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ARTICLE

DISCONSENTS

Daryl J. Levinson * *& David E. Pozen* **

Consent is an indispensable standard and organizing principle in any liberal legal order that prizes self-directed autonomy, self-identified preferences, and collective agreement. Yet consent's capacity to advance those values has become increasingly uncertain in a society beset by power imbalances, information asymmetries, and multiple forms of polarization. In this Article, we document how the rise of neoliberalism has led to greater reliance on consent throughout U.S. law, while at the same time leading to greater doubts about its moral efficacy and empirical feasibility. Connecting and generalizing pathologies of consent-based regulation that have been identified within myriad domains, the Article identifies a systemic crisis of consent that has unsettled not only regimes of private ordering but also constitutional democracy and global governance. The Article offers a typology of legal strategies available to those who wish to shore up specific types of consent or accommodate their failure. And it raises the question whether such strategies are enough to enable effective cooperation, protect vulnerable parties, and vindicate the values consent is meant to serve.

* David Boies Professor of Law, New York University School of Law.

** Charles Keller Beekman Professor of Law, Columbia Law School. For helpful comments on earlier drafts, we thank Ashraf Ahmed, Amna Akbar, Joseph Bankman, Michael Boucai, Anu Bradford, Jedediah Britton-Purdy, Richard Brooks, Daniel Browning, Jessica Bulman-Pozen, Ryan Calo, Josh Chafetz, Mala Chatterjee, Luis Chiesa, Julie Cohen, Adam Cox, Anne Dailey, Barbara Fried, Clayton Gillette, Jonathan Gould, Scott Hemphill, Emma Kaufman, Mark Kelman, Jeremy Kessler, Madhav Khosla, Kate Klonick, James Liebman, Max McCulloch, Trevor Morrison, Richard Pildes, Eric Posner, Robert Post, Benjamin Sachs, Sarah Seo, David Schleicher, Karen Tani, and Andrew Woods, as well as workshop participants at the Cardozo, Columbia, Stanford, University of Buffalo, University of Chicago, University of Connecticut, and Yale law schools.

INTRODUCTION

Liberal legal orders are built on a foundation of consent. Throughout the U.S. legal system, consent distinguishes enforceable contractual obligations from nonbinding promises, constitutionally protected intimacy from criminal sexual assault, neighborliness from trespass, lawful from unlawful.[1] Moving from individual to collective consent, our system of constitutional democracy depends on the "consent of the governed."[2] And

1. See Heidi M. Hurd, The Moral Magic of Consent, 2 Legal Theory 121, 123–24 (1996) (detailing how consent "alters the obligations and permissions that collectively determine the rightness of others' actions"); Roseanna Sommers, Commonsense Consent, 129 Yale L.J. 2232, 2235 (2020) ("Consent is a pivotal concept in many areas of the law, from police searches, to contracts, to medical malpractice, to rape."); Eric Martínez, Measuring Legal Concepts 63 (Feb. 4, 2024) (unpublished manuscript), https://ssrn.com/abstract=4715691 [https://perma.cc/JQ9K-V4CY] (finding empirically that "legal doctrine is largely built upon a small core of foundational legal concepts," including consent (emphasis omitted)).

2. The Declaration of Independence para. 2 (U.S. 1776); see also, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting) ("Our system of government rests on one overriding principle: All power stems from the consent of the people."); The Federalist No. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE.").

moving beyond the United States, most of international law is premised upon the consent of sovereign states.[3] In the ideal society of the classical liberal imagination, virtually every legal entitlement and obligation arises out of one or another form of consent.[4]

Over the past half-century, the rise of what is now called "neoliberalism" has militated for market ordering across an ever-wider range of social spheres and, in the process, made consent all the more crucial as a functional building block and legitimating construct in American law.[5] At the center of the neoliberal portrait of political and economic life stands "the consenting individual" as "the author of the norms under which she will live."[6] Scholars on the left and right agree that "consent enjoys talismanic—if not sacramental—status in modern life and thought,"[7] perhaps nowhere more obviously than in modern law. As this Article will survey, consensual agreement underwrites legal regimes spanning private and public law, including consumer protection, criminal procedure, labor and employment, intellectual property, constitutional lawmaking, and international trade and finance.[8] Both the domestic and the global legal landscapes are at this point a veritable "empire of consent."[9]

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3. See Jack Goldsmith & Daryl Levinson, Law for States: International Law, Constitutional Law, Public Law, 122 Harv. L. Rev. 1791, 1793 (2009) ("Out of deference to state sovereignty, international law is a 'voluntary' system that obligates only states that have consented to be bound . . . ."); J.H.H. Weiler, The Geology of International Law—Governance, Democracy and Legitimacy, 64 Heidelberg J. Int'l L. 547, 548 (2004) (Ger.) (describing "the principle of Consent" as "so deeply rooted in the normative discourse of international law and its principal legitimating artifact").

4. See David Johnston, A History of Consent in Western Thought, *in* The Ethics of Consent: Theory and Practice 25, 45–51 (Franklin G. Miller & Alan Wertheimer eds., 2010) [hereinafter The Ethics of Consent] (tracing this ideal to early modern Europe). "Consent plays a central role in all liberal [political] theory," Professor Benjamin Barber has explained, whether in the form of "original consent" that justifies the social contract, "periodic consent" that justifies representative government, or "perpetual consent" that justifies particular collective acts against claims of individual liberty. Benjamin R. Barber, Liberal Democracy and the Costs of Consent, *in* Liberalism and the Moral Life 54, 57–59 (Nancy L. Rosenblum ed., 1989).

5. See infra section II.A.

6. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis, 129 Yale L.J. 1784, 1814–15 (2020).

7. Richard W. Garnett, Why Informed Consent? Human Experimentation and the Ethics of Autonomy, 36 Cath. Law. 455, 456 (1996); see also, e.g., Robin West, Consent, Legitimation, and Dysphoria, 83 Mod. L. Rev. 1, 3 (2020) [hereinafter West, Consent] ("Today, it is often the act of an individual proffering his or her consent, rather than the enactment of a law by a representative governmental body, which garners our respect and deference. Individual consent, rather than democratic law, in effect, is emerging as the main source of legitimate authority.").

8. See infra Part III.

9. Neil Richards & Woodrow Hartzog, The Pathologies of Digital Consent, 96 Wash. U. L. Rev. 1461, 1467–76 (2019).

Yet even as the empire of consent has colonized legal field after legal field, the ability of consent to play its assigned roles has come under increasing strain. For many participants and observers in many fields, structural inequalities along racial, gender, and economic lines have degraded the normative force of consent, recasting it as exploitation or coercion.[10] The digital economy has magnified the salience and severity of information asymmetries that generate further imbalances of bargaining power, while also casting doubt on the coherence of consumer choices.[11] Such doubts have been exacerbated by the behavioral revolution in psychology and economics, which has brought to light consistent patterns of cognitive failure and irrational decisionmaking.[12] Meanwhile, political polarization and other impediments to collective action have made it more difficult to achieve consent at the scale necessary to meet social demands, creating pressure to dilute or disregard the standards for legally valid consent.[13] On multiple overlapping levels, the United States and other liberal democracies have experienced an erosion of what we will call *the conditions of meaningful and feasible consent*.[14]

Some of the drivers of this erosion have been material, others epistemic or perspectival. For example, income inequality and political polarization have surged in measurable ways over the past couple of generations, and new international institutions have helped to reconfigure the global economic order.[15] What has changed about human cognition or sex, by contrast, is not so much the underlying reality as the influence of social and academic movements, such as behavioral economics and #MeToo, which have generated or popularized new insights into how psychology and society really work.[16] Either way, power imbalances, constraints on choice, informational deficits, cognitive errors, and impediments to collective action have been increasingly recognized as not the exception but the rule of contemporary legal life. And the prospects for achieving meaningful consent in a wide range of contexts have accordingly dimmed.

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10. See infra section II.B.1.

11. See infra sections II.A, III.A.

12. See infra section II.B.2.

13. See infra section II.B.3.

14. See infra section I.A.

15. See infra sections II.B.3, III.G.

16. See infra sections II.B.1–.2, III.B. As the #MeToo phenomenon reflects, not only has the world evolved in ways that make morally transformative consent harder to attain in many fields, but understandings of the world have also evolved in ways that call into question the moral adequacy of consent under long-standing arrangements. See, e.g., Anna E. Jaffe, Ian Cero & David DiLillo, The #MeToo Movement and Perceptions of Sexual Assault: College Students' Recognition of Sexual Assault Experiences Over Time, 11 Psych. Violence 209, 214–16 (2021) (finding that college students were more likely to label past unwanted sexual experiences as "sexual assault" following #MeToo).

In short, at the same time that neoliberal ideology has dialed up legal demand for consent, a series of contemporaneous social, economic, political, and intellectual developments have made it more difficult to meet the demand in any robust fashion. Some of these developments, moreover, have been a product of neoliberalism itself. The result is a contemporary crisis of consent that crosses the public law/private law divide and imperils the integrity of both. Radical skeptics have long questioned whether consent can carry the normative weight assigned to it.[17] As morally dubious forms of consent have proliferated, so has such skepticism.

In diagnosing a "contemporary" crisis, this Article refers to the past five decades or so, effectively adopting the mid-to-late twentieth century as a historical baseline. By focusing on this period, we do not mean to suggest that the quality or functionality of lawful consent is lower across the board now than it was in earlier eras. Although we highlight severe shortcomings of modern consent regimes, there is nothing in them that approximates, say, the treatment of Black workers under peonage or of married women under coverture.[18] In describing the contemporary situation as one of "crisis," the Article identifies what is at bottom a subjective phenomenon—a loss of faith in the social value of many forms of consent that are recognized as legally operative. In other words, the crisis of consent is a *legitimation crisis*, or a collapse of public confidence in the ability of consent to do the work that the law expects of it.[19]

Thus understood, the contemporary crisis of consent leaves reformers in a bind. On the one hand, consent remains an indispensable concept in any

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17. See infra section I.B.

18. See Jack M. Balkin, Abortion and Original Meaning, 24 Const. Comment. 291, 320 (2007) (explaining that under coverture "married women surrendered most of their common law rights under the fiction that they consented upon marriage to the merger of their legal identity into their husband's"); James Gray Pope, Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude", 119 Yale L.J. 1474, 1485 (2010) (explaining that before it was held to violate the Thirteenth Amendment, peonage was "quite commonly" created "by contractual consent").

19. For this understanding of a legitimation crisis as involving both objectively identifiable "alterations in a social system" and the subjective "experience" of those alterations as a threat to the system's normative foundations, see Jürgen Habermas, Legitimation Crisis 1–8 (Thomas McCarthy trans., Polity Press 1988) (1973); see also David O. Friedrichs, The Legitimacy Crisis in the United States: A Conceptual Analysis, 27 Soc. Probs. 540, 540, 550 (1980) (explaining that "crisis," for Habermas, "is a relativistic term applicable to a societal situation in which dramatic changes, conflicts and tensions exist, and active responses are called for" and that a legitimation crisis "is essentially perceptual, but also has behavioral symptoms and structural roots"). In principle, our claim about consent's legitimation crisis could be tested through polling or other quantitative measures of public attitudes on consent, as they have evolved over time. See Friedrichs, supra, at 542. Because such data do not exist, as far as we are aware, the Article supports this claim by pointing to a wide range of indicators and symptoms of rising discontent with consent.

liberal legal order that prizes autonomy, choice, and self-determination.[20] From commercial contracts and romantic relationships to international treaties and cooperative federalism programs, vast swaths of private and public law could scarcely function without it. On the other hand, morally transformative consent has become an increasingly elusive ideal in myriad settings. What can today's jurists and policymakers do to bolster consent or otherwise manage this dilemma? What should they do? Have the latent flaws in the consent paradigm been revealed to the point that we need to rethink its role in our legal system, or rethink the system more broadly?

These questions have assumed new urgency in recent years as neoliberalism has come under sustained political attack and as President Donald Trump's second term has witnessed a revival of right-wing populism, economic protectionism, and national industrial policy.[21] The failures and frustrations of consent-based governance help to explain how the United States and other countries arrived at this crossroads, and where they might go from here. As this Article shows, the crisis of consent is bound up with—indeed co-constitutive of—the crisis of liberal democracy.

The Article proceeds as follows. After Part I provides necessary background, Part II explains how the rise of neoliberalism has led in turn to greater reliance on consent throughout the law and to greater doubts about its moral efficacy, so that some of the problems with consent that have been identified within particular domains generalize broadly.[22] Part III documents through case studies how this phenomenon and related

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20. See Deryck Beyleveld & Roger Brownsword, Consent in the Law 2 (2007) (arguing that in "*any*" legal system that "takes individuals and their choices seriously . . . the concept of consent will come to play a key role"); Don Herzog, Happy Slaves: A Critique of Consent Theory 179 (1989) ("A liberal world must be, in part, a world of consent theory . . . ."); Richards & Hartzog, supra note 9, at 1464 ("A legal system without consent would be so radically different from what we have that it would be almost unimaginable."); see also United States v. Drayton, 536 U.S. 194, 207 (2002) ("In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own.").

21. Cf. Perry Anderson, Regime Change in the West?, Lond. Rev. Books (Apr. 3, 2025), https://www.lrb.co.uk/the-paper/v47/n06/perry-anderson/regime-change-in-the-west [https://perma.cc/MX6N-TRRJ] (discussing "populist revolts against neoliberalism" from the left and the right and reviewing the debate over whether and to what extent a post-neoliberal order is emerging); Melissa Naschek, Are We Still in Neoliberalism? An Interview With Vivek Chibber, Jacobin (June 17, 2025), https://jacobin.com/2025/06/neoliberalism-populism-trump-tariffs-economy [https://perma.cc/6U6E-5V6T] (discussing neoliberalism's persistence in the face of rising "anger against" it since the early 2000s).

