purchase of "extras" costing \$80, including a combination of credit-life, credit accident and health, credit accident and sickness, or accidental death and dismemberment insurance and/or an auto club membership, violating the TILA, the FTCA and the Fair Credit Reporting Act).

¹¹⁶ See *In re Cliffdale Assocs.*, 104 F.T.C. 110, 165 (1984).

¹¹⁷ See Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Un-*

of fraudulent or at least borderline discriminatory credit practices in antimarket communities suggests that mandatory disclosure, while a necessary constraint on credit abuses, simply does not reach many typical credit transactions, and therefore additional protections are needed. The statutes also suffer from their narrow focus on household consumption, which again emphasizes individualized transactions without acknowledging the larger economic context in which consumer exchanges take place.¹¹⁸ Not all problematic offers of credit are deliberately unscrupulous; many are made by vendors that are themselves vulnerable, and most are local to areas ignored by vigilant federal regulators or consumer watchdog organizations.¹¹⁹

But, for these purposes, the ECOA and the TILA comprehend relevant legal principles of equality and disclosure. From an empowerment perspective, they at least codify notions of meaningful choice, the relevance of certain kinds of information to consumer decisionmaking, and a federal interest in

conscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates Under the Unconscionability Standard, 31 HOUS. L. REV. 721, 769-70 (1994) [hereinafter Bender, *Rate Regulation at the Crossroads*]; Braucher, *Defining Unfairness*, *supra* note 99, at 352, n.14, 396-97. On the prohibitive costs of disclosure litigation, see E. ALLAN FARNSWORTH, *CONTRACTS* § 342 (2d ed. 1990). Commentators have pointed out other structural and practical problems with both Acts, including the ECOA's reinforcement of status quo economic relationships in the name of equality. See Taibi, *supra* note 26, at 1467. Some chronicle the TILA's ascendance as an inefficient paper mill useful only to bureaucrats. See William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WISC. L. REV. 400, 420-32 (describing criticisms of the TILA's mandatory disclosures because rate information is either not learned by consumers or is not used by them in reaching decisions, but concluding that such disclosures exceed the benefits of voluntary disclosures and reduce overall disclosure costs). Cf. Jonathan M. Landers & Ralph J. Rohner, *A Functional Analysis of Truth in Lending*, 26 U.C.L.A. L. REV. 711, 722-24 (1979) (discussing social science evidence of consumers' cognitive or decisional overload in the actual context of many credit purchases resulting in diminished attention paid to credit terms); but see David M. Grether et al., *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 301 (1986); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PENN. L. REV. 630, 675-77 (1979).

¹¹⁸ At least two commentators have characterized disclosure protections as middle class in practical application. See Robert L. Jordan & William D. Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B.C. IND. & COM. L. REV. 441, 449 (1967) (describing disclosure protections as "largely middle-class solutions . . . to what has increasingly become a lower-class problem").

¹¹⁹ See *id.*

equalized exchange relationships. Thus, they may constitute parts of a legal norm of empowerment, if only a shell.

B. *Unconscionability*

Ms. Ora Lee Williams, whose presence in *Williams v. Walker-Thomas Furniture Co.*¹²⁰ is usually the first and last appearance of a low-income consumer visited upon first-year law students, has come to epitomize the procedural and substantive features of a bad deal struck down by the unconscionability doctrine. Since its formal adoption in the U.C.C., the common law unconscionability doctrine has been enacted by statute in model consumer protection acts and by several states.¹²¹ Some commentators, citing a string of onerous credit practices disproportionately affecting low-income consumers, argue that it is a more effective prophylactic than usury and it should be directly applied to the kinds of credit transactions covered by the ECOA and the TILA.¹²² Even proponents of more widespread use of the doctrine to combat consumer abuses in antimarkets acknowledge what Ms. Williams' singular presence signifies to students: that the doctrine, perhaps inadvertently, presumes a certain dependency among poor people in which their lack of bargaining power fits a marginalized profile of economic victim, rather than actor.¹²³

¹²⁰ 350 F.2d 445 (D.C. Cir. 1965).

¹²¹ For example, the Uniform Consumer Sales Practices Act provision on price unconscionability, § 4(2), 7A U.L.A. 241 (1971), has been adopted by Kansas, Ohio and Utah. Wisconsin, Wyoming, Oklahoma, Indiana, Colorado, Utah, and Guam have adopted Section 5.108 of the Uniform Consumer Credit Code. California's unconscionability statute applies generally to all contracts, permitting a court to refuse contract enforcement or to limit enforcement so as to avoid any unconscionable result. See Cal. Civ. Code § 1670.5 (West 1985).

¹²² See Bender, *Rate Regulation at the Crossroads*, *supra* note 117, at 724-38.

¹²³ See, e.g., Jeffrey Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 491-92 (1994) ("I am concerned about an approach in which the disadvantaged party is seen as a victim that the law has more or less rescued. This suggests some element of subordination which, in a subtle way, cuts against the elevating and vindicating effects that are more productive.").

Under U.C.C. § 2-302,¹²⁴ unconscionability generally requires that a court find "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."¹²⁵ Although the absence of meaningful choice aspect is associated with procedural unconscionability and the unfavorable terms deemed substantive,¹²⁶ some writers concerned about low-income consumers argue that only the substantive unfairness of deal terms is particularly relevant.¹²⁷

Although this analysis is not unsympathetic to unconscionable bargains struck between low-income consumers and vendors, the focus here is not on price or other contractual terms. Instead, the relevance of unconscionability doctrine to a legal norm of economic empowerment may turn as much on a substantive reading of consumers' bargains as it does on what is behind that image of Ms. Williams striking that particular bargain in the first place. Jeffrey Harrison's social psychological approach to unconscionability and poor consumers suggests that, even in the most straightforward consumer transactions, a "sense of entitlement" divides low-income from middle-income consumers to the former's detriment.¹²⁸ His analysis contends that under either equity theory or relative depriva-

¹²⁴ Subsection (1) provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

UCC § 2-302(1).

¹²⁵ *Williams*, 350 F.2d at 449.

¹²⁶ See FARNSWORTH, *supra* note 117, at 332.

¹²⁷ See Charles R. Bogle, *Unconscionable Conditions: A Contractual Analysis of Conditions on Public Assistance Benefits*, 94 COLUM. L. REV. 193, 232-33 (1994); Bender, *Rate Regulation at the Crossroads*, *supra* note 117, at 749. Other writers have criticized certain aspects of the doctrine's application, including encouragement of bad risk-taking and inefficiency through a meddling reliance of wealth redistribution. See generally Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. LAW & ECON. 293 (1975); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations On The Freedom to Contract*, 24 J. LEGAL STUD. 283 (1995) (arguing that the provision of welfare in a free market produces perverse incentives to take credit risks, which both drive up the cost of the welfare system and undermine its goal of poverty reduction).

¹²⁸ Harrison, *supra* note 123, at 446.

tion theory, poor consumers internalize a denigrated notion of their own worth relative to those who occupy a higher class status and, because preferences are essentially learned, will accept a lower level of fairness that reflects a lower self-esteem in the marketplace.¹²⁹ Thus, class status permeates private contractual ordering, reinforcing diminished expectations of a fair deal among antimarket consumers and propelling metamarket consumers to demand better.

The unrelenting message is that those who receive less must have less to offer and are ultimately less worthy, and, having heard this message long enough, individuals become even more susceptible to it. Disadvantaged people tend not to question a world that tells them how little they have to offer, how little they are entitled to, and that they are ultimately to blame.¹³⁰

Under this analysis of equity theory, Ms. Williams enters into the deal with Walker-Thomas Furniture Co. by consciously or unconsciously viewing the distribution of contractual benefits according to a ratio of outputs to inputs equal to people in her own position—that is, poor people living in neighborhoods in which such deals are commonplace. Worse, even though Ms. Williams may sense that the deal's terms are horribly unfavorable, she may nevertheless “manufacture” a sense of equity to fit a local schema of goods procurement, thereby justifying it as perhaps reasonable under the circumstances.¹³¹ As a consumer in context, she will not compare her deal with similar deals in more affluent parts of town.

Alternatively, under two categories of relative deprivation theory, egoistic and fraternal, the social comparisons she might make are slightly different and assume greater primacy.

In the case of egoistic deprivation, the individual compares [her] plight with that of a similar referent, with the emphasis on the individual's own well-being. With fraternal deprivation, the scope of the comparison changes; the focus is on the plight of the group of which the individual is a member, as compared to a better situated group . . . Individual transactions are more likely to raise issues of egoistic deprivation.¹³²

¹²⁹ See *id.* at 447-49.

¹³⁰ *Id.* at 467-68.

¹³¹ See *id.* at 458-60 (“[I]ndividuals tend to avoid making comparisons with cohorts who are dissimilar.”).

¹³² *Id.* at 461-62.

Harrison's personality inquiries are somewhat consistent with the environmental postulates of my antimarket/meta-market dichotomy. Both environments work to condition the economic expectations not only of the household consumers who live there but also the commercial establishments, public institutions, and service providers doing or seeking business in the respective communities. That the rules and customs are different in each is less obvious to those familiar with fixed, internal referents. Operating in separate economic systems, few consumers are in a position to wonder about the fairness of particular transactions outside of local spheres divided by class.¹³³

These underlying assertions about personality dynamics have obvious import for legal norms of empowerment. They flag the concern that even the most well-intentioned economic development strategies may be limited by place-based expectations of change. Further, they highlight the need to consider how empowerment as a goal may necessitate fundamental consumer education about the broader distribution of "entitlements" in every-day transactions. Finally, they lead to questions about how substantive unconscionability may reach other kinds of consumer exchanges, such as the expectations of public assistance recipients, in which unspoken rules of service provision for the poor are routinely denigrated compared to middle-income consumers.¹³⁴

¹³³ According to Braucher, antimarket consumers may not care to wonder about the fairness of a credit transaction, instead making the psychological comparison of belonging generally to the class of people who can be approved for such transactions.

