

## Digital Regulation and Digital Markets

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Rory Van Loo, *Rise of the Digital Regulator*, 66 **Duke L. J.** 1267 (2017), available at [SSRN](#).

Consumers and corporations today exist in a world of highly intermediated markets. Digital intermediaries aid consumers in their decisions with more and more regularity. They sort the good from the bad, the expensive from the inexpensive, the suitable from the inappropriate. Private and public digital intermediaries collectively act as a soft regulatory force in the marketplace. Private intermediaries like Amazon, AirBnB, Priceline, Carfax, Google, Houzz, and Zillow help consumers make purchasing decisions on goods and services like diapers, automobiles, airline tickets, hotel rooms, summer vacations, car rentals, furniture, apartments, and almost everything under the sun. Public intermediaries like the Consumer Financial Protection Bureau and the Affordable Care Act via their mortgage calculator and insurance exchanges, respectively, assist consumers make key life decisions about buying a home and purchasing health insurance. All of these innovative tools, made possible by technologically-driven intermediation, are generally designed to lead to better, more informed decisions in the absence of heavy-handed government regulation – but do they? How do we better ensure that such innovative, digital intermediaries work in the best interests of consumers? How should we think about law and regulation in the marketplace given the rise of these digital intermediaries?

In his recent article, *Rise of the Digital Regulator*, [Professor Rory Van Loo](#) explores these and other questions concerning digital intermediaries. These questions will likely be some of the most vexing and consequential ones for corporations, law, and society in the near future as many of the most valuable and disruptive businesses today are in the business of serving as digital intermediaries for consumers. Professor Van Loo's article has two core motivations: (1) it highlights the under-appreciated shortcomings and challenges posed by digital intermediaries; and (2) it offers early sketches of potential legal reforms to better address the rise of digital intermediaries.

The article highlights many of the failings and frailties of digital intermediation that are often overlooked in the enthusiasm and allure surrounding them. Private intermediaries frequently operate in uncompetitive landscapes because of the huge barriers to entry posed by the access, accumulation, and analysis of the large volumes of data necessary to create workable, appealing interfaces. Furthermore, because of significant start-up and maintenance costs coupled with the lack of competition, private intermediaries sometimes skew their results to promote options that are more profitable to them, and less sensible to the consumer. Travel websites, for instance, do not always highlight the best choices for consumers; rather, they frequently highlight options of paid sponsors without clear disclosures to the consumers. Public intermediaries face similar issues. They frequently operate with little competition and face huge cost constraints in creating the data analytics capabilities needed to produce a workable framework for the public. Moreover, public intermediaries are subject to the political pressures of elected officials, policymakers, and special interests that sometimes run contrary to the best interests of a majority of the public.

To address some of the shortcomings faced by private and public intermediaries, the article provides a few touchstones to consider. In particular, the article contends that regulation of private intermediaries should focus on promoting more disclosures, encouraging smart competition and improving consumer protection. As for public intermediaries, the article contends that regulation should focus on “adequate funding, anticapture mechanisms, performance metrics, and fully exercising information-collection powers.” (P. 1315.) Ultimately, the article calls for a “uniform lawmaking initiative” akin to the Uniform Commercial Code to design rules and guidelines to govern digital intermediaries. Mindful of the institutional and political barriers inherent in that recommendation, the article contends that this may be one of the best, most realistic paths forward.

The rise of digital intermediaries has presented, and will continue to present some of the clearest benefits and most vexing challenges for consumers, corporations, and regulators. As the marketplace becomes more driven by data, algorithms, and artificial intelligence, digital intermediaries will play an ever-important role in helping us hear the whispers of signals amid the cacophony of noise. More and more, the laws and rules affecting corporations are going to be about the laws and rules of digital intermediaries. In the end, the power to intermediate and to filter is essentially the power to choose. It is an awesome power that must be thoughtfully exercised and carefully governed. Whether our analog political and rulemaking processes are up to addressing the challenges posed by digital intermediaries in a timely fashion remains an important, open question. Nevertheless, as we begin to think about how best to do so, Professor Van Loo's article offers an instructive, early map for the road ahead.

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