22. Several legal scholars have identified an incipient "crisis of consent" in one or another field. See, e.g., James Grimmelmann, The Law and Ethics of Experiments on Social Media Users, 13 Colo. Tech. L.J. 219, 270 (2015) (noting "a national crisis of consent" over sex on college campuses); Orly Lobel, Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance, 106 Minn. L. Rev. 877, 881 (2021) (asserting that "[c]ontract law is currently experiencing a crisis of consent" owing to the rise of boilerplate clauses); Bart W. Schermer, Bart Custers & Simone van der Hof, The Crisis of Consent: How Stronger Legal Protection May Lead to Weaker Consent in Data Protection, 16 Ethics & Info. Tech. 171, 172 (2014) (describing a "crisis of consent" in data privacy law). This Article pushes these claims further and shows that the crisis is systemic.

ones have unsettled not only regimes of private ordering but also regimes of constitutional and global governance. Finally, Part IV offers a typology of strategies available to those who wish to shore up consent against these threats. Across legal domains, we suggest that reforms to the consent rules themselves will typically fail to protect vulnerable parties and vindicate the values consent is meant to serve. The crisis of consent is systemic; fully adequate responses must be as well.

I. THE PROMISE AND PROBLEMATICS OF CONSENT: A BRIEF OVERVIEW

Before turning to the state of consent in the law today, some conceptual and historical scaffolding will be useful. In this Part, we first sketch the conditions that make consent more or less meaningful and feasible in transactional and relational settings, as well as the standard ways in which legal designers try to secure those conditions. Our aim is not to present a novel account of consent, but rather to extract from the voluminous literature on the subject the key ideas needed to understand and evaluate contemporary consent regimes. We then review foundational challenges to consent that the U.S. legal system has weathered in the past, setting the stage for the current crisis.

A. *Securing the Conditions of Meaningful and Feasible Consent*

The potential value of consent to a liberal legal order is nearly self-explanatory. On the standard account, consensual transactions presumptively increase the well-being of the individuals involved and, in the aggregate, societal well-being.[23] Insofar as people tend to be in the best position to know their own interests and to assess how to further those interests, consensual choice offers a more reliable and efficient route to preference satisfaction and utility maximization than do directives from state authorities. In addition, consent advances noninstrumental ideals of autonomy, self-determination, and self-government.[24] Consent-based ordering promises a kind of freedom that is threatened by externally imposed restrictions and obligations. Deontological theory dovetails with consequentialist welfarism in exalting the value of consent.[25]

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23. See Michael J. Trebilcock, The Limits of Freedom of Contract 2–8, 241–42 (1993); see also Richard A. Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Stud. 103, 114 (1979) ("The basic Paretian argument is that a voluntary market transaction . . . *must* make both parties better off, and so increase the level of welfare or happiness in the society, for if both [parties] were not made better off . . . at least one of them would refuse to consent to it.").

24. See Franklin G. Miller & Alan Wertheimer, Preface to a Theory of Consent Transactions: Beyond Valid Consent, *in* The Ethics of Consent, supra note 4, at 79, 83–84.

25. Cf. T.M. Scanlon, What We Owe to Each Other 251–56 (1998) (explaining the combination of instrumental and noninstrumental factors that contribute to the "value of choice").

The limits of consent as a moral and legal principle are also familiar. Consensual transactions that impose costs on nonconsenting third parties are no longer presumed to be socially valuable, and such externalities are often cited as the basis for restrictions on the freedom of contract.[26] In other cases, the law restricts consensual transactions because of concerns about commodification or the moral failings of markets: Prohibitions on buying and selling sex, surrogacy, body parts, and electoral votes create "inalienability" rules that make consent irrelevant.[27] The same is true of other legal constraints on choice that are motivated, at least in part, by paternalistic concerns about self-harm, such as drug bans and seat belt mandates.[28]

All of these forbidden behaviors, which the law places outside the domain of consent, are also outside the domain of this Article. We confine our descriptive and critical analysis to those (many) areas in which the law privileges consent—and makes it a touchstone of legality—rather than ones in which the law subordinates consensual choice to other considerations.[29]

Even within the consent-privileging areas, the legality and morality of consent may pull apart. The law for the most part treats consent "as an all-or-nothing proposition."[30] Either valid consent exists or it doesn't. Both above and below the threshold of legal validity, however, normative judgments about the quality of consent are not binary but scalar.[31] The

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26. See, e.g., Lucian Arye Bebchuk & Jesse M. Fried, The Uneasy Case for the Priority of Secured Claims in Bankruptcy, 105 Yale L.J. 857, 933 (1996) ("[F]reedom of contract arguments have force only with respect to arrangements that do not create direct externalities.").

27. See Margaret Jane Radin, Contested Commodities 16–29 (1996) (explaining "market-inalienability"). The limits on what may be lawfully bought and sold have been stretched during the reign of neoliberalism. See Michael J. Sandel, What Money Can't Buy: The Moral Limits of Markets, *in* 21 The Tanner Lectures on Human Values 87, 93 (Grethe B. Peterson ed., 2000) (describing "the extension of markets and of market-oriented thinking to spheres of life once thought to lie beyond their reach" as "one of the most powerful social and political tendencies of our time").

28. Cf. David Pozen, The Constitution of the War on Drugs 19–42 (2024) (discussing failed constitutional campaigns to invalidate drug bans and motorcycle-helmet mandates on antipaternalist grounds).

29. We relax this constraint in Part IV, where we turn to possible responses to the crisis of consent.

30. Luis E. Chiesa, Solving the Riddle of Rape-by-Deception, 35 Yale L. & Pol'y Rev. 407, 417 (2017); see also Nancy S. Kim, Consentability: Consent and Its Limits 3 (2019) [hereinafter Kim, Consentability] ("Consent in the law is typically viewed as a conclusion, an all-or-nothing concept . . . ."); Daniel J. Solove, Murky Consent: An Approach to the Fictions of Consent in Privacy Law, 104 B.U. L. Rev. 593, 631 (2024) [hereinafter Solove, Murky Consent] ("The law often treats consent as a simple binary—either people consent . . . or people don't consent.").

31. Numerous legal scholars have made a version of this point and suggested that the law should do a better job of tracking consent's complexities. See, e.g., Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law 158 (2013) [hereinafter

degree to which a person may be deceived, intimidated, intoxicated, and so forth ranges across a broad spectrum. The degree to which their consent deserves moral respect does likewise.

While philosophers continue to debate the nature of consent and related concepts,[32] the basic determinants of consent's normative significance, or *the conditions of meaningful consent*, are generally agreed upon. All else equal, an alleged grant of consent by *X* to *Y*'s proposal *Z* will tend to carry less normative weight the more that *X* was coerced or compelled into accepting *Z*, which depends on factors such as whether and to what extent *Y* applied force or threats, the balance of power between *X* and *Y*, and *X*'s ability to modify or reject *Z* in favor of other options.[33] *X*'s consent will also tend to carry less normative weight the more that *X* suffered from impaired or constrained cognition, which depends on factors such as the quality of information available to *X* and *X*'s capacity to understand and act on that information.[34] Virtually every field of law now denies recognition to the most degraded forms of assent,[35] procured through physical violence or

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Radin, Boilerplate] (noting that "we can look at quality of consent as occupying a continuum from clear consent to clear nonconsent" and "urg[ing] consideration of the grey area between the two poles"); Joshua Fairfield, The Cost of Consent: Optimal Standardization in the Law of Contract, 58 Emory L.J. 1401, 1456 (2009) ("Courts should stop treating contractual consent as binary—as existing or not existing."); Orit Gan, The Many Faces of Contractual Consent, 65 Drake L. Rev. 615, 630 (2017) (proposing that courts adopt a "spectrum of consent rang[ing] from full-fledged consent to weak consent"); Solove, Murky Consent, supra note 30, at 627–37 (advocating a "murky consent" approach for privacy law).

32. See, e.g., Tom Dougherty, The Scope of Consent 23–156 (2021) (reviewing "mental," "communicative," and "evidential" accounts of consent in the philosophical literature); Mitchell N. Berman, The Normative Functions of Coercion Claims, 8 Legal Theory 45, 45 nn.1–2 (2002) (collecting classic sources on coercion). This Article adopts a broad definition of consent as any purportedly "voluntary yielding to what another proposes or desires" that is treated as "legally effective assent." Consent, Black's Law Dictionary (12th ed. 2024). Although this definition masks any number of debates about consent's theoretical underpinnings, it captures the core set of practical features and normative dilemmas that drive legal debates about consent across the range of fields we address.

33. See Elettra Bietti, Consent as a Free Pass: Platform Power and the Limits of the Informational Turn, 40 Pace L. Rev. 310, 321–23 (2019) (reviewing "the conditions of moral consent" recognized in the philosophical literature); Sommers, supra note 1, at 2235–36 (explaining that "[u]nder the standard philosophical account," the moral significance of consent "is marred by factors that compromise autonomous decision-making, such as coercion (undermining freedom), incapacity (undermining competence), or fraud (undermining knowledge)").

34. Although the details are debated, we are not aware of any philosopher who denies that these factors bear on the quality of consent. Professor Alan Wertheimer argues that "it is a mistake to think that difficult circumstances and inequalities should be regarded as *invalidating* consent in either morality or law," while implicitly conceding that such circumstances and inequalities may affect our normative evaluations. Alan Wertheimer, Consent to Sexual Relations 191 (2003) [hereinafter Wertheimer, Sexual Relations] (emphasis added).

35. Following Professor Roseanna Sommers, we use the terms "assent" and "agreement" throughout this Article "to refer to simple empirical acquiescence, or what the

outright fraud.[36] But because "perfect consent conditions . . . rarely exist in reality,"[37] the law perpetually struggles to determine just how meaningful consent must be to count as valid, and its determinations of validity are subject to criticism for not being meaningful enough.

A more basic, pragmatic challenge for many consent regimes is to ensure that the parties obtain the requisite assent in the first place. Vast literatures in transaction cost economics, public choice theory, and related disciplines have explored the factors that bear on this challenge, or *the conditions of feasible consent*. For consent to be feasible in bilateral and multilateral settings, the parties must converge first on "a common interest in some end" and then on a plan for achieving that end.[38] All else equal, such convergence is less likely to occur the greater the ideological discrepancies, mistrust, or misunderstanding between the parties. Even parties who would like to consent to mutually beneficial transactions may be thwarted by difficulties in identifying and connecting with one another, collective action problems in reaching agreement, and other kinds of transaction costs.[39] When these costs and barriers are sufficiently high, consent regimes become unworkable.

Concerns about the conditions of meaningful and feasible consent have influenced both where consent regimes appear in the law and how they operate. In some regulatory domains, lawmakers determine that consent would be too costly to obtain at the desired quality or scale and therefore eschew consent-based governance in favor of mandates, tort (in place of contract), compulsory licensing, or other strategies.[40] So-called liability rules, in Judge Guido Calabresi and A. Douglas Melamed's classic schema, are distinguishable from property rules precisely because the former permit the "unconsented taking of an entitlement."[41]

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theorist Peter Westen calls 'factual consent,'" which may or may not amount to legally valid consent. Sommers, supra note 1, at 2236 n.9 (internal quotation marks omitted) (quoting Peter Westen, The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct 16–17 (2004)).

36. See, e.g., Kimberly Kessler Ferzan, Consent and Coercion, 50 Ariz. St. L.J. 951, 954 (2018) (explaining that "when coercion is present, it renders [an] act of consenting null and void" in property law and related fields).

37. Kim, Consentability, supra note 30, at 16; see also id. at 10 ("An act of consent will rarely be free from external influence, and a decision-maker will almost never have perfect information.").

38. Frederick W. Mayer, Narrative Politics: Stories and Collective Action 14 (2014).

39. See, e.g., id. at 13–29 (cataloging "[p]roblems of [c]ollective [a]ction"); Douglass C. North, Transaction Costs, Institutions, and Economic Performance 6–9 (1992) (stating that the four variables that determine how easy or hard it is to transact are measurement costs, enforcement costs, market size, and "[i]deological attitudes and perceptions").

40. See infra section IV.B (reviewing ways in which lawmakers may "abandon" consent); see also Eyal Zamir & Ian Ayres, A Theory of Mandatory Rules: Typology, Policy, and Design, 99 Tex. L. Rev. 283, 289–310 (2020) (providing a typology and catalog of mandatory rules).

41. Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1127 (1972).

Within areas of law that do rely on consent, regulators and judges often develop subsidiary rules to ensure that the consent meets minimal standards of voluntariness, knowledge, and capacity. Defenses such as fraud, misrepresentation, duress, incapacity, unconscionability, and undue influence play this role in contract law, the paradigmatic consent regime.[42] Informed consent requirements serve a complementary function in healthcare, legal ethics, criminal procedure, and beyond.[43] Age-of-consent thresholds are ubiquitous in both relational and transactional settings, as are proscriptions on force, threats, and other blatant forms of coercion.[44] Doctrines such as commandeering and unconstitutional conditions extend this anticoercion logic into constitutional law.[45] Whether framed as duties, rights, defenses, prohibitions, or transaction-level constraints, all of these "consent-protecting rules"[46] aim to safeguard vulnerable parties and, with them, the conditions of meaningful consent. Although lawyers endlessly debate their design,[47] the existence and utility of consent-protecting rules, as a class, are now largely taken for granted.

Yet even as such rules have proliferated to accommodate the imperative of meaningful consent, lawmakers and judges have responded to the imperative of feasible consent by moving in the opposite direction, diluting the standards for valid consent to make it less costly to achieve. As Part III will describe, fields that require a high volume of consensual transactions to operate—such as digital contracting, intellectual property dissemination, and plea bargaining—face strong pressure to lower the bar to legally operative consent.[48] Fields that require the mutual consent of parties with sharply divergent interests, including much of public

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42. See Randy E. Barnett, A Consent Theory of Contract, 86 Colum. L. Rev. 269, 318 (1986) ("Traditional contract defenses can be understood as describing circumstances that, if proved to have existed, deprive the manifestation of assent of its normal moral, and therefore legal, significance.").