A consumer borrower may feel some elation at the social participation of entering into the market in a significant way and at the approval thus conferred by the creditor. This may produce a desire to play the expected role by dutifully assuming the obligation and not questioning the authority of the entity that confers approval and good feelings. Creditors' ordinary presentation of adhesion contracts—as a matter of course and as how these things are done—adds to the consumer's sense of appropriate role-playing.

Braucher, *Defining Unfairness*, *supra* note 99, at 366-67.

¹³⁴ See generally Bogle, *supra* note 127. Bogle argued by analogy that unconscionability should be applicable to unconstitutional conditions analysis with respect to fundamental rights encumbered by welfare laws, triggering strict scrutiny. Citing cases such as *Wyman v. James*, 400 U.S. 309 (1971) (finding Fourth Amendment restrictions on aid recipients), Bogle argued that recipients sometimes give up

The risk in these analyses, however, is to assume a certain ignorance of fairness on the part of marginalized consumers. Acceptance of substantively bad deal terms should not be conflated with endorsement, psychological or otherwise. A consumer may know that the deal is not a good one even though it is common in the area.¹³⁵

Alternatively, they may not know that a given lending rate would be considered usurious outside of their redlined community. Yet their options are limited, not by an internalized inferiority or lack of self-desert, but by ugly circumstances probably within their knowledge but beyond their control. Despite a crippled capacity to litigate new economic norms into local existence,¹³⁶ there is evidence that low-income consumers are quite motivated to shop in metamarket neighborhoods, where the goods and services are more varied, cheaper, and of better quality.¹³⁷

In any event, what we may take from an inquiry into unconscionability doctrine and economic empowerment at this point in the analysis is a heightened appreciation of substantive shortcomings in the kinds of commercial exchanges low-income consumers regularly enter and an awareness of the possible differences in consumers' expectations of fairness based on their class position.

protected rights as a quid pro quo for public benefits. He stated, "Where governments pass such legislation, it should be struck down as unconscionable unless some compelling state interest can be shown." Bogle, *supra* note 127, at 233.

¹³⁵ The reactions to obvious public school disparities by low-income students cast even further doubt on generalizing Harrison's claim too far. When asked about the reason for differences in the physical condition of his school compared to white middle-class schools, a Puerto Rican high school student replied, "If you threw us all into some different place, some ugly land, and put white children in this building in our place, this school would start to shine. No question. The parents would say: 'This building sucks. Its ugly. Fix it up.' They'd fix it fast—no question." KOZOL, *supra* note 91, at 104.

¹³⁶ See note 117 *supra*.

¹³⁷ See generally, Troutt, *Poor Pay More*, *supra* note 29, a study for Consumers Union demonstrating empirically that low-income consumers regularly find ways to travel to middle-class neighborhoods for goods and services such as groceries and banks in order to overcome higher prices as well as poor service and selection in their own neighborhoods.

C. *Unfairness: Consumer Injury*

Discussions of unconscionability often fold into larger inquiries about transactional fairness¹³⁸ where the FTC has established a useful starting point. In 1980, the Commission issued its first version of the Unfairness Statement,¹³⁹ later modified and explained in subsequent decisions. "Unfairness" requires a finding of "substantial unavoidable consumer injury,"¹⁴⁰ a broad standard that on its face would appear relevant to many of the "ghetto shopping" and other experiences of antimarket consumers described in Part I. Thus, the provision of inadequate public health care or education, the unavailability of consumer and business financing except at rates inflated by redlining, or the mistreatment of consumers seeking affordable baby clothes or fruits and vegetables would all, despite the variety of vendors, seem to raise legitimate questions about the fairness of related transactions. The standard, however, breaks down into three elements: (1) how substantial the injury is; (2) whether the practice in question produces offsetting benefits that outweigh the injury; and (3) whether consumers could have reasonably avoided the injury.¹⁴¹ Taking each briefly in turn demonstrates how Commission analysis makes unfairness difficult to prosecute, while revealing principles relevant to a norm of economic empowerment.

The FTC explained the meaning of its three unfairness elements in *In re International Harvester Company*,¹⁴² where the Commission ultimately found that the tractor manufacturer's failure to adequately inform its purchasers about the dangers of "fuel geysering" was unfair within the

¹³⁸ Braucher, *Defining Unfairness*, *supra* note 99, at 350. *See also* Williams, *supra* note 103, at 204 ("[T]he unconscionability doctrine . . . openly and explicitly is geared toward . . . fairness determinations."); FARNSWORTH, *supra* note 117, at 323-24 (noting the doctrine's emergence out of equity).

¹³⁹ *See* Letter from the Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), *reprinted in* H.R. REP. NO. 156, pt. 1, at 33-40 (1983) [hereinafter *Unfairness Policy Statement*]. However, the roots of the unfairness factors come from the Commission's so-called "Cigarette Rule" sixteen years earlier. *See* Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8325, 8355 (1964).

¹⁴⁰ *In re Orkin Exterminating Co.*, 108 F.T.C. 263, 360 (1986).

¹⁴¹ *See id.* at 362.

¹⁴² 104 F.T.C. 949 (1984).

meaning of Section 5 of the Federal Trade Commission Act. As to substantiality, the Commission wrote that "unfairness cases usually involve actual or completed harms[,] which may be monetary or, as the policy statement indicated, present "unwarranted health and safety risks."¹⁴³ The second element, harm in net effects, "requires us to balance against the risks of injury the costs of notification and the costs of determining what the prevailing consumer misconceptions really are" — a detailed analysis.¹⁴⁴ Finally, the unavoidability of the injury factor requires that "the injury be one that consumers could not reasonably have avoided through the exercise of consumer choice."¹⁴⁵ Thus, the entire analysis entails cost-benefit balancing, focusing "on the maintenance of consumer choice and consumer sovereignty" in the operation of free markets.¹⁴⁶

Noting the efficiency-oriented language of the Commission's unfairness pronouncements, at least one author has argued for normative inquiries alongside its cost-benefit analysis.¹⁴⁷ That analysis boils down to determining whether market failure exists and what substitution of outcomes might satisfy the balance, a two-step process designed ultimately "to try to empathize with the situation of consumers."¹⁴⁸

If fairness and efficiency are often thought to be mutually exclusive, empathy and efficiency are even harder to join. This may be especially true where the consumer situations at issue are isolated in antimarkets where notions about fairness may differ substantially from the norms operating in metamarkets. Empathizing with low-income consumers might also entail empathy for how they came to be low-income consumers in the first place, or how ghettos became antimarkets, questions that sometimes reduce to simplistic considerations of blame or discrimination that again work to push the poor to the margins of

¹⁴³ *Id.* at 247 (citing the Unfairness Policy Statement).

¹⁴⁴ *Id.* at 247-48.

¹⁴⁵ *Id.* at 248.

¹⁴⁶ *See id.* at 247-48.

¹⁴⁷ Braucher, *Defining Unfairness*, *supra* note 99, at 352 ("Although this is an understandable reaction to the political pressures the Commission faces, the result is that the explanations it offers for its regulatory actions are sometimes incomplete or unconvincing The use of economic labels is part of the FTC's effort to de-emphasize the necessity of value choices.").

¹⁴⁸ Braucher, *Defining Unfairness*, *supra* note 99, at 352.

normal productivity and consumer exchange. For this reason alone, however, it might be a helpful exercise.

Begin by assuming several consumer scenarios, graduating the degree of abstraction outward from, for example, the household hair care services consumer to the neighborhood as a consumer of resources for parks and recreation. In the example of the Harlem hair salon (described in the Introduction), it is easy to empathize with the customer, Shawna. Although she is but a single consumer, FTC unfairness analysis (despite its tendency to look at more aggregate claims) would seem readily to apply. A fairness norm construed in that way would protect her from substantial injury arising from the use of poor products or their negligent application, such as a severely damaged scalp or long-term hair loss.¹⁴⁹ The net effects element is probably satisfied with a showing that Aaki, the stylist, could have opted for the less damaging product or procedure without substantially increasing her own costs. The last element, unavailability, is a little more problematic. Imagining ourselves as Shawna, we could have gotten our hair done elsewhere (or even walked out if we sensed something was wrong). But our empathy might be broader; it might also assume that the constraints upon stylists like Aaki are similar throughout neighborhoods like this one where we are more likely to find stylists who specialize in black women's hairstyles.

A norm of consumer fairness is more easily susceptible to empathic evaluation when the subject is the individual consumer seeking necessities and basic conveniences. In addition to hairstyling, we might demand similar modes of commercial fairness in leasing an apartment, buying groceries, purchasing clothing or furniture, or seeking family counseling or prenatal care. These kinds of consumption activities are shared by most of us, and the use by some does not seriously infringe on the use by the rest of us.

Now take the example of the community consumer seeking parks and recreation for a neighborhood with a disproportionate number of children and teenagers but few places to play. The injuries here are the incalculable problems associated with idle youth, dangerous substitute play spaces (such as streets), and other ills associated with *not* having the resource avail-

¹⁴⁹ Of course, her claims might also sound in tort.

able. In other words, there has been no transaction to police. Yet the injury is substantial. The cost-benefit balance seems clearly to favor parks and pools over idleness and domesticity. And here unavoidability is patently unreasonable: people simply will not just stay home nor feel welcome traveling across town. Yet the common absence of parks and recreation in antimarket neighborhoods (or their maintenance and safety) suggests a clear lack of empathy by those who enjoy such common facilities in other parts of the city and a manifest unfairness by comparison. An unfairness analysis of public transportation, road repair, locally unwanted land uses ("LULU") siting, and public education would yield similar conclusions. It might also demonstrate a lack of empathy not only by unaffected consumers (e.g., NIMBYism), but more importantly by vendors of public services. The legal problem, of course, is that the mode of consumption implicated by these goods and services is again beyond the reach of established consumer law. That is, it demonstrates the distinction between legally recognized consumer protections and economic empowerment.

D. *Toward a Legal Norm of Economic Empowerment*

The foregoing analysis of consumer law principles and antimarkets takes us deep into considerations about the constituent legal norms that might inform a larger legal norm of economic empowerment, but it also reveals many shortcomings. The three established areas of consumer protection—disclosure, unconscionability, and fairness—do not constitute the entire field of available legal protections. Nor were all their inherent norms and objectives fully explored here. The point is not to survey all the available statutes that might be utilized by consumers and agencies in inner-city economic development strategies. Rather, the objective is to distill established legal precepts of an empowerment norm where they exist and to expand them where they do not. This requires a continuation of the exercise in the last section.

But first it is relevant to isolate elements of what economic empowerment may mean, at least in a root sense. Given the psychological literature about how economic access to certain

goods and services is conditioned,¹⁵⁰ empowerment implies a condition of psychic and economic belonging. To *feel* empowered probably requires a capacity for asserting one's economic interests, a feeling that derives in part from perceived economic as well as political status. Like the fearless negotiator, this may imply the ability to walk away at the recognition of a bad deal. Such a complicated state of belonging and self-support, I submit, has something to do with command over the resources that ultimately bring about personal or community growth. Rather than the desired outcome itself, empowerment involves the internal capacity for the desired outcome.

1. Disclosure, Equality, and Fairness

The three consumer law principles explicit in the earlier discussions of this Part are disclosure, equality, and fairness—all within the established confines of a contractual exchange and all within the context of an individual consumer transaction. Though each is critical to low-income consumers, antimarket conditions demand a broader notion of relevant consumption. That is, they demonstrate the impact that the neighborhood, as consumer, has on the individual household consumer (or commercial enterprise). When the unfairness exercise reached beyond individuals to community resources, its protections failed for three reasons. First, the dearth of certain resources in antimarkets may cement a pre-contractual condition. Second, the injuries, though undoubtedly substantial, may not easily be quantified. Third, the law currently does not conceive of consumer protection as collectivized, except by aggregating bad individual bargains.

Nevertheless, we can imagine many typical household consumer situations in which the greater operation of disclosure, equality, and fairness norms would have an empowering effect. In addition to grocery shopping, apartment rentals, and home furnishing purchases on credit, we could include mortgage lending and public services such as public transportation, education, and social services.¹⁵¹ For the low-income consumer, all of these transactions require that terms are disclosed,

¹⁵⁰ See generally Harrison, *supra* note 123.

¹⁵¹ For an illustration, see discussion *infra* Part V.

that the goods and/or services are provided on an equitable basis, and that without those protections, an unfairness is worked to a debilitating and disempowering degree. Expanding our notion of relevant consumption, we could find that local businesses depend on the same norms to govern the provision of commercial real estate leasing, sanitation and utilities, and banking and credit relationships. Without investment supports on such terms, local commercial markets remain skeletal or decline.¹⁵² Finally, looking at the community as a consumer brings many of the same benefits full circle. The resources for public safety, schools, transportation, infrastructure, and even parks inure to the benefit of individual households in the community.

But clearly that is not all that these categories of antimarket consumers need in order to realize greater economic empowerment. At best, these merely level the playing field, and only theoretically at that. However, as antimarkets, these urban communities (and many of the consumer households living within them) have been systematically disfavored in the provision of economic resources for a very long time. A foundation for economic empowerment is therefore unlikely without at least three more principles of consumption rarely emphasized in consumer law: access, remediation, and accommodation.

2. Access, Remediation, and Accommodation

Without access to economic and other resources, norms like remediation and accommodation have no meaning in antimarkets. Access may be read narrowly to mean the reasonable availability of basic neighborhood goods and services close to home, or broadly to encompass opportunity, such as a community voice in public decisionmaking or systems of credit to counteract the dearth of capital caused by redlining.¹⁵³ The

¹⁵² See Troutt, *Poor Pay More*, *supra* note 29, at 30-34 (comparing, *inter alia*, constraints on necessary business expansion between low- and middle-income area merchants).

¹⁵³ Redlining may be considered the epitome of an antimarket's lack of access in the broad sense of opportunity. Redlining artificially diminishes opportunity by profiling a neighborhood for capital deprivation. As investments flow out of and away from redlined areas, opportunities for commercial and non-profit organization

Community Reinvestment Act¹⁵⁴ (the "CRA") is an example of the broader access norm enacted through federal legislation. In theory, it is intended to counteract the historic effects of bank redlining by charging qualified lending institutions with geographically defined obligations to make home loans available to underserved markets.¹⁵⁵ This particular form of economic access-as-structural-opportunity is also associated with remediation in the sense that the imposition of the CRA obligations on banks is justified by the need to remedy the effects of past and present discrimination.¹⁵⁶ The analogy to civil rights laws generally is not accidental.

Similarly, remediation as a legal norm may simply return people to the position they were in before something untoward happened. Yet, in the antimarket context, it may acknowledge the history of racial and economic exclusion by which cumulative disadvantages have sedimented.¹⁵⁷ The processes of exclusion discussed in Part I, such as a lack of land use planning and protections or the abandonment of public services, literally scar the landscape, hindering economic growth and signaling marginalization to disempowered residents. Remediation, in the sense of bringing additional resources to long underserved communities, is therefore critical to antimarket empowerment.

Finally, accommodation of neighborhood peculiarities and demographic differences makes this a necessary norm within empowerment. Access, remediation, and accommodation work together. For instance, the three consumer law principles (disclosure, equality, and fairness) may positively impact upon community consumption needs, such as public schools, safety, transportation, and infrastructure. But they fail to reach the ground beneath, which contains the sedimentation of long unmet needs. Further, the needs and preferences of antimarket consumers often differ substantially from those of metamarket consumers in both kind and severity.¹⁵⁸ For ex-

as well as job creation, homeownership, and a more stable tax base dry up, systematically contributing to further economic decline.

¹⁵⁴ 12 U.S.C. §§ 2901-2907 (1994).

¹⁵⁵ See generally 12 U.S.C. § 2901.

¹⁵⁶ See Taibi, *supra* note 26, at 1467.

¹⁵⁷ See OLIVER & SHAPIRO, *supra* note 61, at 51.

¹⁵⁸ See, e.g., Regina Austin, 'An Honest Living': *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2123 (1994) (discussing

ample, public education in ghettos is complicated by many factors unseen in middle-class schools, but the amount and type of resource allocations are certainly foremost among them.¹⁵⁹ Low-income students obviously require greater access to the public good that is education, but mere equality of school funding and environmental inputs is unlikely to magically empower students where they are. Instead, their differences (economic, social, cultural, etc.) as students coming from and mired in acutely difficult circumstances in turn must characterize the allocation of that public good if it is to have the empowering effect on students' economic lives that most education consumers seek. Thus, access, remediation, and accommodation help assure the conditions for economic empowerment.

3. A Legal Norm of Economic Empowerment

Earlier, I defined empowerment in its root sense as the condition of psychic and economic belief in and belonging to the capacity for self-support and stability, buttressed by the ownership of or command over the resources that effectuate outcomes conducive to growth. Its legalistic tenor reflects an attempt to see empowerment as a norm general enough to comprehend *all* consumers. Command over resources need not be strictly economic resources; growth need not be based solely on wealth or income. The idea is relational and aspirational; these are its raw materials. Empowerment is a condition of strength and agency.

The discussion of consumer law principles now helps to refine the above definition in the more specific context of inner-city economic development, where "empowerment" is often used but rarely defined. What, then, is a legal norm of economic empowerment? The legal norm of economic empowerment is a condition of agency capable of bringing about self-support,

street vending cultural goods).

¹⁵⁹ See *supra* Part I.A.2. See also KOZOL, *supra* note 91, at 115 ("When a school board hires just one woman to retrieve 400 missing children from the streets of the North Bronx, we may reasonably conclude that it does not particularly desire to find them."). Similar arguments may be made about the relationship between law enforcement and antimarket consumers, the different needs for public transportation among the poor, and the greatly deferred needs of infrastructure maintenance.

stability, and growth through the protected control and ownership of economic resources. The legal norm is actualized by resort to principles of open disclosure, access, equality of treatment, remediation of persistent constraints on capacity, fairness concerns for preventing substantial, unavoidable injuries, and accommodation of differences. It is rooted in consumption dynamics both between individuals and community and between community and the wider metropolis.

A remaining question is whether the empowerment norm's objectives are consistent with a consumer-oriented approach, given obvious reservations about consumerism, and implicates larger cultural questions about the extent to which the legal and economic realms cross into the realms of the personal and political. This is the third relevant distinction and probably the most subtle: consumerism versus beneficial consumption. These matters are the subject of Part III.

III. THE THIRD DISTINCTION: CONSUMERISM AND BENEFICIAL CONSUMPTION

A. *Critiques of Consumption and the Antimarket Difference*

Even if the law were to comprehend consumption more broadly than consumer law has in the past, this does not alone justify making consumption a beneficial basis for an empowerment norm. Local government law scholars such as Jerry Frug have long observed how the distribution of goods and services in and around cities has become consumerized to detrimental effect.¹⁶⁰ Frug rightly laments the anti-communitarian effects of contemporary thinking about the urban milieu as an individualized shopping spree for the right schools, parks, taxes, and subsidies.¹⁶¹ In earlier writing, I have responded that these tendencies, for the most part, belong to an already-empowered middle class, whose needs for basic public and private goods and services have long been met.¹⁶²

¹⁶⁰ See Frug, *City Services*, *supra* note 78, at 42.