43. See Informed Consent, Legal Info. Inst., https://www.law.cornell.edu/wex/informed_consent [https://perma.cc/VR3F-5337] (last visited Sep. 9, 2025).

44. See, e.g., Ferzan, supra note 36, at 954 ("Coercion is particularly important to consent."); Joseph J. Fischel, Per Se or Power? Age and Sexual Consent, 22 Yale J.L. & Feminism 279, 285–94 (2010) (surveying U.S. age-of-consent statutes for sex).

45. See infra notes 280–288 and accompanying text.

46. Ian Ayres & Gregory Klass, Promissory Fraud Without Breach, 2004 Wis. L. Rev. 507, 520 n.42.

47. Consider, for example, the vast literature on the unconscionability doctrine in contract law. For a small sampling of influential works, see M. P. Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757 (1969); Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & Econ. 293 (1975); Arthur Allen Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967); Seana Valentine Shiffrin, Paternalism, Unconscionability Doctrine, and Accommodation, 29 Phil. & Pub. Affs. 205 (2000). As this literature reflects, the design and desiderata of any given consent regime may be contested even when the general decision to defer to the parties' consensual choices is itself uncontroversial.

48. See infra sections III.A, III.D–.E.

international law and structural constitutional law, also face pressure to make consent easier to achieve by lowering the relevant standards.[49] Designing legal regimes in which consent is both sufficiently feasible and sufficiently meaningful is an endemic challenge.

B. *Sidestepping Radical Challenges*

The law of consent has also been subject to more radical challenge. For centuries, critical theorists of various stripes have cast doubt on the possibility and value of consent, and on the liberal premises that underlie the consent paradigm. Beyond questioning the details of any given consent regime, these critiques question the appropriateness of relying on consent to validate social arrangements.

Perhaps most famously, generations of left-leaning legal theorists have troubled or denied the distinction between consent and coercion in employment relationships rife with exploitation. This skeptical tradition is often associated with Karl Marx, who characterized the consensual exchange of labor for wages as a "deceptive *illusion* of a transaction," as under capitalism the worker "is compelled to sell himself of his own free will" to survive.[50] In the early to mid-1900s, American legal realists such as Robert Hale and Morris Cohen argued that workers are coerced into accepting employment contracts not only because of their economic precarity and inferior bargaining positions—leaving them with "no real power to negotiate or confer with the corporation as to the terms under which [they] will agree to work"[51]—but also by a legal system that constructs those conditions and then enforces the agreements they generate.[52] For Hale and Cohen, "all employment contracts are the result

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49. See infra sections III.F–.G.

50. 1 Karl Marx, Capital: A Critique of Political Economy 932, 1064 (Ben Fowkes trans., Penguin Books 1976) (1867). For a leading sociological study of why workers consent to their own exploitation, see generally Michael Burawoy, Manufacturing Consent: Changes in the Labor Process Under Monopoly Capitalism 93 (1979) ("[J]ust as playing a game generates consent to its rules, so participating in the choices capitalism forces us to make also generates consent to its rules, its norms.").

51. Morris R. Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 569 (1933).

52. See, e.g., id. at 562 ("[T]he notion that in enforcing contracts the state is only giving effect to the will of the parties rests upon an utterly untenable theory as to what the enforcement of contracts involves."); Morris R. Cohen, Property and Sovereignty, 13 Corn. L.Q. 8, 12 (1927) (discussing "the fiction of the so-called labor contract as a free bargain"); Robert L. Hale, Bargaining, Duress, and Economic Liberty, 43 Colum. L. Rev. 603, 627–28 (1943) ("Bargaining power would be different were it not that the law endows some with rights that are more advantageous than those with which it endows others."); Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470, 473 (1923) ("It is the law of property which coerces people into working for factory owners . . . ."); see also Barbara H. Fried, The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement 47–70 (1998) (reconstructing Hale's arguments that markets were not a sphere of freedom but a "[n]etwork of [c]oercion").

of coercion backed by law."[53] The worker's consent is too constrained to count as truly free, and the constraints themselves are ultimately legal in character.[54]

A generation or so later, critical legal theorists pushed these arguments further, making the case that supposed acts of "voluntary yielding to what another proposes or desires"[55] are pervasively shaped by background norms and distributions that constrict the choices of vulnerable parties. Linking legality to consent serves to mask these dynamics and naturalize the status quo. Drawing at times on Antonio Gramsci's concept of hegemony as the means through which the ruling class secures the consent of ordinary people to their own oppression,[56] these theorists "argued that the principle of consent legitimates unjust hierarchies, economic inequality, and overt discrimination" not just in the employment setting but throughout the law.[57] Feminist scholars developed especially influential versions of this argument. Under prevailing conditions of male domination, Professor Catharine MacKinnon famously questioned whether meaningful consent to heterosexual sex is possible at all, much less any kind of guarantor of women's sexual autonomy or equality.[58]

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53. Samuel R. Bagenstos, Consent, Coercion, and Employment Law, 55 Harv. C.R.-C.L. L. Rev. 409, 423 (2020) [hereinafter Bagenstos, Consent]. For an overview of Hale's and Cohen's arguments and their central place in "the Legal Realist critique of choice and consent," see id. at 422–29.

54. Cf. Matthew Dimick, 'Without Remainder': Law and the Constitution of Economy and Society, Legal Form (July 11, 2022), https://legalform.blog/2022/07/11/without-remainder-law-social-constitution-adorno-kant-hale-dimick/ [https://perma.cc/4BGP-F9UA] (agreeing "with both Marx and Hale that the nature of consent in the exchange society is rather fictive" while offering a Marxist critique of Hale's view that the economy is "constituted—all the way down—by law and coercion").

55. Consent, Black's Law Dictionary (12th ed. 2024).

56. See, e.g., Antonio Gramsci, Selections From the Prison Notebooks of Antonio Gramsci 12 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., International Publishers 1971) (1947) (discussing the "consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group"); see also Douglas Litowitz, Gramsci, Hegemony, and the Law, 2000 BYU L. Rev. 515, 515 & n.2 (describing Gramsci's concept of hegemony as "a central theme during the heyday of the Critical Legal Studies movement" and collecting sources).

57. Aya Gruber, Consent Confusion, 38 Cardozo L. Rev. 415, 421 (2016).

58. See, e.g., Catharine A. MacKinnon, Toward a Feminist Theory of the State 178 (1989) ("If sex is normally something men do to women, the issue is less whether there was force than whether consent is a meaningful concept."); see also Lucinda M. Finley, The Nature of Domination and the Nature of Women: Reflections on *Feminism Unmodified*, 82 Nw. U. L. Rev. 352, 383 (1988) (reviewing Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law (1987)) (crediting MacKinnon with popularizing the insight "that far too often in a world of gender hierarchy, sex for women is a dominating, subjugating experience in which 'consent' and 'free choice' are meaningless terms"); Catharine A. MacKinnon, Rape Redefined, 10 Harv. L. & Pol'y Rev. 431, 447 (2016) (describing "standard" ways in which "[c]oerced submission can merge with consent" for women in sexual settings).

An overlapping line of Western political and psychological thought has emphasized the extent to which people's decisions are shaped not only by all-too-evident socioeconomic hierarchies but also by forces beyond their conscious awareness.[59] Critical legal scholars applied and extended this set of ideas as well, casting doubt on the assumptions of rational choice theory and the relationship between consensual decisionmaking, on the one hand, and autonomy and welfare, on the other. Individual preferences as revealed through choices, these scholars argued, are often inconsistent, manipulable, and self-destructive, as well as adapted to unchosen (and often unfair) circumstances.[60] Even relatively unconstrained choices, accordingly, cannot be relied upon to advance the chooser's moral agency or substantive freedom.

For all these reasons, Professor Robin West recounts, a refusal to accept the presumptive valorization of consensual transactions and the institutions in which they are embedded was a "hallmark of late twentieth-century critical legal studies . . . writing."[61] The critical legal studies movement was by no means alone in this. Inside and outside the law, countless communitarians and social and religious conservatives, for example, have likewise rejected an individualistic conception of the choosing self as the primary basis for legal and political ordering.[62]

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59. See The Structuralists: From Marx to Lévi-Strauss, at xii (Richard T. De George & Fernande M. De George eds., 1972) ("The attempt to uncover deep structures, unconscious motivations, and underlying causes which account for human actions at a more basic and profound level than do individual conscious decisions, and which shape, influence, and structure these decisions, is an enterprise which unites Marx, Freud, Saussure, and modern structuralists."); Bernard E. Harcourt, Radical Thought From Marx, Nietzsche, and Freud, Through Foucault, to the Present: Comments on Steven Lukes's *In Defense of "False Consciousness"*, 2011 U. Chi. Legal F. 29, 33–38 (surveying lines of thought questioning the relationship between individual choice and the autonomous pursuit of self-interest, from Marx to the Frankfurt School on ideology and false consciousness; from Freud to Lacan on repression and the unconscious; and from Nietzsche to Foucault on genealogy, knowledge, and power).

60. See Mark Kelman, A Guide to Critical Legal Studies 126–41 (1987); see also Vanessa E. Munro, Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy, 41 Akron L. Rev. 923, 926–35 (2008) (reviewing "structural, post-structural, and communitarian" critiques of consent).

61. Robin West, From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights, 118 Yale L.J. 1394, 1408 (2009); see also id. at 1408–09 nn.41–44 (collecting sources).

62. See generally Stephen Holmes, The Anatomy of Antiliberalism (1993) (surveying, synthesizing, and critically assessing the main currents of non-Marxist antiliberal thought). For the communitarian perspective, see, e.g., Michael J. Sandel, Liberalism and the Limits of Justice (2d ed. 1998); Charles Taylor, Sources of the Self: The Making of the Modern Identity (1989); see also T. Alexander Aleinikoff, Theories of Loss of Citizenship, 84 Mich. L. Rev. 1471, 1494 (1986) ("If the bywords of liberal theory are freedom, choice, and consent, the bywords of communitarian theory are solidarity, responsibility, and civic virtue."). For the socially and religiously conservative perspective on liberalism, see, e.g., Patrick J. Deneen, Why Liberalism Failed (2018); Alasdair MacIntyre, After Virtue: A Study in Moral Theory (2d ed. 1984); see also Adrian Vermeule, Why I Lost Interest in the

The forms of collective consent that are supposed to underwrite constitutional democracy, the liberal state, and the international legal system have also been subject to fundamental criticism. Political theorists have thoroughly and repeatedly debunked the notion that our contemporary system of government rests on the actual (as opposed to hypothetical or idealized) consent of the governed.[63] Grounding the legitimacy and binding force of the U.S. Constitution in its ratification by the propertied white-male fraction of a population long dead is hardly more convincing.[64] Philosophers have similarly denied that the consent of sovereign states within the Westphalian system does or should provide the foundation for international law.[65] On all of these accounts, justificatory appeals to the consent of states or their citizens are at best vestigial legal fictions and at worse deliberately misleading lies.

From Marx to MacKinnon and beyond, these radical critiques of consent assail its politics, value, and coherence—so forcefully that they press against the boundaries of liberal theory. Short of abandoning liberalism altogether, it is hard to see how a capitalist-democratic legal order could respond to such fundamental attacks on one of its operational and ideological pillars. Unsurprisingly, then, lawmakers have mostly shrugged them off. In some areas, the radical critiques have been invoked in support of regulatory approaches that rely less on the consent of individual parties, such as minimum wage laws and collective bargaining laws for workers.[66] In other areas, they have helped pave the way for new or enhanced consent-protecting rules, such as the resurrection of the

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Liberalism Debate, New Digest (Feb. 3, 2024), https://thenewdigest.substack.com/p/why-i-lost-interest-in-the-liberalism [https://perma.cc/52LD-FJXL] ("Extant liberalism relentlessly frames every policy debate in terms of the value of individual autonomy and an endless project of human liberation from the oppression of unchosen constraints, including constraints of customary morality, natural law and even biology . . . .").

63. See A. John Simmons, Political Obligation and Consent, *in* The Ethics of Consent, supra note 4, at 305, 319–22 (reviewing classic objections to theories of government by consent).

64. See, e.g., Louis Michael Seidman, On Constitutional Disobedience 16–17 (2012) (summarizing weaknesses of consent-based theories of constitutional obligation); Michael S. Moore, Justifying the Natural Law Theory of Constitutional Interpretation, 69 Fordham L. Rev. 2087, 2096–97 (2001) ("Despite our official mythology, very little truth lies in the fiction that our Constitution is legitimated by the 'consent of the governed.'").

65. See, e.g., Ronald Dworkin, A New Philosophy for International Law, 41 Phil. & Pub. Affs. 2, 5–11 (2013); Liam Murphy, Law Beyond the State: Some Philosophical Questions, 28 Eur. J. Int'l L. 203, 229–32 (2017); see also John A. Perkins, The Changing Foundations of International Law: From State Consent to State Responsibility, 15 B.U. Int'l L.J. 433, 435 n.2 (1997) ("The consent thesis and its sovereignty premise have been the subject of scholarly criticism . . . as infirm in logic, as grounded in unrealistic legal fictions, and as simply missing the point in what it is that gives international law its capacity to function as law.").

66. See, e.g., Bagenstos, Consent, supra note 53, at 428–29 (discussing Hale's influence on the National Labor Relations Act).

unconscionability doctrine in the Uniform Commercial Code[67] or the development of the law of sexual harassment.[68] Yet while they may have contributed to a patchwork of incremental reforms, the radical critiques by no means displaced consent from its central perch in the law.

To the contrary, the rise of neoliberalism over the past half-century has reinvigorated legal commitments to market ordering premised on consensual exchange. As the consent paradigm has strengthened its hold on and expanded its reach across more and more fields, existential doubts have been left behind. We are now living in "the Age of Consent," Professor Philip Bobbitt wrote in 2014, which "puts the maximization of individual choice at the pinnacle of public policy" and the center of the legal universe.[69]

II. NEW CHALLENGES TO THE CONDITIONS OF CONSENT

The Age of Consent is a troubled time, however. Across many different areas of law and policy, complaints about "consent fatigue"[70] and cynical assessments of the emptiness of consent have become commonplace.[71] So have stronger claims that consent is little more than a mask for power. What accounts for this mounting exhaustion, frustration, and backlash?

This Part explains how a series of social, political, economic, and intellectual developments over the past half-century have simultaneously pressed for more and more legal consent while making meaningful consent more and more difficult to attain. Some of these developments involve material changes in the world. For example, the arrival of informational capitalism brought with it an explosion of cursory consent

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67. See Mark C. Rahdert, Reasonable Expectations Revisited, 5 Conn. Ins. L.J. 107, 126 (1998) ("It had been a principal objective of Karl Llewellyn's pathfinding legal realist scholarship to establish the proposition that courts possessed the power to disregard unconscionable contract terms, and Llewellyn had succeeded in importing some of his proposed reforms on the subject into the U.C.C.").

68. See Martha Chamallas, The New Gender Panic: Reflections on Sex Scandals and the Military, 83 Minn. L. Rev. 305, 344 (1998) ("The feminist-inspired redefinition of consent paved the way for the development of the new body of sexual harassment law.").

69. Philip C. Bobbitt, The Age of Consent, 123 Yale L.J. 2334, 2382 (2014); see also West, Consent, supra note 7, at 3 (arguing that democratically enacted law has steadily "give[n] way to consent as the generative source of our rights and responsibilities").

70. Solove, Murky Consent, supra note 30, at 623–27.

71. See, e.g., Shoshana Zuboff, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power 241 (2019) (asserting that "[t]he euphemisms of consent can no longer divert attention from the bare facts" of surveillance capitalism); Bietti, supra note 33, at 366 (describing consent as "a performative façade" in digital privacy law); Peter H. Schuck, Rethinking Informed Consent, 103 Yale L.J. 899, 934 (1994) ("[A]necdotal and social science evidence alike demonstrate that informed consent law in action [in health care] is often ritualistic, formalistic, and hollow."). The case studies in Part III provide many more examples of such cynical assessments.

practices between companies and consumers. Other developments reflect changes in beliefs about the world. For example, the behavioral revolution in law and economics has created new doubts about the realities of human cognition. Both sets of changes—in the world, and in our understanding of the world—have worked in tandem to create a crisis of consent across the legal system.

The next Part will describe how this crisis has manifested across myriad areas of law. This Part offers a more general explanation for why so many areas have experienced growing discontent with consent. Abstracting away from fights over particular policies, we first recount how neoliberalism has led to greater demands for consent, entrenching the model of market contracting and expanding it to criminal justice, sexual relations, global governance, and beyond. We then explain how a suite of parallel trends have made these demands harder to satisfy by degrading the conditions of meaningful and feasible consent. The result has been a crisis of confidence in consent at both the individual and collective levels, and in both private and public law. This is a great deal of ground to cover. Fortunately, because the developments at issue are familiar—they have been central currents in legal thought for a generation—we can move briskly, focusing on the consequences for consent.

A. *Neoliberal Demands and Contradictions*

As an extensive body of scholarship has documented, the past fifty years or so witnessed the rise of neoliberalism as a dominant mode of governance in the United States and other Western democracies. Neoliberalism, on one standard account, holds "that human well-being can best be advanced by the maximization of entrepreneurial freedoms within an institutional framework characterized by private property rights, individual liberty, unencumbered markets, and free trade."[72] Its policy program has revolved around privatization, deregulation, and a reduced role for organized labor and the welfare state, along with a lowering of tariffs, quotas, and other trade barriers.[73] Its ideology, as many have observed, "is marked by glorification of individual choice" and responsibility.[74]

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72. David Harvey, Neoliberalism as Creative Destruction, 610 Annals Am. Acad. Pol. & Soc. Sci. 22, 22 (2007). Prominent histories of neoliberalism include Gary Gerstle, The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era (2022); David Harvey, A Brief History of Neoliberalism (2005) [hereinafter Harvey, Brief History]; Jamie Peck, Constructions of Neoliberal Reason (2010); Quinn Slobodian, Globalists: The End of Empire and the Birth of Neoliberalism (2018).

73. The current Trump Administration's approach to trade has thus broken with neoliberalism, so defined, even if its domestic policy agenda has not. See supra note 21 and accompanying text; see also Naschek, supra note 21 (contending that neoliberalism "is undergoing an important change" on "the international front" but no discernible change "in terms of how states and the capitalist class deal[] with the domestic economy").

74. David M. Kotz & Terrence McDonough, Global Neoliberalism and the Contemporary Social Structure of Accumulation, *in* Contemporary Capitalism and Its Crises: Social

Consistent with this vision, legislators and administrators gravitated toward consent-based governance strategies after the 1970s. Mandates, prohibitions, and the like were seen as threats to economic efficiency and individual freedom.[75] Consent policies, by contrast, were seen as a market-friendly means to advance both values.[76] Any doubts about the quality of consent could be dispelled by minimal interventions such as disclosure requirements to ensure that people's choices would be rational and informed.[77]

The turn away from substantive regulation in favor of consent was most apparent in the digital markets that developed with the advent of the internet. Having already declared that "[t]he era of big Government is over,"[78] President Bill Clinton insisted that "governments must adopt a non-regulatory, market-oriented approach to electronic commerce."[79]

Structure of Accumulation Theory for the 21st Century 93, 94 (Terrence McDonough, Michael Reich & David M. Kotz eds., 2010); see also Shahrzad Shams, Deepak Bhargava & Harry W. Hanbury, Roosevelt Inst., The Cultural Contradictions of Neoliberalism: The Longing for an Alternative Order and the Future of Multiracial Democracy in an Age of Authoritarianism 19 (2024), https://rooseveltinstitute.org/wp-content/uploads/2024/04/RI_Cultural-Contradictions-of-Neoliberalism_Report_042024.pdf [https://perma.cc/5SK3-FYKR] (discussing neoliberal culture's "obsession with choice . . . and self-reliance"); Martha T. McCluskey, Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State, 78 Ind. L.J. 783, 786 (2003) ("[N]eoliberalism claims to trim the role of government so that the state functions primarily as a value-neutral facilitator of individual choices."). Most debates over how best to define neoliberalism are not important for this Article's purposes. See, e.g., Daniel Rodgers, The Uses and Abuses of "Neoliberalism", Dissent (Winter 2018), http://www.dissentmagazine.org/article/uses-and-abuses-neoliberalism-debate [https://perma.cc/NU93-H8EQ] (reviewing neoliberalism's "identity problem"). We therefore bracket them here and focus on how policies and ideas widely associated with neoliberalism have affected consent's place in the law.

75. See David E. Pozen, Transparency's Ideological Drift, 128 Yale L.J. 100, 135–41 (2018) [hereinafter Pozen, Ideological Drift] (discussing the post-1970s regulatory turn away from "openly coercive forms of government action, such as mandates and penalties," toward targeted transparency and other "'light-touch,' 'choice-preserving' alternatives").

76. See Bietti, supra note 33, at 387 (reviewing arguments that consent-based governance "avoid[s] excessive regulatory interference [with business transactions] while ensuring their legitimacy"); Ella Corren, The Consent Burden in Consumer and Digital Markets, 36 Harv. J.L. & Tech. 551, 556 (2003) ("As consent is a low-cost, low-intervention control mechanism, this type of regulation has become the go-to strategy for many regulators.").

77. See, e.g., Luke Herrine, The Folklore of Unfairness, 96 N.Y.U. L. Rev. 431, 482–83 (2021) (describing the "neoliberal conceptualization of consumer protection," which "focuses on ensuring consumer choice that is 'rational' and 'informed' but otherwise leaving 'the market' to sort things out").

78. Address Before a Joint Session of the Congress on the State of the Union, 1 Pub. Papers 79, 79 (Jan. 23, 1996).

79. William J. Clinton & Albert Gore, Jr., A Framework for Global Electronic Commerce, White House (1997), https://clintonwhitehouse4.archives.gov/WH/New/Commerce/read.html [https://perma.cc/88H3-X6PJ]; see also Ira C. Magaziner, Creating a Framework for Global Electronic Commerce, Progress & Freedom Found. (July 1999), [https://perma.cc/TW47-Y2TH] (explaining that the Clinton Administration rejected "a

Pursuant to this approach, *notice and consent* became the lynchpin of digital privacy law and the "predominant governance tool" for informational capitalism more generally.[80] As a matter of law, consent is now "the foundation of the relationships we have with search engines, social networks, commercial websites, and any one of the dozens of other digitally mediated businesses we interact with regularly."[81] If the "touchstone act of personal choice" under neoliberalism is "the consumer purchase,"[82] the touchstone act of legal ordering is the click on the "I Agree" box by which the consumer consents to a site's terms and conditions, including the right to collect, use, and sell their personal data.

While the neoliberal empire of consent may be most immediately visible in online contracting, it has colonized many other domains as well. Because neoliberalism's "consumer conception of autonomy is not tethered to any specific institutional setting, it is easily extended to new areas."[83] And so it has been. In the analog world as in the digital world, mandatory arbitration clauses and liability waivers became ubiquitous features of the workplace and the marketplace, and they were largely upheld by courts on the basis of employee or consumer consent.[84] From the deregulation of sodomy and pornography to the more stringent regulation of sexual assault on college campuses, the law of sex has evolved toward an identifiably neoliberal principle of consent-based sexual autonomy.[85] Neoliberal economic reforms have led to the decline of

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traditional regulatory role for government" with regard to the internet, in favor of policies "maximiz[ing] individual freedom and individual choice"). The Bush and Obama Administrations likewise embraced this approach. See Jack Goldsmith, The Failure of Internet Freedom, *in* The Perilous Public Square: Structural Threats to Free Expression Today 241, 242–43 (David E. Pozen ed., 2020).

80. Corren, supra note 76, at 558; see also Salomé Viljoen, A Relational Theory of Data Governance, 131 Yale L.J. 573, 594 (2021) ("Notice-and-consent structures the basic legal relationship between the individual consumer . . . and the digital service provider . . . .").

81. Richards & Hartzog, supra note 9, at 1463.

82. David Singh Grewal & Jedediah Purdy, Introduction: Law and Neoliberalism, 77 Law & Contemp. Probs., no. 4, 2014, at 1, 13.

83. Id.

84. See Ryan Martins, Shannon Price & John Fabian Witt, Contract's Revenge: The Waiver Society and the Death of Tort, 41 Cardozo L. Rev. 1265 (2020) (documenting the rise of enforceable contractual waivers of tort liability); Note, The Market Participant Doctrine and Forced Arbitration, 137 Harv. L. Rev. 1359, 1359 n.1 (2024) (collecting sources on the growth of mandatory arbitration agreements); see also Judith Resnik, Procedure as Contract, 80 Notre Dame L. Rev. 593, 662 (2005) (explaining that when reviewing mandatory arbitration agreements, forum selection clauses, and the like, "courts are willing to rely on individual consent even as they know that such consent is given under conditions of profound inequality").

85. See, e.g., Melissa Murray & Karen Tani, Something Old, Something New: Reflections on the Sex Bureaucracy, 7 Calif. L. Rev. Online 122, 127 (2016), https://static1.squarespace.com/static/640d6616cc8bbb354ff6ba65/t/643a09846057841b61c1fa23/1681525125751/122-152Murray-Final-Online.pdf [https://perma.cc/4SBM-JNDY] (discussing "the neoliberal underpinnings of the modern sex bureaucracy" on college campuses).

unions, the deregulation of labor markets, and the restoration of a "free labor" system of individual worker contracting.[86] Neoliberal retrenchment of social welfare policies has, on many accounts, helped give rise to the carceral state and a regime of "free market criminal justice" that relies heavily on the consent of suspects and defendants to legitimize police searches and plea bargains and, with them, mass incarceration.[87] In the information economy, the neoliberal "propertization" of knowledge has driven the need for high-volume, cross-border exchange of intellectual property (IP) rights.[88] In public international law, neoliberalism spurred the creation and expansion of trade and investment regimes that reflect the United States' hegemonic power but "function[] mainly by consent" of the state parties.[89] Across these and other fields, market-oriented regulatory strategies based on consent have been called upon to accomplish more and more.

What consent can accomplish, however, depends on the conditions that determine its moral quality and practical feasibility. And over the same decades that neoliberalism has entrenched and amplified legal demands for consent, those conditions have deteriorated. As the next section will describe, contemporaneously growing concerns about structural inequality, cognitive capability, and political polarization have made normatively robust forms of consent more difficult to achieve. The "neoliberal model of choice," critics allege, "refuses to account for the ways material realities and inequalities constrain choice."[90] The neoliberal model of consent-based regulation has exemplified the same neglect.

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86. Right-to-work legislation that forbids compulsory union membership or dues, to take one example, has been defended on the ground that it "renews the vitality of individual consent and autonomy." Harry G. Hutchison, Reclaiming the First Amendment Through Union Dues Restrictions?, 10 U. Pa. J. Bus. & Emp. L. 663, 714 (2008).