¹⁶¹ See Frug, *City Services*, *supra* note 78, at 28-34.

¹⁶² See Troutt, *Ghettoes Made Easy*, *supra* note 2, at 479-80.

What Frug and others criticize might best be considered excesses and luxuries of *consumerism*, rather than a universal norm of conspicuous acquisition that puts all places within the metropolis at equal risk of "I got mine-ism." Antimarkets, I have argued, need more responsive consumer infrastructures,¹⁶³ which include many of the same amenities (and opportunities) now abundant in wealthier parts of town.

But some within the inner-city economic development law community worry about another dimension of consumerism. Specifically, they decry the professionalization of community economic development lawyers too concerned with material improvements in antimarket neighborhoods than with economic empowerment.¹⁶⁴ Daniel Shah, for example, persuasively argues that my notion of empowerment, as the condition of agency capable of bringing about self-support, stability and growth, is directly undermined by strong tendencies to allow outside corporate interests to exploit under-utilized markets for profit rather than enhanced community control.¹⁶⁵ Federal empowerment zone legislation has provoked similar structural criticisms of larger-scale economic development strategies.¹⁶⁶

¹⁶³ "Consumer infrastructure" may also denote an aggregate measure of a given neighborhood's available public and private goods and services, which then allows for objective comparisons between communities. See generally Troutt, *Poor Pay More*, *supra* note 29 (analyzing housing, health care, lending, and other services in four California neighborhoods).

¹⁶⁴ See Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217, 250 (1999) He wrote:

[I]f the ends of community development remain material improvements, and the means continue to subordinate the voices of the communities they serve, and funding community-based organization[s] co-opts leaders by giving them a stake in the system that continues to oppress their constituents, then community development programs will never present a stage on the trajectory of the path to empowerment.

Id.

¹⁶⁵ See *id.* at 234. Perhaps Shah's best example of this "professionalized," yet distancing, role is the shift from government subsidies for housing development to tax credits. "Because of the private sector's focus on measurable returns on investments, the priority of projects addressing material improvements increased." *Id.* The complexity of the deals increased reliance on lawyers.

¹⁶⁶ *Id.* at 240-41. See also Otto J. Hetzel, *Some Historical Lessons for Implementing the Clinton Administration's Empowerment Zones and Enterprise Communities Program: Experiences from the Model Cities Program*, 26 URB. LAW. 63, 68, 79 (1994); Wilton Hyman, *Empowerment Zones, Enterprise Communities, Black Business, and Unemployment*, 53 WASH. U. J. URB. & CONTEMP. L. 143, 160-62 (1998); see generally Troutt, *Ghettoes Made Easy*, *supra* note 2.

Still others draw the parallel to the bureaucratization of public institutions such as welfare and schools, so dominant in the fabric of inner-city life. They note convincingly how the disinterest in recipients' actual lives and the indifference to personal decisionmaking dehumanizes local residents and contributes to systematic disempowerment of the poor.¹⁶⁷

These are real problems for a consumer-oriented approach to empowerment. In some form or another, most of these criticisms prescribe decentralized control,¹⁶⁸ if not direct grass-roots takeover of commercial and non-commercial institutions within antimarkets.¹⁶⁹ Like the land use roots of metamarket development across America, local control of community character, aided by concrete forms of economic stakeholdership and participatory decisionmaking, probably builds empowered communities. This, by itself, is an unproblematic conclusion, but it assumes "the community" would not want a focus on physical improvements or a Starbucks on every corner. Because it might, decentralized control is only a means to implementing the goals of economic empowerment. But those goals are not clear.

Anthony Taibi has articulated one of the clearest visions of economic empowerment goals, although he qualifies his specific banking proposals by acknowledging that his community empowerment paradigm represents "more a sensibility and approach" than a distinct body of doctrine.¹⁷⁰ It is based on a critique of existing federal banking and credit statutes, such as the ECOA and the CRA, mainly for attempting inefficient

¹⁶⁷ See Jacqueline Pope, *The Colonizing Impact of Public Service Bureaucracies in Black Communities*, in RACE, POLITICS, AND ECONOMIC DEVELOPMENT 141 (James Jennings ed., 1992). "[B]ureaucratization' is intensifying and steadily destroying the capacity of African-Americans to develop strategies of empowerment and self-help. Vast numbers of African-Americans are controlled by four major public institutions: the police forces, schools, health agencies and public assistance." *Id.* Further, Pope argues that public bureaucracies—and public assistance in particular—contribute to the depoliticization of black people by withholding decisionmaking control over the resources necessary to live and dehumanizing black recipients as undeserving or lazy rather than recognizing them as clients or citizens. *See id.* at 142.

¹⁶⁸ See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843, 1908 (1994); Gerald E. Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 273-303 (1993).

¹⁶⁹ See Pope, *supra* note 167, at 146.

¹⁷⁰ See Taibi, *supra* note 26, at 1541.

equality-based financial reforms without addressing the oppressive character of economic globalization on local communities of color. His specific proposals call for strengthening community development financial institutions, such as credit unions; community-development banks and loan funds, whose entrepreneurship and close relationships with community development corporations assure greater "independence, local control, and freedom from red tape."¹⁷¹ But over all, Taibi presents a comprehensive, aspirational set of empowerment goals that subsumes economic models within the social and political realities beyond the ghetto's borders. It warrants quoting at some length:

Community empowerment shows us that our real interests lie in establishing economic and political structures that strengthen community-based institutions and allow the issues that most directly touch people's lives to be decided at the local level. Community empowerment advances the interests of every non-elite American, regardless of race or ethnicity, and addresses problems of middle-class anomie as well as of lower-class hopelessness. Part of the struggle must be to create a financial structure that ensures that all Americans can buy and improve their own homes, start and maintain their own businesses, and serve their own people. A community-empowerment paradigm sees lower- and middle-class Blacks and Whites as united by their desires to resist the cultural and economic colonization of their respective communities and to engage in self-determination. Moreover, a community-empowerment approach may provide a more legitimate and enduring basis for transracial politics, because unlike existing civil rights paradigms, community empowerment is based on a genuine respect for our differences.¹⁷²

None of Taibi's statements appear to preclude a consumer-oriented approach to economic empowerment nor to reject the legal principles constitutive of the norm that I have proposed. In the abstract, if consumption is an effective organizing principle in both middle-class and low-income communities (albeit driven mainly by narrow self-interest), then it may provide a foundation for the type of inclusion, self-determination, and transracial politics that he and others advocate.¹⁷³

¹⁷¹ *Id.* at 1522.

¹⁷² *Id.* at 1516-17.

¹⁷³ See John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering At the Interesection of Race, Space, and Poverty*, 67 *FORDHAM. L. REV.* 1927, 1952 (1999).

But consumption, like economic globalization, does not affect all communities within the city the same way. A harrowing array of vulnerabilities, such as gentrification¹⁷⁴ or *carte blanche* dealmaking among private-sector actors, make antimarkets susceptible to destructive consumerist dynamics that may subordinate the interests and voices of low-income consumers. Unlike metamarkets, from which the middle class can effectively exit when the ideals of local economic arrangements are destabilized, the persistently poor cannot move so easily—or thwart changes by threatening exodus. At the level of political influence and economic staying power, antimarket residents and institutions are in a radically different position than metamarket consumers. Therefore, economic empowerment in ghettos must at some point embrace meanings different than those that fuel and stabilize the norm in middle-class areas.

B. *Cultural Critiques of Consumption Within Antimarkets*

The above considerations suggest problems for a consumer approach because of consumption modes from outside the antimarket community itself. But the dangers of relying too heavily on consumption emanate from within antimarkets, too. This is mainly because, as I discussed earlier,¹⁷⁵ consumption as a part of identity, status, and belonging is powerfully cultural. And, for empowerment purposes, what is cultural is increasingly economic.

If, as Celia Lury notes, “[C]onsumer choice is still the means by which our society thinks about individual agency and autonomy and makes judgments . . . about personal identity,”¹⁷⁶ then it is both an opportunity for and a threat to empowerment. Nowhere is this perhaps more true than consump-

¹⁷⁴ See generally NEIL SMITH, *THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY* (1996). According to Smith, gentrification is a back-to-the-city movement by capital rather than people. See *id.* at 70. It rests on historical waves of devalorization in the spaces between the urban center and the outlying areas, reflecting a sort of natural depreciation of once more expensive land. “This devalorization produces the objective economic conditions that make capital *revaluation* (gentrification) a rational market response.” *Id.* at 67.

¹⁷⁵ See *supra* notes 71-74 and accompanying text.

¹⁷⁶ LURY, *supra* note 74, at 248.

tion in ghettos where the risk of being measured and swallowed up by material possession has higher stakes and dangers for household wealth and welfare.¹⁷⁷ Culture as an industry is all over ghettos, producing true market participation on a global scale.¹⁷⁸ Most writers about the consumption habits of the poor tend to focus on popular culture, usually black popular culture. Of course, most ghetto neighborhoods are not populated primarily by teenagers, gangster rappers, or drug dealers. But their effect on cultural identity in a consumer sense is extensive enough to question the viability of a consumer-oriented approach to economic empowerment.