87. Darryl K. Brown, Free Market Criminal Justice: How Democracy and Laissez Faire Undermine the Rule of Law *passim* (2016) [hereinafter Brown, Free Market Criminal Justice]. For other important works on the causal and ideological links between neoliberalism and mass incarceration, see Bernard E. Harcourt, The Illusion of Free Markets: Punishment and the Myth of Natural Order (2011); Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America (2016); Loïc Wacquant, Punishing the Poor: The Neoliberal Government of Social Insecurity (2009). For a discussion of how welfare policy itself became increasingly "contract-based" after the 1970s, see Marc Aidinoff, Computerizing a Covenant: Contract Liberalism and the Nationalization of Welfare Administration, *in* Mastery and Drift: Professional-Class Liberals Since the 1960s, at 201, 201–02 (Brent Cebul & Lily Geismer eds., 2025).

88. See Quinn Slobodian, Are Intellectual Property Rights Neoliberal? Yes and No, Promarket (Apr. 18, 2021), https://www.promarket.org/2021/04/18/intellectual-property-rights-neoliberal-hayek-history/ [https://perma.cc/W9RR-U2XJ] (summarizing scholarship that describes "the global IP regime . . . as 'neoliberal,'" though noting complications).

89. Robert W. Cox, Social Forces, States and World Orders: Beyond International Relations Theory, *in* Neorealism and Its Critics 204, 246 (Robert O. Keohane ed., 1986).

90. Corinne Blalock, Neoliberalism and the Crisis of Legal Theory, 77 Law & Contemp. Probs., no. 4, 2014, at 71, 98 n.139.

To make matters worse, as a number of the case studies in Part III will illustrate, the difficulties of achieving meaningful consent have been exacerbated by neoliberalism itself and the scale of consensual transactions needed to sustain contemporary markets. The information economy's insatiable demands for digital contracting, for example, have rendered consumer consent mechanical and "largely meaningless."[91] Something similar is true of the criminal system's demands for mass punishment, commercial demands for the mass licensing of IP rights, and United States–led demands for global cooperation, all of which have put downward pressure on the standard for legal consent.[92] In these and other settings, we thus observe a self-defeating dynamic of neoliberalism simultaneously exalting and undermining consent.

This dynamic, moreover, feeds further structural threats to the quality and feasibility of consent. Neoliberal economic policies, for example, are widely believed to have contributed to the dramatic growth since the 1970s in income and wealth inequality and industry concentration, creating a more constrained and exploitative choice environment for consumers, citizens, and less developed states in the international system.[93] The same economic policies have undercut labor unions and collective bargaining, depriving workers of the leverage that had historically served to make their consent more meaningful.[94] Economic inequality has also contributed to spiraling political polarization, threatening the basic mechanisms of collective consent required by our constitutional system of government.[95] Neoliberalism has threatened democratic culture as well, prominent theorists argue, by insisting on the primacy of individual self-rule over collective self-government.[96] Communitarian-minded critics contend that

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91. Woodrow Hartzog, Privacy's Blueprint: The Battle to Control the Design of New Technologies 211 (2018).

92. See infra sections III.D–.E, .G.

93. See, e.g., Mike Konczal, Katy Milani & Ariel Evans, Roosevelt Inst., The Empirical Failures of Neoliberalism 1–4 (2020), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_The-Empirical-Failures-of-Neoliberalism_brief-202001.pdf [https://perma.cc/57LZ-JU5Z]. Just how significant a contribution these policies have made is subject to empirical and explanatory debate. See, e.g., Roy Kwon, How Do Neoliberal Policies Affect Income Inequality? Exploring the Link Between Liberalization, Finance, and Inequality, 33 Socio. F. 643, 644 (2018) ("[E]mpirical literature is unable to provide clarity on the connection between liberalization and income inequality . . . .").

94. See infra section III.C.

95. See infra section III.F.

96. See, e.g., Wendy Brown, Undoing the Demos: Neoliberalism's Stealth Revolution 9–10 (2015) (arguing that "neoliberalism transmogrifies every human domain and endeavor, along with humans themselves, according to a specific image of the economic" and in so doing "assaults the principles, practices, cultures, subjects, and institutions of democracy understood as rule by the people"); Steve Fraser, The Capitalist Threat to Democracy, Jacobin (Oct. 16, 2024), https://jacobin.com/2024/10/capitalism-democracy-liberalism-trump-constitution [https://perma.cc/PR3S-77FK] ("A society anchored in individualism, that treats its citizens as self-interested micro entrepreneurs of self-

neoliberal policies and ideology have sapped the value of consent across the board, by corroding the communities, intermediary institutions, social bonds, and shared understandings that are necessary for acts of choice to be experienced as empowering.[97]

None of this is to deny that neoliberalism or policies labeled neoliberal may hold real appeal. As Part III's case studies illustrate, these policies have brought benefits to a range of constituencies in a range of contexts. Some credit neoliberal globalization for lifting a billion people out of poverty worldwide.[98] Nor do we mean to suggest that neoliberalism has ever held a totalizing sway over U.S. lawmaking. There are certain domains in which top-down, choice-constraining policies became more rather than less prominent over the past fifty years. The proliferation of zoning, environmental, and other land use regulations that have increased the costs of infrastructure and housing development offers one conspicuous example.[99] Finally, we do not mean to cast neoliberalism as the sole or ultimate cause of the turn toward consent-based governance. Another plausible driver, for instance, has been Americans' declining trust in the state since the 1970s[100]—a decline that has both fueled and been fueled by neoliberalism.[101] A society that has lost collective faith in institutional authority may be fertile ground for an ideology of individual choice and responsibility.

It is this ideology, and in particular its manifestations in law, that matter for present purposes. Call it neoliberalism or something else, the key takeaway is that a redoubled (if not entirely consistent) commitment to market ordering has expanded the empire of consent across legal domains, even while draining many of them of moral and social value.

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exploitation, . . . is not the most ecologically habitable zone for democracy. After all, democracy assumes some communing together.").

97. See, e.g., Michael J. Sandel, Democracy's Discontent 201–49 (2d ed. 2022) (discussing the failure of "the voluntarist conception of freedom" that took hold in the late twentieth century to make good on its "liberating promise").

98. See, e.g., Louis Menand, The Rise and Fall of Neoliberalism, New Yorker (July 17, 2023), https://www.newyorker.com/magazine/2023/07/24/the-rise-and-fall-of-neoliberalism [https://perma.cc/NM7D-BAHN].

99. See David Schleicher, Exclusionary Zoning's Confused Defenders, 2021 Wis. L. Rev. 1315, 1317 ("[T]here is broad agreement in economic and legal scholarship that land use controls in our richest regions and cities have gone much, much too far."). Some of these regulations, moreover, have created consent problems of their own by empowering narrow interest groups to exercise a legal or political veto over new projects. See, e.g., Jerusalem Demsas, Community Input Is Bad, Actually, The Atlantic (Apr. 22, 2022), https://www.theatlantic.com/ideas/archive/2022/04/local-government-community-input-housing-public-transportation/629625/ (on file with the *Columbia Law Review*).

100. See Henry E. Brady & Thomas B. Kent, Fifty Years of Declining Confidence & Increasing Polarization in Trust in American Institutions, 151 Daedalus, no. 4, 2022, at 43, 45 fig. 1.

101. See Travis Holloway, Neoliberalism and the Future of Democracy, 62 Phil. Today 627, 630–38 (2018).

Relatively perfunctory, context-insensitive forms of consent have become an everyday feature of our legal lives. At the same time, as we will now proceed to explain, additional trends have been undermining the conditions of consent on still further levels.

B. *Parallel Impediments*

Recall the conditions for achieving meaningful and feasible consent.[102] Consent is vexed in any context involving coercion or exploitation, whether produced by force, fraud, an asymmetry of power, or an absence of alternatives. Consent is also compromised by impaired cognition, whether produced by ignorance, irrationality, or incapacity. Finally, consent is thwarted when mutually beneficial transactions cannot be consummated owing to bargaining breakdowns, collective action problems, and other transaction costs.

Beyond neoliberalism, a parallel set of developments have made each of these conditions more difficult to satisfy across a wide range of settings. Concerns about structural inequality and injustice have cast the consent of marginalized groups in a more coercive light. The rise of the behavioralist paradigm in the social sciences has given cause to believe that many consensual choices are cognitively flawed and exploitatively elicited. And the emergence of intense polarization has made it prohibitively costly to achieve and sustain political cooperation on the basis of mutual consent.

1. *Structuralism.* — For over a century, as recounted in Part I, critical legal scholars have questioned the distinction between consent and coercion in employment contracts and other settings characterized by severe imbalances of power.[103] In recent decades, as the figure below suggests, waves of commentary and advocacy on "structural" injustice have revived, and generalized, concerns about the meaningfulness of consent in the face of such imbalances.[104] Structural accounts help explain why so many socioeconomic inequalities persist along lines of race and sex, among many other axes, even though the most blatant forms of racism and sexism have been banned and "most Americans' overt attitudes toward race and gender have become increasingly egalitarian" since the 1960s.[105]

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102. See supra section I.A.

103. See supra section I.B.

104. See, e.g., Maeve McKeown, Structural Injustice, Phil. Compass, July 2021, at 1, 11, https://compass.onlinelibrary.wiley.com/doi/epdf/10.1111/phc3.12757 (on file with the *Columbia Law Review*) (describing "the growing importance of structural injustice theory" in political theory and beyond); K. Sabeel Rahman, Constructing and Contesting Structural Inequality, 5 Critical Analysis L. 99, 100 (2018) ("[S]tructural inequalities are of increasing concern in social science and legal scholarship, as well as public policy debates.").

105. Samuel R. Bagenstos, The Structural Turn and the Limits of Antidiscrimination Law, 94 Calif. L. Rev. 1, 2 (2006).

FIGURE 1. THE STRUCTURAL TURN (GOOGLE BOOKS NGRAM VIEWER)[106]

By spotlighting the degree to which patterns of inequality constrain choices, limit bargaining power, and invite exploitation of marginalized groups notwithstanding their attainment of formal equal rights, the structural turn has cast a harsh light on consent regimes that assume away such disparities. In the context of criminal law, for example, recent years have seen an outpouring of critical commentary on the ways in which the government procures the consent of vulnerable subjects—disproportionately Black and brown—to justify searches, interrogations, and plea deals, as part of a larger "Racial Contract" to which "the nonwhite subset of humans [cannot] be a genuinely consenting party."[107] Scaled up to the level of the nation-state, commentators have raised comparable questions about the international legal system's reliance on the consent of developing countries to justify trade agreements, climate change policies, and other arrangements that may contribute to these countries' ongoing

106. Structural Inequality, Google Books Ngram Viewer, https://books.google.com/ngrams/graph?content=structural+inequality&year_start=1800&year_end=2022&corpus=en&smoothing=3 [https://perma.cc/V97Y-NFQX] (last visited Sep. 9, 2025).

107. Charles W. Mills, The Racial Contract 11–12 (1997). For a sampling of the critical literature on consent searches, see Susan A. Bandes, Police Accountability and the Problem of Regulating Consent Searches, 2018 U. Ill. L. Rev. 1759, 1768 ("[S]everal studies have shown that the burdens of consent searches are by no means equally distributed, and critics have noted the 'ease with which' consent doctrines 'can be pressed into service as tools of racial profiling.'" (quoting Seth W. Stoughton, Policing Facts, 88 Tul. L. Rev. 847, 871–72 (2014))); I. Bennett Capers, Criminal Procedure and the Good Citizen, 118 Colum. L. Rev. 653, 678 (2018) ("Scholars have been almost unanimous in noting that the consent exception [to the Fourth Amendment warrant requirement] disregards evidence that psychological pressures often induce individuals to consent."); Diana R. Donahoe, Not-So-Great Expectations: Implicit Racial Bias in the Supreme Court's Consent to Search Doctrine, 55 Am. Crim. L. Rev. 619, 621 (2018) (arguing that consent search doctrine provides police "with the tools to exploit the black community's expectations . . . and perpetuates the stigmatization of black men as criminals"); George C. Thomas III, Terrorism, Race and a New Approach to Consent Searches, 73 Miss. L.J. 525, 542 (2003) ("The consent search doctrine is the handmaiden of racial profiling.").

oppression.[108] In the context of sexual relations, the #MeToo movement has been especially emphatic in challenging the adequacy of consent to protect women from degradation and predation under conditions of patriarchy.[109] #MeToo has also "sparked a general conversation about how we understand consent" in settings rife with subordination—which, on the structural account, are everywhere.[110] "As the #MeToo movement demonstrates," one legal scholar has written, "perceived consent is usually coercion when there's an imbalance in power."[111]

To be clear, the point is not that imbalances of power, and hence opportunities for coercion, are on average materially more severe than they were in the past.[112] The point is that recent decades have witnessed growing demands for substantive equality for and from a host of historically disadvantaged groups, spurred by the recognition that institutional and social practices can frustrate such demands even in the absence of unlawful or malicious behavior by those in charge. The *mismatch* between enhanced egalitarian expectations and entrenched structural inequalities has laid bare the power asymmetries and material deficits that constrain, and distort, legally consequential choices made by members of subordinated groups. And in so doing, it has led to a broad devaluation of such acts of consent by lawyers, legal scholars, and others who see the relevant choice environments as systemically exploitative or coercive. To this extent at least, Marx's and MacKinnon's critiques of consent have gone mainstream.

2. *Behavioralism.* — At the same time that the structural turn has exacerbated concerns about the social and institutional environments in which many decisions are made, another intellectual turn has exacerbated concerns about the cognitive processes that underlie human decision-making. The economistic paradigm of rational choice that emerged mostly unscathed from Freudian and Foucauldian attacks has in recent decades been shaken by the "behavioral revolution" in the social

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108. See, e.g., Frank J. Garcia, Consent and Trade: Trading Freely in a Global Market 52–107 (2019) (trade agreements); Maria A. Gwynn, Power in the International Investment Framework 182–87 (2016) (investment treaties); David Ciplet, Rethinking Cooperation: Inequality and Consent in International Climate Change Politics, 21 Glob. Governance 247, 253–68 (2015) (climate change treaties).

109. See infra section III.B.

110. Renata Grossi, What Can Contract Law Learn From #MeToo?, 49 J.L. & Soc'y 263, 276 (2022); see also id. at 275 ("Just as patriarchy makes a mockery of consent in negotiating sexual encounters, so too do free market economics, liberalism, and neoliberalism make a mockery of consent and freedom to contract in economic relationships.").

111. Josephine Ross, What the #MeToo Campaign Teaches About Stop and Frisk, 54 Idaho L. Rev. 543, 561 (2018).

112. See supra notes 18–19 and accompanying text. Nor is it clear how any such claim about coercion could be proved. Cf. Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1428–29 (1989) (arguing that "any useful conception of coercion is irreducibly normative").

sciences.[113] The figure below gives a sense of this revolution's rhetorical magnitude. Starting in the 1970s, researchers in economics, cognitive psychology, and related fields have "systematically documented the many ways that human behavior differs from the rational behavior assumed by neoclassical economics."[114] A vast array of cognitive limitations and biases lead people to make persistent logical, factual, and perceptual errors, to miscalculate risks and rewards, and to mispredict their future utility. Some of these tendencies appear to be hard-wired into the human brain; others reflect the "bounded" nature of our computational abilities, memories, and willpower.[115]

FIGURE 2. THE BEHAVIORAL REVOLUTION (GOOGLE BOOKS NGRAM VIEWER)[116]

113. For representative uses of this phrase, see Russell Korobkin, What Comes After Victory for Behavioral Law and Economics?, 2011 U. Ill. L. Rev. 1653, 1664; David Brooks, Opinion, The Behavioral Revolution, N.Y. Times (Oct. 27, 2008), https://www.nytimes.com/2008/10/28/opinion/28brooks.html (on file with the *Columbia Law Review*).

114. Ryan Bubb & Richard H. Pildes, How Behavioral Economics Trims Its Sails and Why, 127 Harv. L. Rev. 1593, 1601 (2014).

115. See generally, e.g., Dan Ariely, Predictably Irrational: The Hidden Forces that Shape Our Decisions (rev. & expanded ed. 2009); Daniel Gilbert, Stumbling on Happiness (2007); Judgment Under Uncertainty: Heuristics and Biases (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); Daniel Kahneman, Thinking Fast and Slow (2011). For influential early reviews and applications of these findings in the legal literature, see generally Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics, 88 Calif. L. Rev. 1051 (2000). For more recent overviews of behavioral law and economics, see generally Research Handbook on Behavioral Law and Economics (Joshua C. Teitelbaum & Kathryn Zeiler eds., 2018); Eyal Zamir & Doron Teichman, Behavioral Law and Economics (2018).

116. Behavioral Economics, Google Books Ngram Viewer, https://books.google.com/ngrams/graph?content=behavioral+economics&year_start=1800&year_end=2022&corpus=en&smoothing=3 [https://perma.cc/LL5R-APJU] (last visited Sep. 27, 2025).

When individuals decide to consent or to withhold consent, this body of research suggests, their choices may well be inconsistent with their own declared goals and intentions. Much of the time, individuals "are apt to offer consent without anything approaching adequate understanding" of the analytic mistakes to which they are prone.[117] If it is a "false assumption"—"indeed, obviously false"—that people usually "make choices that are in their best interest or at the very least are better than the choices that would be made by someone else,"[118] then it is also likely to be false that choices to consent or not to consent are reliably welfare-enhancing.

Behavioralism has also reshaped relationships between ordinary individuals and many of the institutions with which they interact. Sophisticated parties in business and government have mined the behavioral literature for insights into the biases and heuristics that drive so many dubious decisions, and turned these cognitive failures to their advantage. By structuring the choice environment with such biases and heuristics in mind, these actors can nudge the vast majority of people to elect certain options rather than others while preserving "the illusion of choice."[119] Sometimes, nudging may yield attractive results.[120] But profit-motivated firms also draw on behavioral findings to manipulate users' consent for their own ends; to fail to do so is to risk losing market share.[121] Many firms have also drawn on companion literatures in neuroscience to "encourage excessive consumption and addiction" among users of their products "by targeting the limbic system, the part of the brain responsible for feeling and for quick reaction."[122]

The behavioral revolution thus troubles the conditions of meaningful consent on two levels—by exposing the irrational and imperfectly rational

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117. Nora Freeman Engstrom, Lawyer Lending: Costs and Consequences, 63 DePaul L. Rev. 377, 384 (2014); see also id. (describing client consent as "the workhorse of contemporary legal ethics").

118. Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness 9 (2008).

119. See Bubb & Pildes, supra note 114, at 1606; see also Chunlin Leonhard, The Unbearable Lightness of Consent in Contract Law, 63 Case W. Rsrv. L. Rev. 57, 90 (2012) ("[W]ith unprecedented manipulation of human decision-making biases, as identified by behavioral economists in the last few decades, consent has become very elusive and difficult to define and ascertain [in contract law].").

120. See Thaler & Sunstein, supra note 118, at 11 ("Choice architects can make major improvements to the lives of others by designing user-friendly environments.").

121. See Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: The Problem of Market Manipulation, 74 N.Y.U. L. Rev. 630, 726 (1999) ("Cognitive biases present profit-maximizing opportunities that manufacturers *must* take advantage of in order to stay apace with competition. . . . [O]nly firms that capitalize on consumer cognitive anomalies survive.").

122. David T. Courtwright, The Age of Addiction: How Bad Habits Became Big Business 6 (2019).

character of countless choices, and by enabling commercial and governmental strategies to exploit such cognitive failures. Skeptical accounts of people's capacity to know and act on their own interests may be nothing new in the humanities. Yet both because of the apparent strength of the core evidence and because it emerges out of economics and applied social sciences, this recent body of research has penetrated law and policy circles to an extraordinary degree.[123] Although legal doctrines on consent never go so far as to demand that choices be fully wise or free, they necessarily assume a baseline level of rationality and autonomy among consenting parties to justify deferring to their choices.[124] Behavioralism has shaken the legal community's faith in this assumption and in the quality and coherence of human decisionmaking more generally.[125]

3. *Polarization.* — Shifting focus from individual to collective consent, a third development has threatened the consensual premises of constitutional democracy and global governance. The rise over the past half-century of polarization—in the forms of hyperpartisanship, social and epistemic division, and international fragmentation—has made collective consent harder to achieve across wide swaths of public law. And even where nominal consent has been secured, its meaning and value have been increasingly called into question.

The basic story of polarization in U.S. politics is well known. Since the 1970s, Democrats and Republicans have moved further and further apart on an expanding range of policy issues and constitutional concerns. By 2011, the parties were "internally more unified and coherent, and externally more distant from each other, than anytime over the last one hundred years."[126] Americans have become increasingly divided not only

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123. See Zachary Liscow & Daniel Markovits, Democratizing Behavioral Economics, 39 Yale J. on Regul. 1274, 1281–86 (2022) (describing the "huge scope" of policy informed by behavioral law and economics); Thomas S. Ulen, The Importance of Behavioral Law, *in* The Oxford Handbook of Behavioral Economics and the Law 93, 120 (Eyal Zamir & Doron Teichman eds., 2014) ("[B]ehavioral law is one of the most important developments—and probably *the* most important—in legal scholarship of the modern era.").

124. Cf. David A. Westbrook, Liberal Environmental Jurisprudence, 27 U.C. Davis L. Rev. 619, 689 n.178 (1994) ("To consent, one must be at least rational, that is, in possession of some capability to ratiocinate and to communicate. One must also possess some sense of being distinct from others.").

125. The unfolding "replication crisis" in the behavioral sciences does not (yet) seem to have shaken the faith of policymakers or the legal community in behavioralism. See, e.g., Leif Weatherby, Opinion, A Few of the Ideas About How to Fix Human Behavior Rest on Some Pretty Shaky Science, N.Y. Times (Nov. 30, 2023), https://www.nytimes.com/2023/11/30/opinion/human-behavior-nudge.html (on file with the *Columbia Law Review*) ("Despite all its flaws, behavioral economics continues to drive public policy, market research and the design of digital interfaces.").

126. Richard H. Pildes, Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America, 99 Calif. L. Rev. 273, 277 (2011); see also id. at 276 n.2 (collecting sources on partisan polarization); David E. Pozen, Eric L. Talley & Julian Nyarko, A

in their political commitments but also in their beliefs about non-ideological facts. This development has been linked to numerous causes, including the decline and fragmentation of legacy media markets, the rise of social media and algorithmically mediated echo chambers, the speed and scale with which disinformation and misinformation spread online, and the collapse of trust in traditional epistemic authorities.[127] If partisan polarization means that "facts may no longer provide a common ground upon which to build political consensus,"[128] epistemic polarization means that facts may no longer provide a common ground upon which to build *factual* consensus.

FIGURE 3. LIBERAL–CONSERVATIVE PARTISAN POLARIZATION IN CONGRESS (NOMINATE SCORES)[129]

Computational Analysis of Constitutional Polarization, 105 Corn. L. Rev. 1, 34–67 (2019) (showing that polarization extends to constitutional discourse).

127. Large literatures explore each of these subjects. On epistemic fracture generally, see, e.g., Daniel T. Rodgers, Age of Fracture (2011). On media fragmentation and disinformation, see, e.g., Yochai Benkler, Robert Faris & Hal Roberts, Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics (2018). On the collapse of epistemic authority, see, e.g., Brian Leiter, The Epistemology of the Internet and the Regulation of Speech in America, 20 Geo. J.L. & Pub. Pol'y 903 (2022). An entire field of "misinformation studies" has emerged in response to "the rising tide of distorted and manipulative information." Ryan Calo, Chris Coward, Emma S. Spiro, Kate Starbird & Jevin D. West, How Do You Solve a Problem Like Misinformation?, Sci. Advances, Dec. 8, 2021, at 1, 2, https://doi.org/10.1126/sciadv.abn0481 (on file with the *Columbia Law Review*).

128. Michael J. Klarman, The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—And the Court, 134 Harv. L. Rev. 1, 158 (2020).

129. Jeff Lewis, Polarization in Congress, Voteview (Oct. 23, 2023), https://voteview.com/articles/party_polarization [https://perma.cc/DD5T-QQGR].

Polarization has challenged the operation and stability of constitutional democracy at every level of government. Partisan polarization makes elected officials less likely to seek and achieve consensual solutions, and more likely to use hardball tactics, within multiparty institutions like Congress and across government institutions controlled by different parties.[130] The resulting gridlock and dysfunction have opened the door to executive unilateralism and an increasingly imperial presidency that, in the view of many, now flirts with autocracy.[131] Epistemic polarization further fuels the autocratic threat.[132] Polarization has also contributed to democratic instability by raising the stakes of elections and reducing the likelihood that electoral losers will "extend their consent to the winners' right to rule."[133]

While political and epistemic polarization have been blocking consensual collective action within the United States, analogous collective action problems among nations have been vexing global governance regimes. Increasingly urgent and potentially existential threats such as climate change, terrorism, cyberattacks, and pandemics demand ambitious transnational responses. And yet, few such responses can hope to garner anything approaching the consent of all states, given their leaders' divergent policy preferences, the uneven distribution of expected costs and benefits, and the potential for free riding. The upshot has been a "decay of consent" in international law and a multidecade shift in theory and practice toward nonconsensual forms of lawmaking.[134]

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130. See Klarman, supra note 128, at 167 ("Extreme political polarization undermines the inclination and capacity of politicians to compromise and makes hardball tempting.").

131. See infra notes 262–275 and accompanying text.

132. See Nikhil Menezes & David E. Pozen, Looking for the Public in Public Law, 92 U. Chi. L. Rev. 971, 996 (2025) (explaining that epistemic polarization and related developments "invite a brand of populist politics in which elected leaders claim to speak for the people—the 'real people'—while dismantling checks on their own power").

133. Christopher J. Anderson, André Blais, Shaun Bowler, Todd Donovan & Ola Listhaug, Losers' Consent: Elections and Democratic Legitimacy 190 (2005). For recent empirical evidence that polarization undermines political parties' and voters' commitment to "losers' consent," see L. (Lisa) Janssen, Sweet Victory, Bitter Defeat: The Amplifying Effects of Affective and Perceived Ideological Polarization on the Winner–Loser Gap in Political Support, 63 Eur. J. Pol. Rsch. 455, 464–73 (2024) (finding that polarized British "voters experience[d] a stark decrease in their political support" for the democratic system after the loss of their favored political party in the 2015 and 2019 UK general elections); Geoffrey Layman, Frances Lee & Christina Wolbrecht, Political Parties and Loser's Consent in American Politics, 708 Annals Am. Acad. Pol. & Soc. Sci. 164, 167–79 (2023) (finding that U.S. party activists have become increasingly less committed to democratic norms, especially losers' consent).

134. Nico Krisch, The Decay of Consent: International Law in an Age of Global Public Goods, 108 Am. J. Int'l L. 1 (2014); see also Shelly Aviv Yeini, Whose International Law Is It Anyway? The Battle Over the Gatekeepers of Voluntarism, 45 Mich. J. Int'l L. 1, 2 (2024) (discussing the recent proliferation of "theories that do not consider consent as the cornerstone of international law"). We return to this issue below in section III.G.

The architects of American constitutional law and the Westphalian international order have been little detained by philosophical doubts about collective consent, but the practical threat of polarization is proving more formidable. By degrading the conditions of meaningful and feasible consent, polarization has pressed domestic and international political actors alike to eschew consensual solutions and to substitute destabilizing, ad hoc alternatives. At the same time that consent regimes in private law are facing mounting skepticism, consent regimes in public law are facing mounting circumvention and subversion as they fail to deliver the shared solutions needed to sustain effective governance. Just as more and more observers have come to question consent's capacity to safeguard individualistic values like agency and autonomy under current socio-economic conditions, many now question its capacity to safeguard collective commitments to democracy and the rule of law.