Alluding to these black popular culture forms, sounds, and imagery, Cornel West connects some of their underlying values to what he calls the nihilistic threat to existence that goes beyond economic deprivation and political powerlessness to a "profound sense of psychological depression, personal worthlessness, and social despair so widespread in black America."¹⁷⁹ According to West, the nihilistic threat is the greatest threat to black America—greater than racist oppression—and

¹⁷⁷ Excessive consumerism in ghetto neighborhoods can be lethal. Although the adolescent obsession with the latest athletic footwear or prominently visible gold jewelry is glorified daily in rap songs and videos, less remembered is the violence sometimes associated with it. These and other consumer items may be idealized for the luxury of "living large" that they represent, but the finest clothing, adornments, cars, and champagne are attainable by very few with ghetto incomes—except drug dealers. Hence the association with these accoutrements is embedded in criminal culture: what a drug dealer can have, what a gangster can take. The two inextricable associations, the one for the pleasure of possession, the other for personal status, may explain the importance these items achieve and why ghettos are replete with the images of young people shot by other young people taking what little measure of them that they can. Although the fatalities are occasionally newsworthy, the near fatalities, particularly the sight of paralyzed young people crossing the streets in wheelchairs, is a daily reminder in many communities of too much desire overwhelmed by too much desperation over unattainable icons. See, e.g., David Rhode, *The Shattered Lives Left by a Street War*, N.Y. TIMES, Jan. 16, 2000, at A29 (citing reports that estimate hundreds, perhaps thousands of inner-city adolescents across the nation are paralyzed by shooters seeking personal items from their innocent and criminal victims, one of whom describes the adolescents as "sort of casualties of the ghetto").

¹⁷⁸ See, e.g., Calvin Wilson, *It Takes a Nation of Hip-Hop; Rap Music has Exploded Across Racial Lines without Being Co-opted*, KANSAS CITY STAR, Mar. 12, 2000, at J1 (describing origins and rise of rap music popularity beyond inner-city neighborhoods).

¹⁷⁹ Cornel West, *Nihilism in Black America*, in *BLACK POPULAR CULTURE* 21 (Gina Dent & Michele Wallace eds., 1992).

it is often concealed by both liberal structuralist accounts and conservative behaviorist accounts of contemporary black culture. Critiquing liberals in particular, West argues:

We should reject the idea that structures are primarily economic and political creatures—an idea that sees culture as an ephemeral set of behavioral attitudes and values. Culture is quite as structural as the economy or politics; it is rooted in institutions like families, schools, churches, synagogues, mosques, and communication industries (television, radio, video, music). Similarly, the economy and politics are not only influenced by values, they also promote particular ideals of the good life and good society.¹⁸⁰

For West and others,¹⁸¹ this threat has always been a part of African-American existence, but recently increased by factors such as commodification of black life, problems of black leadership, and the shattering of black civil society's institutions (e.g., families, churches, neighborhoods, and schools).¹⁸² He is especially critical of "corporate market institutions" and how they work to shape culture for profit:

The common denominator in these [market] calculations and [cost-benefit] analyses is usually the provision, expansion, and intensification of *pleasure* . . . This [is] especially evident in the culture industries—television, radio, video, music—in which gestures of foreplay and orgasmic pleasure flood the marketplace.¹⁸³

West's analysis reveals deep fissures in notions of entrepreneurial activity, let alone economic empowerment, in antimarket communities. Although blacks and Latinos do not spend consumer dollars on entertainment in numbers anywhere near whites in America,¹⁸⁴ entertainment-oriented en-

¹⁸⁰ *Id.*

¹⁸¹ See, e.g., Stuart Hall, *What Is This 'Black' In Black Popular Culture?*, in *BLACK POPULAR CULTURE* 21 (Gina Dent & Michele Wallace eds., (1992)). Hall argues that a danger of globalizing black popular culture out of its traditional place in contradiction and marginalization is commodification, presumably its totalizing expression through "the industries where culture enters directly into the circuits of dominant technology—the circuits of power and capital." *Id.* at 26.

¹⁸² See West, *supra* note 179, at 41.

¹⁸³ *Id.* at 41-42.

¹⁸⁴ For example, according to the Bureau of Labor Statistics 1998 Consumer Expenditures Survey, the average annual expenditures for entertainment (fees, admissions, TVs, radio, and sound equipment) was \$1,746 for all households. However, the breakdown by racial and ethnic groups is revealing: Hispanic, \$1,148; African American, \$1,064; but \$1,801 for Non-Hispanic and non-African-American (primarily whites and Asians). See Bureau of Labor Statistics web site (visited Sept.

trepreneurship is seizing the imagination of a great many prospective entrepreneurs of color.¹⁸⁵ If Taibi is correct that respect for genuine community differences forms the basis of economic empowerment and that economic empowerment entails local control and self-determination, then the powerful cultural forces that direct antimarket consumption must be subject to the kind of critiques that accompany American consumerism in general. If West is right about the nihilistic obsession with pleasure that reduces cultural output to a dangerous commodification of identity, then a consumer-oriented approach to economic empowerment walks an impossibly fine line between the fulfillment of personal agency and the totalizing demands of "I got mine." How might the balance be struck?

C. *The Balance of Empowerment: Transforming Consumption*

One starting point on the way to achieving balance returns to the premise of this Article: that prevailing notions of consumerism and consumption divide favored and marginalized places within the city, but that notions of consumption can be reformulated to aid empowerment. Indeed, our common status as consumers is the fulcrum of a balanced perspective. And if inclusion rather than isolation is a primary objective of community economic empowerment (and it must be), then empowerment strategies that include the poor in the economic life of the city demand that the rest of the city include the poor in beneficial consumption. Re-formulating consumption from within the unspoken boundaries of our consumer culture therefore necessitates a re-evaluation of the entitlements we receive and the desires for what we and our communities buy. Sometimes metamarkets get too much in the distribution of public and private goods and services. Often, antimarket communities

7, 2000) <<http://stats.bls.gov/sahome.html>>.

¹⁸⁵ See Greg Johnson, *The Ball's in His Court; As Corporate Contracts Expire, Shaq Goes Into Business for Himself*, L.A. TIMES, July 9, 1998, at D5 (chronicling basketball player Shaquille O'Neil's assorted business ventures in music and clothing under his "TWISM"—The World Is Mine—trademark). See also Vanessa E. Jones, *For Badder or for Worse, Embrace It or Deplore It, 'Pimp Chic' is Selling Music, Clothes, and More*, BOSTON GLOBE, July 26, 2000, at D1 (describing the "ghetto-fabulous" styles popular among rappers-turned clothes designers and the attraction to 1970s pimp culture).

seek too little. Both they and the household consumers within them, for sometimes different reasons, indulge in unproductive excesses.

Yet the first danger in rejecting a consumer-oriented approach may be in assuming the insurmountability of simple dualisms: individual/group, poor/non-poor, minority/majority, good neighborhood/bad neighborhood, prudent consumption/waste. Measured by a legal norm of empowerment, distinctions are better made by considering whether a given consumption pattern enables the capacity for self-support, stability, and growth through the control of economic resources *that do not work to disempower others*. In this light, the concerns explored in the previous section constitute reminders, rather than irrebuttable criticisms, that the dualisms of consumption must be collapsed.

This kind of self-critical observation is already abundant in cultural studies, urban theory, and in lawyering¹⁸⁶ and law reform.¹⁸⁷ The uncelebrated difference locked into most socially constructed binaries of racial identity is probably not what

¹⁸⁶ Among legal scholars, Gerald Lopez has mounted a comprehensive critique of lawyering practices in the public interest, which he calls "regnant" and disempowering of clients. Non-legal professionals who work with the same client base but are rarely engaged by public interest lawyers "come to appreciate the fact that huge numbers of lawyers for the subordinated regularly do certain things and not others, feel comfortable in certain arrangements and not others, talk in certain ways and not others, and imagine certain possibilities within reach and not others." GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 26 (1992). See also Janine Young Kim, Note, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385 (1999) (describing embedded assumptions of the black/white paradigm in civil rights and its problems and continuing uses for Asian Americans); see generally Elizabeth M. Iglesias & Francisco Valdes, *Afterword-Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 UCLA CHICANO-LATINO L. REV. 503 (1998).

¹⁸⁷ See Ford, *supra* note 168, at 1906-17. See also Georgette Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 609 (1997). "I propose that we deconstruct the Legal City and view the existence of the city, in fact all of local government, as a manifestation of revealed choice based on the collective individualism of its citizens." *Id.* She defines collective individualism as "spatially delineated individual expressions of self that are aggregated into community definition." *Id.* Moreover, she argues that Economic, rather than legal structures such as local government, should predominate in order to develop legal structures that "validate consumers' individualism and revealed choice by dissolving legal impediments to the full and free expression of their choice." *Id.*

scholars like Taibi advocate when they seek respect for difference. Nor is within-group disrespect for difference—such as racial essentialism—consistent with the urban requirement of more collective identities.¹⁸⁸ The catalogue of marginalizing oppressions I describe as the metamarket/antimarket dichotomy is itself a dualism in need of dissolution if cities are to function as heterogeneous sites of empowerment. “In order to promote the creation of the humane city, rather than the alienating megalopolis, a positive vision of the urban is necessary.”¹⁸⁹

Returning to culture and urban theory, the urban geographer Edward Soja acknowledges the general difficulty of this sort of “de-centering.”¹⁹⁰ “Empowerment from multiplicity, fragmentation, and disorder is no easy matter, but the prospects for achieving it are much greater in the new cultural politics than the old.”¹⁹¹ Like West and cultural studies scholars such as bell hooks,¹⁹² Soja sees the economic and political dynamics separating parts of the city as constituent parts of the culture of politics.¹⁹³ This convergence allows certain possibilities for change, which he calls a third alternative over conventional dualisms, “an Other choice”:

The assertion of the Other term disrupts the logical and epistemological foundations of the binary, promoting a more open,

¹⁸⁸ See Hall, *supra* note 181, at 29-30 (“The essentializing moment is weak because it naturalizes and dehistoricizes difference, mistaking what is historical and cultural for what is natural, biological, and genetic . . . [A]s always happens when we naturalize historical categories (think about gender and sexuality), we fix that signifier outside of history, outside of change, outside of political intervention.”) Thus, even in popular black community culture, some are needlessly excluded. See also Edward W. Soja, *Margin/Alia: Social Justice and the New Culture Politics*, in *THE URBANIZATION OF INJUSTICE* 180 (Andy Merrifield & Erik Swyngedouw eds., 1997). Drawing on the work of David Harvey, Soja wrote, “[T]he new cultural politics seeks social justice through the assertion and preservation of difference and the maintenance of strategically chosen and non-exclusive individual and collective identities.” *Id.* at 190.