III. THE CRISIS OF CONSENT: CASE STUDIES

The previous Part outlined a number of broad developments that help to explain growing discontent with consent throughout the legal system. We are now in a position to look at that discontent more directly. This Part does so through a series of case studies, which together illustrate just how broad and deep the contemporary crisis of consent has become. As one might expect, there is significant variation in the details of consent's collapse across fields, reflecting both the multiplicity of roles that consent plays in the law and the multiplicity of extralegal forces that may bear on those roles. But the commonalities, having been introduced in advance, will also be clear. As disparate as the case studies might seem, they all involve legally consensual transactions or arrangements that—for overlapping reasons—are widely seen to have degraded in quality, feasibility, or both.

A. *Digital Contracting and Data Privacy*

The digital economy has exacerbated longstanding problems of consent in consumer contracting. As a large literature details, the traditional model of contractual consent based on bargaining and mutual agreement breaks down when consumers are confronted with standard-form contracts of adhesion that they have little choice but to accept, little time or inclination to read, and little ability to understand.[135] These take-it-or-leave-it contracts are drafted by businesses that are highly motivated

135. See, e.g., Nancy S. Kim, Wrap Contracts: Foundations and Ramifications (2013); Radin, Boilerplate, supra note 31; Symposium, "Boilerplate": Foundations of Market Contracts, 104 Mich. L. Rev. 821 (2006). A now-famous experiment found that 98% of subjects registering for a fake social media site failed to notice that they were signing over their firstborn children as payment. Jonathan A. Obar & Anne Oeldorf-Hirsch, The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services, 23 Info. Commc'n & Soc'y 128, 134, 143 (2020).

and well equipped to impose terms that serve their advantage. Ordinary people, compelled to enter into multifarious transactions in the course of their daily lives, are left vulnerable to exploitation. With limited exceptions, courts have acquiesced to the imperative of feasibility and enforced such contracts, including all the boilerplate terms, mandatory arbitration clauses, and liability waivers therein.[136] Asymmetries of bargaining power combine with asymmetries of information to undermine the normative value of consent.

These general concerns about standard-form contracting are nothing new.[137] More than half a century ago, Karl Llewellyn recognized that "[i]nstead of thinking about 'assent' to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all."[138] The best the legal system can do, Llewellyn counseled, was to accept the "blanket assent" of consumers "to any not unreasonable or indecent terms"—without pretending that these terms have been read, understood, or specifically agreed to.[139]

What *is* new is the scope and scale of standard-form contracting in the digital age. Virtually every time we interact with websites, apps, search engines, social networks, and other online services, the interactions are governed by lengthy and opaque contracts. As the recent Restatement of Consumer Contracts describes:

> Whereas shopping at a grocery store in the brick-and-mortar world entails very few standard contract terms (and many legally supplied gap-fillers), shopping at the online outlet of that store now entails a lengthy list of standard terms. The proliferation of lengthy standard-term contracts, mostly in digital form, makes it practically impossible for consumers to scrutinize the terms and evaluate them prior to manifesting assent. A signature at the bottom of the form, a click of "I Accept," or some other form of manifestation of willingness to enter the transaction is, at best, a declaration that "I know I am agreeing to something, but I don't know to what."[140]

Further challenging the ability of online consumers to make informed, rational choices is the increasing skill with which companies design interfaces to exploit cognitive biases and steer consumers toward

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136. See supra note 84 and accompanying text.

137. See Robert A. Hillman & Jeffrey J. Rachlinski, Standard-Form Contracting in the Electronic Age, 77 N.Y.U. L. Rev. 429, 434–63 (2002) (reviewing "[t]he [b]asic [i]ssues" presented by standard-form contracts "[i]n a [p]aper [w]orld").

138. Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 370 (1960).

139. Id.; see also, e.g., Friedrich Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 640 (1943) (warning that "[s]tandard contracts" may enable "powerful industrial and commercial overlords . . . to impose a new feudal order of their own making upon a vast host of vassals").

140. Restatement of Consumer Contracts, intro. note at 2 (A.L.I. 2024).

purchases and permissions that disserve their interests.[141] The combination of new technological affordances and deeper understanding of these biases has systematically blurred the line between persuasion and exploitation.[142]

As doubts about consumer consent have become more severe, the social stakes have risen. Standard-form contracting at this point arguably "displaces tort liability more aggressively than at any time in American history, including even at the high point of the nineteenth-century age of contract."[143] And the emerging system of "informational capitalism" or "surveillance capitalism" raises a host of much-discussed concerns.[144] Tech platforms like Google, Meta, X, Amazon, and Uber collect massive amounts of data about their users. An endless array of streaming services, smartphone apps, digital assistants, and other devices do the same. These companies and their algorithms come to know our likes and dislikes, locations and movements, habits and health, and social networks and relationships. The companies then put this knowledge to use in ways that are individually and socially harmful: engineering epistemic bubbles and echo chambers while engaging in predatory advertising, privacy violations, discrimination, and behavioral manipulation.[145] Commentators sound increasingly dire warnings that we are building an economy that "will thrive at the expense of human nature and will threaten to cost us our humanity."[146]

The "new oil" that drives informational capitalism is user data.[147] How do tech firms acquire this valuable, and dangerous, commodity and the

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141. See Ryan Calo, Digital Market Manipulation, 82 Geo. Wash. L. Rev. 995, 999 (2014) ("A specific set of emerging technologies and techniques will empower corporations to discover and exploit the limits of each individual consumer's ability to pursue his or her own self-interest."); Jamie Luguri & Lior Jacob Strahilevitz, Shining a Light on Dark Patterns, 13 J. Legal Analysis 43, 44 (2021) (describing user interfaces that "knowingly confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions").

142. See supra notes 119–122 and accompanying text. To be sure, sellers' ability to exploit cognitive biases is not limited to the digital domain. For a wide range of examples, from credit cards and mortgages to health clubs and magazines, see Oren Bar-Gill, Seduction by Contract: Law, Economics, and Psychology in Consumer Markets (2012).

143. Martins et al., supra note 84, at 1269; see also John Gardner, The Twilight of Legality, 43 Australasian J. Legal Phil. 1, 9 (2018) (describing "more and more of the 'lifeworld'" as having been "colonized by take-it-or-leave-it boilerplate" insulated from legal challenge).

144. Julie E. Cohen, Between Truth and Power: The Legal Constructions of Informational Capitalism (2019) [hereinafter Cohen, Between Truth and Power]; Zuboff, supra note 71.

145. See, e.g., Zuboff, supra note 71, at 19–20 (discussing the central role of "behavior modification" and "the self-authorized extraction of human experience for others' profit" in surveillance capitalism (emphasis omitted)).

146. Id. at 11–12.

147. See Jack M. Balkin, Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation, 51 U.C. Davis L. Rev. 1149, 1154 & n.14 (2018) (internal quotation marks omitted) (quoting Jonathan Vanian, Why Data Is the New

legal rights to leverage it for their own purposes? The answer is, primarily, through consensual transfers. The dominant legal regime in the United States governing the collection and use of data is based on consumer consent, operationalized through neoliberal "notice and choice."[148] Companies post notices about their data policies in the form of privacy statements or end-user license agreements, and consumers choose to accept these policies as a condition of accessing the companies' products or services. The data-driven power of Big Tech that threatens our humanity was created through our legal consent.

The pathologies of consumer consent in this context have become glaringly obvious. Given that "'notice' can mean a vague but not false description of data practices buried deep within a long privacy policy and 'choice' can mean no more than the choice to use the service in the first place,"[149] there is no reason to believe that most digital consumers understand what kinds of data are being collected from them or the consequences that may follow. Tech firms empowered to "create the environment in which end users operate" and "structure the very conditions of choice" have every incentive to nurture addiction and maximize the extraction of information while minimizing user knowledge and concern.[150] The notion that consumers can elect to opt out, moreover, rings increasingly hollow in a world in which dealing with internet platforms is nearly unavoidable for working, shopping, socializing, researching, and more. Further undermining the conceit of free choice is the market power of the dominant tech firms, bolstered by network effects that raise the costs of switching if an alternative even exists.[151]

The resulting "asymmetries of knowledge, power, and control" render consent in the context of digital contracting and data privacy

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Oil, Fortune (July 12, 2016), https://fortune.com/2016/07/11/data-oil-brainstorm-tech/ (on file with the *Columbia Law Review*)). We do not mean to endorse the data-as-oil analogy in full. For forceful critiques, see Amy Kapczynski, The Law of Informational Capitalism, 129 Yale L.J. 1460, 1498–508 (2020) (book review); Lauren Henry Scholz, Big Data Is Not Big Oil: The Role of Analogy in the Law of New Technologies, 86 Tenn. L. Rev. 863, 874–84 (2019).

148. See supra note 80 and accompanying text.

149. Richards & Hartzog, supra note 9, at 1471.

150. Jack M. Balkin, The Fiduciary Model of Privacy, 134 Harv. L. Rev. Forum 11, 16 (2020), https://harvardlawreview.org/wp-content/uploads/2020/10/134-Harv.-L.-Rev.-F.-11.pdf [https://perma.cc/5E3P-B9VM] [hereinafter Balkin, Fiduciary Model]; see also Hartzog, supra note 91, at 5 (discussing these firms' "overwhelming incentives to design technologies in a way that maximizes the collection, use, and disclosure of personal information").

151. See Ignacio Cofone, The Privacy Fallacy: Harm and Power in the Information Economy 56 (2024) ("We periodically agree to more data practices than we otherwise would because the consequence of not doing so is social or economic exclusion."); Lina M. Khan & David E. Pozen, A Skeptical View of Information Fiduciaries, 133 Harv. L. Rev. 497, 538–39 (2019) (discussing the market power of large internet platforms and the degree to which they "control[] the terms of access to essential services").

inherently deficient or entirely fictitious.[152] Many now believe that the system of informational capitalism has been built on a degraded foundation of dubious consent. Indeed, it is a challenge to identify any recent legal or popular commentary that denies this.

B. *Sexual Relations*

Over the past generation or two, American legal regimes regulating sex have converged on a principle of sexual autonomy operationalized by consent. The basic determinant of whether sex is permissible has become, simply, whether it is consensual. Consensual sexual behaviors have been largely deregulated, from same-sex relationships and contraception to most pornography, sodomy, adultery, and fornication.[153] At the same time, sex discrimination doctrine and enforcement bureaucracies have grown to suppress consent-deficient sex in schools and workplaces.[154] Rape and sexual assault laws, which will be the focus of this discussion, have also been reoriented around the goal of criminalizing nonconsensual sex. From the prevailing legal liberal—or neoliberal[155]—perspective, the primary role of the law, in the bedroom as in the market, is to police and support consensual transactions.[156]

In many ways, this is a story of progress. For most of American legal history, the line between permissible and impermissible sex was determined not so much by consent as by marriage. Procreative sex between

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152. Balkin, Fiduciary Model, supra note 150, at 12; see also, e.g., Cofone, supra note 151, at 8 ("Consent is unattainable in the information economy . . . ."); Bietti, supra note 33, at 315 (arguing that all of "the conditions [that] constitute consent as a morally transformative device are absent" in the platform economy); Solove, Murky Consent, supra note 30, at 605 ("In most situations, privacy consent is scant, incomplete, unreliable, nonexistent, or impossible.").

153. The main exceptions involve children, who are incapable of giving valid consent. For adults who have cognitive or mental disabilities, as Professor Jasmine Harris details, courts and legislatures became increasingly unwilling over the past several decades to equate "the existence of [such a] disability . . . with a finding of legal incapacity to consent." Jasmine E. Harris, Sexual Consent and Disability, 93 N.Y.U. L. Rev. 480, 551–52 (2018). Although prostitution remains illegal in most jurisdictions, a reform movement for the decriminalization of "consensual" sex work is well underway. See Jonah E. Bromwich, Manhattan to Stop Prosecuting Prostitution, Part of Nationwide Shift, N.Y. Times (Apr. 21, 2021), https://www.nytimes.com/2021/04/21/nyregion/manhattan-to-stop-prosecuting-prostitution.html (on file with the *Columbia Law Review*) (last updated July 23, 2021).

154. See Jacob Gersen & Jeannie Suk, The Sex Bureaucracy, 104 Calif. L. Rev. 881, 891 (2016).

155. See Kristin Bumiller, In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence 15 (2008) ("[T]he feminist campaign against sexual violence evolved in the context of neoliberal state policy.").

156. On these parallel transformations, see Anne M. Coughlin, Sex and Guilt, 84 Va. L. Rev. 1, 11–20 (1998); Jed Rubenfeld, The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy, 122 Yale L.J. 1372, 1381–95 (2013) [hereinafter Rubenfeld, Myth of Sexual Autonomy]; Robin West, Sex, Law, and Consent, *in* The Ethics of Consent, supra note 4, at 221, 221–24 [hereinafter West, Sex].

married partners (which meant, by definition, heterosexual couples) was legally and morally approved. As the traditional marital rape exemption made clear, consent had nothing to do with it. All nonmarital sex was deemed illegal and, especially for women, immoral.[157] The traditional justification for rape law was to prevent the defilement of unmarried women, preserving their chastity for wedlock.[158] From virtually any liberal or feminist point of view, sex law's movement away from a focus on marriage toward a focus on consent marks an advance for individual autonomy as well as gender equality, a belated victory in the broader legal evolution from status to contract.[159]

But the legal primacy of consent in the domain of sex has brought problems of its own. Scholars, advocates, and policymakers disagree about whether the standard for expressing consent to sex should be subjective and attitudinal or objective and behavioral; and if the latter, under what circumstances silence can count.[160] They have also struggled to rationalize, or reform, the law of sexual consent's relative inattention to concerns about duplicity and deceit that are deemed critical in other contexts. "[I]n virtually every legal arena outside of rape law, a 'yes' obtained through deception is routinely (and correctly) rejected as an expression of true consent."[161] Yet a man (for instance) who gains consent to sex by deceiving a woman—pretending he is unmarried or wealthy or interested in a serious relationship—has committed no crime nor, in most jurisdictions, even a tort.[162] Some feminist scholars have condemned this aberrational disregard for women's autonomy, attributing it to patriarchal sympathy for men's "right to seduce."[163] Professor Jed Rubenfeld goes so far as to argue

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157. See Gersen & Suk, supra note 154, at 888; West, Consent, supra note 7, at 5–6.