¹⁸⁹ Ford, *supra* note 168, at 1908.

¹⁹⁰ Soja, *supra* note 188, at 189.

¹⁹¹ Soja, *supra* note 188, at 189-90.

¹⁹² See bell hooks, *Postmodern Blackness*, in *YEARNING: RACE, GENDER AND CULTURAL POLITICS* 30 (1990) (describing how the shared sensibilities of alienation in society creates a potential for coalition within “a postmodernism of resistance”).

¹⁹³ See Soja, *supra* note 188, at 189 (“[T]he political power of the economic is now increasingly cultural in its real and imagined, material and ideological, manifestations.”).

flexible, and eclectic 'both/and also . . . ' search for new possibilities, different ways of (re)constituting the nature and meaning of the multitude of binary relations that have so powerfully shaped western philosophical and political thought: subject-object, material-mental, individual-societal, real-imagined; and, with regard to the cultural politics of class, race, and gender: capital-labour, white-black, male-female.¹⁹⁴

The "both/and also" possibilities of economic empowerment might recognize, for example, that consistent over-siting in antimarkets of necessary but undesirable land uses, such as waste treatment facilities, breathes vitality to neighborhoods across the city, but increases the incidence of asthma in antimarkets while depressing the value of developable land there.¹⁹⁵ Joint consumption no doubt produces the waste, but low-income areas are disproportionately affected *as consumers* by the location of its end-product management. Therefore, such practices are violative of a legal norm of economic empowerment. All communities should care about environmental toxins, but residents and businesses in antimarkets must advocate from an empowerment basis that such disproportionate distribution of public services works to marginalize their communities. In the process of re-figuring local governmental notions of consumption, they must assertively collapse the dualism that has historically characterized their communities and not others as dumping grounds.

Different arguments about what constitutes beneficial consumption and our relative entitlements to it on the basis of empowerment could be made for an endless range of antimarket variables—from the hours and routes of public transportation service to encouragement of check cashing outlets and home equity scams through bank disinvestment. Some of these will be addressed in Part IV as a brief exploration of empowerment praxis. But most of these kinds of initiatives

¹⁹⁴ See Soja, *supra* note 188, at 188.

¹⁹⁵ There are several established means for making this argument, especially in the name of environmental justice advocacy. See generally Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L. J. 687 (1995); Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 271 (1992). The point here, however, is to wrap such efforts into a comprehensive legal norm around which neighbors and neighborhoods can rally and thereby participate in decisionmaking and further the underlying goals of local control and stability.

take necessary aim at a larger problem of consumerism: the primacy of the individual and the sanctity of the private sphere. Because these values are not only consistent with traditional liberalism but also integral to notions of personal autonomy, they give rise to a final criticism that only the poor are expected to subsume their individual needs and preferences for those of the group.

D. *The Unnatural Sacrifice of Individualism vs. the Nature of Things*

Seeking collective identity across neighborhood boundaries for the sake of empowerment may be a worthy aspiration, but it is not likely for all of the reasons that make exclusion an underlying norm of metamarket development and maintenance. Meanwhile, the poor and non-white have been frequently expected to relinquish self-sovereignty and privacy in order to promote some greater, often moral, goal—or at least to seek power by overt identification with a social or racial group. In the name of empowerment, then, why should the persistently poor not actualize their needs and preferences through pure individualism if they want? Doesn't a reformation of low-income consumer priorities reinforce the notion of their subordination? To this I have three responses.

First, pure individualism is overrated—and philosophically unsupported, at least as a universal norm.¹⁹⁶ That some communities want or need to opt for modified rules of consumption and welfare is neither new nor compromising. Indeed, pure individualism, as much as exclusion, probably creates the condition for antimarkets in the first place by replicating zero-sum outcomes that direct scarce resources away from certain interests in favor of others.

Second, by definition antimarkets *are* different; they are environments in which economic joinder has been insufficient

¹⁹⁶ See Haar, *supra* note 41, at 1019-20. He wrote:

While zoning remains primarily individualistic, it bears the Aristotelian idea that justice is found in shared undertaking both for the good of individuals and the good of the community. The free-rider problem and the social paradoxes, sharply manifest in metropolitan land, limit the area for the exercise of unbridled individualism.

and the constraints are so great as to demand communal organization. One might argue further that there is a lot of pure individualism in antimarkets already—and much of it is destructive, such as crime.

Third, middle-class metamarkets are not in fact bastions of pure individualism. As environments, and despite their apparent fealty to liberal organization, the middle class regularly accepts conditions on their economic freedoms for the communal good: the social compact.¹⁹⁷ Indeed, on a practical level, middle-class life in America is often a rule-bound life.

IV. TWO HYPOTHETICAL EXPERIENCES IN CONSUMER-ORIENTED ECONOMIC EMPOWERMENT

The final Part of this Article explores the legal norm of economic empowerment in legal praxis. Specifically, I discuss two general and hypothetical means by which lawyers for economic empowerment might assist communities in establishing strategies for development from a consumer orientation. The first involves questions of direct consumer education and relies on the concept of beneficial consumption in the public sphere. The second also seeks the promotion of beneficial consumption, but through an investment vehicle more related to the private sphere. Both skeletal strategies are designed mainly to illustrate some of the ways in which the foregoing analysis might effectively join consumption with bona fide, wealth-enhancing agency, local decisionmaking, and self-support by communities for the purpose of antimarket transformation. Both strategies involve what I have called facilitative, rather than adversarial, lawyering.¹⁹⁸

A. *Public-Regarding: Consumer Education and Organizing*

There are competing ideas of what constitutes beneficial consumption, and it is the character of this competition that often distinguishes consumerism from empowerment-oriented

¹⁹⁷ See Haar, *supra* note 41, at 1019-20; see also EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 145-49 (1994) (describing how since their beginning, common interest development restrictions reverse Lockean beliefs in property ownership and citizenship).

¹⁹⁸ See Troutt, *Ghettoes Made Easy*, *supra* note 2, at 490-505.

consumption. Three examples may clarify important differences: the "big box border war," a city-suburb public services disparity and, most importantly, an intra-city exchange of impoverished services for the poor. Before they are set out, imagine the role of lawyers as convening with an emerging community-based organization I will call The Empowerment Center ("TEC"), which is chartered to educate antimarket consumers and to advocate with them on a variety of "consumer" matters.¹⁹⁹ Obviously, the first issue is to convey to low-income residents that they are indeed consumers of the services below. I will save for the third example a fuller discussion of how the advocacy issues might be joined.

First, in the example of the big box border war, an inner-ring suburb facing rising levels of low-income families and a declining tax base woos a big-box retail development to the city's borders.²⁰⁰ Low-income consumers and workers in the town believe its arrival would be a good thing. This is a development designed for pure consumption; the store will attract others, consumers (from that city and its neighbors) will meet their shopping needs more cheaply and easily, and the store will contribute sales and property tax revenues and, most importantly, create jobs. However, it will also create more traffic on nearby expressways shared by other, more affluent suburbs, which do not want big-box superstores. They are consumers of a quieter life and the "blessings of quiet seclusion,"²⁰¹ whose consumption will be diminished, they believe, by the nearby encroachment of mega-retail and accompanying traffic. Here the "rights" of the less-affluent suburb ought to be se-

¹⁹⁹ I am aware of the gross oversimplification of relying upon a single organization—community based or otherwise—to work with consumers. The structure of legal and social services in antimarket neighborhoods is often far more complex and extensive than that. Suffice it to say, then, that TEC merely represents a species of organization that might be dedicated to these kinds of interventions, though in practice these efforts would likely be coordinated among similar kinds of groups.

²⁰⁰ This hypothetical is based loosely on a similar dispute developing among Westchester County suburbs of New York City. See Lisa W. Foderaro, *Affluent Town Seeks to Curb Development Outside Its Borders*, N.Y. TIMES, Mar. 11, 2000, at B1.

²⁰¹ See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

cured by home rule and other land use law to develop what they want, the way they want. How is this a matter of economic empowerment?

Rather than waiting to see how the home rule fight is resolved between dueling municipal administrations, The Empowerment Center might first assemble residents in meetings to discuss exactly how their needs as individual consumers may coalesce with the collective consumption needs of their strapped municipality.²⁰² This is indeed the exercise of home rule rather than its theory. Local citizen participation in this process—among previously uninvolved residents—may not only strengthen the municipality's hand relative to its affluent neighbor but also produce public comment about the actual benefits of the project, information about the allocations of increased tax revenues, and perhaps, result in some modifications to or exactions from the store itself. Here the empowerment dimensions of TEC's information and advocacy work reflect disclosure and awareness of the costs and benefits of retail development, the self-agency of citizen participation and local control over project scope, as well as the community wealth-enhancing features of the larger project.²⁰³

The second example involves public services disparities within one city, yet affecting suburban interests outside its borders.²⁰⁴ City residents of poor neighborhoods use the same mass transit trains to get to work as suburban riders, but the fares for shorter rides within the city are actually more expensive than those for longer rides to the wealthier areas (in part

²⁰² Briffault reminds us that, as for competition among cities and economic development, the policy goals of municipalities have been to retain businesses, bring in new investment and encourage gentrification, rather than to empower low-income consumers. See Briffault, *supra* note 31, at 411. A related aspect is the unequal bargaining power in siting decisions, which, even in the suburbs, is sometimes substantial, therefore implicating issues of eminent domain and the process of designating certain areas and not others as "blighted." See Debra West, *IKEA Wants to Move In, but Neighbors Fight Moving Out*, N.Y. TIMES, Mar. 7, 2000, at B1.

²⁰³ That the affluent suburban neighbors feel slighted is unfortunate but not dispositive. Consumerist control over the economic life of communities across borders they ordinarily benefit from simply reflects excessive regional power.

²⁰⁴ This hypothetical is based on Randy Kennedy, *Survey Finds Disparities in Train Service*, N.Y. TIMES, Feb. 11, 2000, at B5 (describing results of New York City Public Advocate survey that documents gross disparities suffered by urban users of the Long Island Railroad and Metro-North).

because of special discounts that are offered weekly to "commuters"). Moreover, service is less frequent to some inner-city stops. Is a consumer-based petition by and on behalf of the inner-city residents against the transit company empowering? Ordinarily, municipal services disparities occupy lawyers in difficult litigation strategies,²⁰⁵ but TEC's reliance here on a consumer petition drive could disclose to riders some economic dimensions of metropolitan service delivery. Moreover, the fare differentials at issue bring to the fore more than equality principles, but also substantive unconscionability and unfairness principles in relative context. Finally, public transportation matters are, by definition, economic access issues with important implications for employment and related household welfare.

The last example demonstrates the tenuous link between relevant consumers and a quasi-contractual relationship to government-provided goods and services. The poorest neighborhoods in the city are comprised of families disproportionately represented in the child welfare services administration, a city agency.²⁰⁶ That is, they are the direct "beneficiaries" of

²⁰⁵ See Dubin, *supra* note 30, at 779-82; Troutt, *Ghettoes Made Easy*, *supra* note 2, at 496-500. See also *Ammons v. Dade City, Fla.*, 594 F. Supp. 1274 (M.D. Fla. 1984); *Hawkins v. Town of Shaw, Mississippi*, 437 F.2d 1286 (5th Cir. 1971) (recognizing that 98% of homes fronting on unpaved streets were occupied by blacks, 97% of homes not served by sanitary sewers were in black neighborhoods, all high-powered mercury vapor street lighting was installed in white neighborhoods, and most of the white occupied homes were served by 6 inch water mains whereas 63% of the black occupied homes were served by either 4 inch, 2 inch, or 1 1/4 inch water mains); *Johnson v. City of Arcadia, Fla.*, 450 F. Supp. 1363 (M.D. Fla. 1978) (finding that black Arcadia residents were three and a half times more likely than white residents to live in a house fronting on unpaved streets due to policy that designated dead-end streets as lowest paving priority while more blacks lived on dead-end streets, park and recreation facilities in black neighborhoods were far inferior to facilities in white neighborhoods, and black neighborhoods contained a water delivery system inadequate to deliver proper water pressure due to small diameter pipe); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 929 (2d Cir. 1988) (zoning regulation that restricted private multi-family housing to minority "urban renewal area" resulted in shortage of affordable rental housing for low- and moderate-income households which impacted blacks three times more than the overall population); *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987) (noting that city annexed new territory in such a manner as to annex only white-occupied land while excluding adjacent black community so as to perpetuate city's all-white voting population). See also *Dowdell v. City of Apopka, Fla.*, 698 F.2d 1181 (11th Cir. 1983).

²⁰⁶ This hypothetical is based loosely on Somini Sengupta, *Bleak Assessment*

its federal, state, and local taxpayer-funded services. As a result, they consume (at no charge) the representation of private and public social workers (paid with public funds) and the decisions of family court judges. Their involvement often has life-altering implications, such as foster care placements dividing families or domestic violence determinations and relocation directives. However, the system poorly trains its social workers, who are not only representatives sometimes unaware of their "clients'" particular circumstances or unprepared for hearing appearances, but are also essential gatekeepers of family composition. A commissioned report based on reviews of caseworkers' representation and placement histories finds that a great percentage of caseworkers are incompetent.²⁰⁷ Further, family court judges are afraid not to defer to the incompetent caseworkers' decisions, thus giving poor decisions the often permanent stamp of law.

Legal advocates for foster children and families have engaged in numerous litigation strategies against city foster care agencies.²⁰⁸ As important as some of these cases have been to reform efforts, few directly empower low-income consumers, who, in these matters, are children (and families). Lawyers working with TEC for community economic empowerment would first have to establish consumer status among the many families in antimarket neighborhoods affected by child welfare rules. That is, they must assist children and families accustomed to thinking about the child care bureaucracy as a powerful, alienating, indifferent bureaucracy with whom they have struck only an accidental bargain to re-conceive it as a service

Offered on City's Child Welfare System, N.Y. TIMES, Mar. 10, 2000, at B3 (describing findings reported by the Special Child Welfare Advisory Panel, such as "a child coming in contact with this system cannot count on being assigned a case-worker who has received enough training to be properly prepared for the complex work that she is expected to do").

²⁰⁷ The reasons many caseworkers in large social welfare systems are unprepared are complicated, and I do not mean this example as a critique on the profession or its standards.

²⁰⁸ See *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981) (Section 1983 suit against city for deliberate indifference in foster care cases); *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998) (Federal False Claims Act against New York City for filing falsified caseworker reports of children in foster care); *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986) (stipulation and settlement in 20-year Section 1983 case challenging New York State's statutory scheme for the provision of foster care placements).

provider obligated to act pursuant to the children and families' legally defined interests.²⁰⁹ This is undoubtedly difficult; most families in foster care are already weakened by crisis, and many children in need of placement outside the home are further silenced by minority status. However, some of these weaknesses are compounded by administrative mistreatment with further disempowering (and sometimes irrevocable) effects. The marginalizing impact of official mistreatment may include permanent family dislocation, the potential for abuse, educational transiency, and predisposition to criminality. The collective effects on the communities from which these families come are incalculable.

But like public education and transportation, these too are city services, and, like those services, middle-class consumers regularly empower themselves through demands for disclosure of system rules and allocable benefits. Here, the absence of knowledge about caseworker competency requirements, placement options and specific processes for family reunification (where appropriate) may be remedied, in part, by much greater consumer education about lawful and effective state interventions. This triggers the disclosure and access inquiries of the empowerment norm.

Although the precise steps TEC and its lawyers might take toward empowerment in this complicated field are beyond this analysis, the unfairness in failing to accommodate antimarket consumers of foster care services presents the prospect of substantial and unavoidable consumer injury, further destabilizing families with mistaken agency decisionmaking and depositing into ghettos more individuals who have at an early age assimilated a diminished capacity for personal agency and self-support.²¹⁰ Therefore, TEC might work with "at-

²⁰⁹ For purposes of this hypothetical analysis, I accept current interpretations of the best-interests-of-the-child standard, despite evidence in this scenario of possible judicial neglect.

²¹⁰ In New York City, as one example of big city foster care caseloads, studies indicate that about 1,200 adolescents leave the foster care system and are released into poor neighborhoods with little or no job skills, education, or financial resources, despite early lives in sometimes crack-addicted parental situations and frequent movement in and out of different foster care youth homes. See Somini Sengupta, *Youths Leaving Foster Care System With Few Skills or Resources; Risks of Homelessness and Jail Are Great, Studies Suggest*, N.Y. TIMES, Mar. 28, 2000, at A1.

risk" families and the children themselves to demand detailed information about foster care rights and entitlements at the point of entry, petition for public hearings in which affected consumers may voice their interests concerning rule changes, and propose the requirement of heightened support services and accountability structures for both children and families.

B. *Private-Regarding: "The Community Unit Investment Trust"*

If economic empowerment includes the protected control and ownership of resources that enable self-support, then like most of us, antimarket consumers must find ways to accumulate wealth. However, antimarkets are not typical sites of wealth creation; given the acute dearth of banks—and the profound antipathy with which many antimarket consumers perceive them—antimarkets are not typical sites even of basic savings accounts.²¹¹ The problem for antimarket consumers clearly goes beyond lack of income. A great many low-income consumers spend considerable sums of cash purchasing lottery tickets—by some estimates, an average of more than \$10 per week.²¹² And although individual resources may seem meager, aggregate low-income consumer spending power—at least for retail items—is not insubstantial.²¹³ Empowerment zone

²¹¹ See, e.g., Troutt, *Poor Pay More*, *supra* note 29, at 66 (describing experiences of low-income banking consumers and barriers to access).

²¹² See, e.g., Charles T. Clotfelter et al., *The Unseemly 'Hard Sell' of Lotteries*, N.Y. TIMES, Aug. 20, 1987, at A27 (using survey data from one state, the authors, Duke Univ. public policy professors, found that 15% of adults in low-income households spend \$10 or more a week on the lottery); see also Brett Pulley, *Waiting For Riches: A Special Report; Living Off the Daily Dream Of Winning a Lottery Prize*, N.Y. TIMES, May 22, 1999, at A1 (using New Jersey State lottery data and zip code data, the *Times'* study found that "people living in the 100 lowest average-income ZIP codes in New Jersey spent \$53 per \$10,000 of their earnings [on instant-win tickets]. But in the 100 ZIP codes with the highest-average income, spending on instant-win tickets was just \$12 per \$10,000.").

²¹³ See, e.g., Troutt, *Poor Pay More*, *supra* note 29, at 29 (favorably comparing aggregate disposable income for consumers in Oakland, California's low-income neighborhoods with those in middle-income areas); Michael E. Porter, *The Competitive Advantage of the Inner City*, 73 HARV. BUS. REV. 3, 58-59 (1995) (demonstrating substantial disposable income in low-income areas). See also Mark Alpert, *The Ghetto's Hidden Wealth*, FORTUNE, July 29, 1991, at 167 (reporting that inner city markets are underserved as to both variety and quality of stores because of misconceptions about income levels of community).

legislation is premised in part on the assumption that stores and businesses encouraged to enter low-income neighborhoods will succeed (with some help) by tapping unmet consumer need. The wealth created by such arrangements, however, is only indirectly community based, if at all. Area shoppers may enjoy the greater convenience and certainty of buying brand-name items closer to home, yet they build no assets by doing so. But what if they could?

In our hypothetical inner-city neighborhood, outside investors have slowly begun to open retail chain stores both in recognition of untapped consumer markets and in response to governmental incentives (e.g., revised equipment depreciation rules and payroll and sales tax abatements connected with state and federal redevelopment initiatives). Specifically, four publically traded retailers of clothing, music, hardware, and beverages as well as two services-oriented public companies, a large movie theater, and a health club, have relocated to the area, as well as a major bank. Although they take some advantage of the government incentives, each claims that their marginally profitable presence is motivated more by increased good will (locally and globally) and the future gentrification of the area. Local consumers generally favor the new businesses as centers of low-paying job creation and availability of brand-name goods and services at affordable prices.

So far, this scenario represents economic development, but not community economic empowerment. The deals that facilitated the location of each store were made with city officials without significant citizen input. Infrastructure improvements were made by the city as concessions to the public companies and primarily at their direction, with little comprehensive planning input by local officials or community-based organizations. There is no provision for direct benefit to the community, even in capturing tax revenues. Local merchants' concerns about unfair competition (e.g., they receive no tax incentives for continuing their businesses) were overridden. Thus, the portrait of community change is mixed, but clearly portends the possibility of gentrification (as commercial rents increase along with residential rents and property values) and displacement of poorer, unrepresented residents seems certain on some scale.

What if income-eligible residents could become shareholders in the success or failure of the redevelopment initiative?²¹⁴ Lawyers working in connection with TEC and perhaps an established community development financial institution ("CDFI") propose a special investment opportunity only available to income-eligible residents of the area (a geographically defined "zone").²¹⁵ These low-income consumers are invited to buy reduced-cost shares in a financial investment opportunity modeled after a unit investment trust ("UIT").²¹⁶ "A UIT is an unmanaged investment vehicle that invests in securities and sells interests ('units') in itself."²¹⁷ Shares in a periodically fixed portfolio of the same publicly-traded companies doing retail business in our hypothetical redevelopment zone would be sold to qualified investors on comparatively flexible terms.

In the "unit" or "fixed" investment trusts there is no obligation to pay any specified amount. Typically the holder of a share in such a trust has merely an undivided interest in a package of specified securities that are held by a trustee or custodian. There is no board of directors, and management discretion in the management of the portfolio is entirely eliminated or reduced to a minimum. Indeed, the trust's sole asset is almost always the share of a single open-ended investment company, and the unit investment trust issues 'periodic payment plan certificates' that represent the indirect interest of its investors in the shares of the underlying investment company.²¹⁸

²¹⁴ Beyond empowerment zones and related types of government-initiated redevelopment projects, compare Michael Porter's detailed proposals for competitive advantage business clustering in overlooked ghettos in *The Competitive Advantage of the Inner City*, supra note 213.

²¹⁵ Nothing prevents these ideas from traveling. Even if pilot versions of such a plan were locally restricted—focusing, for example, on some of the ten current federal empowerment zones—the trust itself could be opened to other income-eligible consumers in antimarket communities across the country. Expansion would simply expand trust administration.

²¹⁶ The ensuing analysis of UITs and their specific treatment under the federal securities laws is admittedly skeletal. A more in-depth review is simply beyond the scope of this hypothetical and this Article as a whole. I also acknowledge other financial vehicles that may have an equal or greater value as a model for community wealth accumulation, but offer this one as a framework with some precedent.

²¹⁷ Thomas S. Harman, *Emerging Alternatives to Mutual Funds: Unit Investment Trusts and Other Fixed Portfolio Investment Vehicles*, 1987 DUKE L.J. 1045, 1046.

²¹⁸ LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION, 1H.6.a.(ii) (1995).

The legal advantages of what we might call the Community Unit Investment Trust ("CUIT") are substantial. While providing low-risk, low-cost, fully redeemable investments,²¹⁹ the CUIT would require minimal administrative responsibility and expense because of its relaxed oversight requirements under federal securities laws²²⁰ and, unlike mutual funds, the identity of the companies whose shares are traded within it can be relatively static.²²¹ The UIT form might also allow for a sharing of supervisory responsibilities between, for example, a bank trustee (perhaps the major bank that has relocated to the neighborhood) and a community-based trustee, such as TEC or the local CDFI.²²² In any event, legal disclosure and management requirements fall under the securities laws, thus ensuring a greater measure of protection against fraud to investor-consumers.²²³ Finally, the inherent need for transactional legal assistance from lawyers not customarily involved in community development work (as well as other securities professionals) might further link isolated antimarket consumers and their financial concerns with their metamarket counterparts and professionals in more affluent parts of town.

The CUIT's empowerment benefits to antimarket consumers are also formidable.²²⁴ While frequently expending scarce

²¹⁹ According to Harman, *supra* note 217, at 1046, "UITs are attractive investments because they offer liquidity and diversity at an affordable price. They allow investors of even moderate means to own an interest in a pool of diversified securities and, because they issue redeemable securities, they allow investors to liquidate their investments quickly and avoid many of the market's vagaries."

²²⁰ This is true under both the applicable provisions of the 1933 and 1940 Securities and Exchange Commission Acts. See, for example, registration and disclosure requirements at 15 U.S.C. §§ 80a-3, a-4(2), a-24 (2000); 17 C.F.R. § 270.30a-1 (2000); 15 U.S.C. §§ 77h(a) and (c), 77j(a)(3) (2000); 17 C.F.R. § 230.485 (2000), some of which have undergone modification by the Commission since interest in UITs was rekindled in the 1980s.

²²¹ Harman, *supra* note 217, at 1047.

²²² Although UITs generally require a custodial trustee (often the same as the sponsor), a depositor and an evaluator (of share values), there appears no reason that a bank sponsor could not act as co-trustee along with a CDFI. *See id.* Indeed, for the idea to work, such a locally trusted and known intermediary may be an important feature for many antimarket consumers skeptical of banks.

²²³ The more onerous disclosure requirements to which mutual funds are obligated may arguably offer greater protections to securities consumers. However, under C.F.R. § 270.30d-2, UITs that invest most of their shares in one management company (as CUIT presumably would) must provide regular reports to shareholders.

²²⁴ The benefits to businesses operating in or near these areas should also be

dollars on wealth-enhancing hopes such as lottery tickets, low-income people watch the same barrage of do-it-yourself Internet stock trading advertising that all Americans see on TV. These ads for financial self-empowerment undoubtedly compound many other daily messages distinguishing the access enjoyed by middle-class households from poorer ones in our consumer culture. The CUIT, in addition to its basic financial disclosure norms, may first empower antimarket consumers with a heightened sense of economic access. If through the assistance of consumer education intermediaries such as TEC low-income investors can come to trust banking and investment institutions, many may develop the same interest in and vigilance for securities investments that the lottery currently holds. Obviously, empowerment here invokes additional norms of access to wealth production and remediation even in the way investment products and redevelopment projects are designed. Yet equally important to the success of the CUIT hypothetical is accommodation to the scant savings histories and the terrifying (if not degrading) institutional experiences many low-income consumers have had with mainstream finance. Finally, if wealth enhancement is to promote empowerment along the lines described in this Article, antimarket consumers must truly *feel* protected in their ownership of economic resources, which means designing instruments that provide the same assurances of control that metamarket consumers rightly expect.

CONCLUSION

In this Article, I have attempted to build upon the foundational dichotomy separating metamarket from antimarket communities in order to develop a consumer-oriented legal norm of economic empowerment. The analysis emphasized three critical distinctions along the way: metamarket versus antimarket consumption patterns, established consumer law

recognized. Although my portrayal of corporate interests here is somewhat cynical (at least regarding their companies' motivations for locating in inner-city neighborhoods), many companies with a presence in antimarkets value the local goodwill it generates. Many others would like to participate. The UIT provides a corporate avenue for corporations interested in developing relationships with low-income consumers.

protections versus empowerment norms, and self-interested consumerism versus beneficial consumption. A legal norm of empowerment, I have argued, is a condition of agency capable of bringing about self-support, stability, and growth through the protected control and ownership of economic resources. The necessarily implied protections, such as disclosure, equality, and fairness, are evident in our consumer laws, but require the addition of access, remediation, and accommodation. Even then, the legal norm risks being consumed by consumerism. That is, empowerment as a legally recognized idea premised on principles of consumption may, in an increasingly consumerized culture, be subverted to disempowering ends. The fine line we walk, therefore, requires a collapsing of dangerous dualisms and vigilant consumer education in ways I have tried hypothetically to illustrate.

Community economic empowerment is as potentially large a field of legal theory and praxis as any set of structures configuring American community life in the United States. Underlying analyses such as these are real people and neighborhoods struggling for survival in often unspeakable isolation. Much of my analysis has attempted to highlight the legal mechanisms by which middle-class and low-income sensibilities may be bridged for the primary benefit of marginalized consumers but also for the secondary benefit of metropolitan communities linked in more ways than are sometimes imagined. However, these are only legal mechanisms and, like this analysis itself, contain within them obvious and inherent limitations in their ability to see more compassionately into very difficult lives and circumstances. This is but one more attempt in a series of ongoing efforts, spurred, I hope, by a recognized need for transformation along some third way.