158. See Rubenfeld, Myth of Sexual Autonomy, supra note 156, at 1388–92.

159. See West, Consent, supra note 7, at 1–4.

160. See Stephen J. Schulhofer, What Does 'Consent' Mean?, *in* Sexual Assault: Law Reform in a Comparative Perspective 53, 57–63 (Tatjana Hörnle ed., 2023) [hereinafter Sexual Assault].

161. Jed Rubenfeld, Rape-by-Deception—A Response, 123 Yale L.J. Online 389, 395 (2013), https://yalelawjournal.org/pdf/1225_btg7ir1z.pdf [https://perma.cc/2L7V-JP72]. But see Sommers, supra note 1, at 2242–44 (pointing out other areas of law in which deception does not always vitiate consent).

162. Sommers, supra note 1, at 2242. The special exceptions to this rule in criminal law are cases in which a doctor convinces a patient that sex is a medical procedure and cases of spousal impersonation. Rubenfeld, Myth of Sexual Autonomy, supra note 156, at 1397.

163. Susan Estrich, Real Rape 71 (1987); see also Robin West, A Comment on Consent, Sex, and Rape, 2 Legal Theory 233, 242 (1996) ("The state's refusal to criminalize nonviolent fraudulent or coerced sex evidences the state's refusal to grant women full possessory, sovereign rights over their bodies and their labor. It evidences its refusal to grant women the status of equal personhood."). Professor Rubenfeld explains rape law's inattention to fraud as a holdover from the old-fashioned legal paradigm of protecting unmarried women against defilement. Rubenfeld, Myth of Sexual Autonomy, supra note 156, at 1401–02. Other scholars point to the evidentiary and line-drawing difficulties that would arise in attempting to police misrepresentations and to the different, and perhaps

that legal tolerance of rape-by-deception should call into question the entirety of consent-based rape law and the broader principle of sexual autonomy upon which it is based.[164]

Whatever explains its inattention to fraud in this area, the American legal system has long fixated on force as a threat to sexual consent.[165] Until very recently, rape law required proof of physical force threatening bodily harm.[166] As the physical force requirement has been abandoned, and more capacious standards of (non)consent adopted, judges and regulators have had to determine what kinds of coercion, beyond the threat of violence, should be understood to invalidate sexual consent. How should this area of law deal with economic pressures, as when a woman agrees to sex in order to keep a job or enters into a sexual relationship with a man who promises to pay her bills or take care of her children? Or social pressures, as when having sex is a path to popularity or a prerequisite for being viewed as a good partner or not a prude? And what about the view of MacKinnon that sexual coercion is pervasive and inevitable in a male-dominated society that constrains women's choices, shapes their preferences, and subjugates them at every turn?[167] If all heterosexual sex is coerced through the economic, political, social, and ideological power of men over women, then perhaps all such sex should be considered rape.

Needless to say, this view has been far too radical for most liberals, who believe that sexual autonomy must include the autonomy of women genuinely to consent to sex, at least under some circumstances. But courts and scholars have had a notoriously difficult time drawing clear, consistent, or normatively convincing lines between unlawful sexual coercion and the choice to engage in sex that may be pressured in various ways but is still deemed consensual. Theorists have devised a variety of frameworks for distinguishing impermissibly coercive threats and inducements from permissibly persuasive offers and enticements, but they have not converged on any consensus.[168] The law is also ambiguous and

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lesser, harm that results when consensual sex is later discovered to have been based on false pretenses. See, e.g., Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law 152–59 (1998) [hereinafter Schulhofer, Unwanted Sex]; Wertheimer, Sexual Relations, supra note 34, at 199; see also Sommers, supra note 1, at 2245–48 (surveying views on this issue and then introducing a different explanation for the law's tolerance of sex-by-deception, based on a psychologically commonsense understanding of consent that permits certain kinds of deception).

164. Rubenfeld, Myth of Sexual Autonomy, supra note 156, at 1413–23.

165. See Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 Colum. L. Rev. 1780, 1784 nn.21–22 (1992) (documenting that the requirement of force or threat of force remained in state penal codes into the 1990s).

166. See Coughlin, supra note 156, at 14–18.

167. See supra note 58 and accompanying text.

168. See, e.g., Alan Wertheimer, Consent to Sexual Relations, *in* The Ethics of Consent, supra note 4, at 195, 217 (acknowledging that "the question as to when consent to sexual relations should be regarded as [morally transformative]" remains unresolved).

unsettled. Some sexual assault statutes enumerate specific factors that invalidate consent, without explaining why these factors count but not others.[169] Other statutes offer open-ended definitions of coercion without attempting any contextual specification.[170] The recently revised Model Penal Code does both, defining criminally extortionate sex in terms of specifically prohibited acts (for example, threats to report a person's immigration status) and as threats "to take any action . . . that would cause someone of ordinary resolution in that person's situation" to submit to sex.[171] Title IX has been interpreted to prohibit nonconsensual sex on campus, including sex between students, and it has motivated many universities to adopt expansive definitions of coercion—covering, in the words of one policy, "a wide range of behaviors, including intimidation, manipulation, threats, and blackmail."[172]

The difficulty of distinguishing sexual coercion from consent has become front-page news in recent years. First there were well-publicized controversies arising from the implementation of campus sex codes in contexts of often blurry consent.[173] Then came the more broadly influential #MeToo movement, calling out cases of sexual coercion by powerful men, not just by means of physical violence but also through nonviolent threats, intimidation, offers, and opportunities. As the movement expanded, women's stories brought to light a wide variety of problematic sexual encounters that may be legally consensual but are experienced by women as unfree and undesired. Such experiences are distressingly common. As West catalogs, there is "un-pleasurable and undesired sex offered in exchange for the maintenance of an emotionally satisfying relationship"; "[h]ook-ups between near-strangers on college or high school or middle school campuses that are not desired . . . and which are driven . . . by a desire for recognition by [a social] group, or by high

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169. See, e.g., N.C. Gen. Stat. § 14-27.22(a)(2) (2025) (defining sex as forcible rape when the other person "has a mental disability or is mentally incapacitated or physically helpless").

170. See, e.g., 18 Pa. Stat. and Cons. Stat. Ann. § 3101 (2025) (defining forcible compulsion as "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied").

171. Model Penal Code § 213.4(1)(b)(i), (iii) (A.L.I., Tentative Draft No. 6, 2022); see also Erin Murphy, Article 213 of the American Law Institute's Model Penal Code, *in* Sexual Assault, supra note 160, at 185, 185–95.

172. Williams Coll., Defining Sexual Misconduct (2021), https://titleix.williams.edu/files/2021/11/Defining-Sexual-Misconduct-November-2021.docx.pdf (on file with the *Columbia Law Review*). University policies are shaped by guidance from the Department of Education's Office for Civil Rights, which has, in some periods, encouraged substantive and procedural standards that have been criticized for favoring complainants and empowering administrators to make their own judgments about sexual morality. See Karen M. Tani, An Administrative Right to Be Free From Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective, 66 Duke L.J. 1847, 1884–86, 1884 nn.177–178 (2017) (collecting criticisms).

173. These controversies are the subject of Gersen & Suk, supra note 154.

status individuals within the group"; "[s]ex between workers at grossly divergent levels in a workplace hierarchy"; "[e]xchanges of sex for a placid home life, for a healthier because more pacific environment for oneself and one's children, or for the simple absence of a 'foul mood' from a partner or spouse"; and "sex given against the backdrop of a vague and unstated promise by a partner that although he could, he will *not* employ force."[174] These examples are illustrative of the countless circumstances in which women are driven to trade sex "for economic security, affection, status, physical protection, money, promises of various sorts, or other forms of in-kind compensation."[175] Even if sex under these circumstances is considered legally consensual, the fact remains that the sex in many cases is, as West puts it, "unwanted" and harmful.[176]

As the "influx of women's stories into public spaces" has made it "far more evident" that, "[a]gainst the backdrop of steep and pervasive social inequalities, a complete absence of coercion is uncommon,"[177] the consent-based legal framework for sexual assault has come to seem clearly inadequate.[178] There is no realistic prospect that the legal system would prohibit all of this coercive, quasi-coercive, and unwanted sex. Even MacKinnon did not literally want to criminalize all sex as rape.[179] Yet there is every reason to doubt that sexual consent, as the legal system defines it, tracks a meaningful or morally coherent conception of women's sexual autonomy.

C. *Collective Bargaining and the Law of Work*

The arc of labor and employment law in this country has traced the perceived value of consent in governing the relationship between workers and capital. Following Reconstruction, lawmakers and courts broadly exalted the contractual consent of individual workers to employment relationships as a vindication of the principles of free labor and freedom

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174. West, Consent, supra note 7, at 21–25.

175. Id. at 23.

176. West, Sex, supra note 156, at 235–40; cf. Victor Tadros, Consent to Sex in an Unjust World, 131 Ethics 293, 295–302 (2021) (developing a moral theory of how consent to sex can be valid but unjust).

177. Deborah Tuerkheimer, Sexual Violation Without Law, 76 N.Y.U. Ann. Surv. Am. L. 609, 613 (2021).

178. Outside of law, the prevailing "consent culture" in the domain of sex has also been criticized by feminist scholars on political and epistemological grounds. See, e.g., Katherine Angel, Tomorrow Sex Will Be Good Again: Women and Desire in the Age of Consent (2021).

179. See Catharine A. MacKinnon, Pornography Left and Right, 30 Harv. C.R.-C.L. L. Rev. 143, 144 (1995) (book review) ("To say that I—and others who analyze sexual abuse as part of gender inequality—say all sex is rape is a political libel, a false statement of fact that destroys repute . . . .").

of contract.[180] Regulation of the employer–employee relationship was frowned upon, inasmuch as "the freedom to enter or exit employment seemed sufficient to constrain employer domination and exploitation at work. Conceptually, that freedom put the stamp of consent on whatever happened inside the workplace."[181]

By the turn of twentieth century, however, the transformation of the economy through the industrial revolution was making a mockery of this egalitarian vision of workers and employers bargaining on equal terms. As small proprietors and opportunities for self-employment were replaced by a factory system in which workers were commodified inputs, "free labor" began to look more like "wage slavery."[182] The government's main solution to this problem was to level up the power of workers by replacing individual contracting with collective bargaining. Seeking to "restor[e] equality of bargaining power between employers and employees," Congress in 1935 enacted the National Labor Relations Act (NLRA).[183] The NLRA's principal sponsor, Senator Robert Wagner, explained that leaving "a single workman, with only his job between his family and ruin, . . . to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call" would subject that workman to "economic duress" and "slavery by contract."[184] Only "by securing for employees the full right to act collectively through representatives of their own choosing" could employees and employers come to "possess equality of bargaining power."[185]

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180. This ideal of free labor has a long pedigree. From Adam Smith to Thomas Paine to present-day proponents of free markets, classical liberals and libertarians have maintained that freedom of contract between workers and employers will result in mutually beneficial labor arrangements. Contrasted with the oppressive, status-based systems of feudalism and chattel slavery, it is not hard to see how a regime of consensual labor relationships, in which workers are free to enter and exit employment relationships at will, could be seen as a progressive and egalitarian innovation. See Elizabeth Anderson, Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It) 1–33 (2017) [hereinafter Anderson, Private Government].

181. Cynthia Estlund, Rethinking Autocracy at Work, 131 Harv. L. Rev. 795, 799 (2018) (book review).

182. Anderson, Private Government, supra note 180, at 35 (emphasis omitted).

183. Act of July 5, 1935, ch. 372, § 1, 49 Stat. 449, 449 (codified as amended at 29 U.S.C. §§ 151–169 (2018)).

184. 78 Cong. Rec. 3679 (1934) (statement of Sen. Wagner).

185. Id. (statement of Sen. Wagner). In upholding the NLRA against a constitutional challenge two years later, the Supreme Court acknowledged that a "union was essential to give laborers opportunity to deal on an equality with their employer," given that "a single employee was helpless in dealing with an employer." Nat'l Lab. Rels. Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (citing Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921)). But cf. Samuel Bagenstos, Econ. Pol'y Inst., *Lochner* Lives On 9 (2020), https://files.epi.org/pdf/215889.pdf [https://perma.cc/5EH4-9AFV] (arguing that in labor and employment law, unlike constitutional law, "*Lochner* never really left").

The hope of collective bargaining was to "engender that most precious commodity of the workaday world: informed and willing consent" on the part of workers.[186] That hope was significantly realized for several decades, as unions traded industrial peace for higher wages and benefits, and workers (or at least white, male workers) shared in the benefits of productivity gains.[187] Unions during this time were also successful in leveraging their organizational power into political power, becoming a potent force in electoral democracy and advocating for policies that benefited the working class.[188] It is not a coincidence that the postwar decades of peak union density were also one of the most economically egalitarian periods in American history.[189]

It is also no coincidence that the subsequent collapse of unions has coincided with the dawn of a "new Gilded Age" of staggering economic inequality. Union decline started in the 1970s, as global and domestic competition intensified, manufacturing sectors of the economy shrank, corporations "fissured" by outsourcing work and replacing full-time employees with independent contractors, and human workers were replaced by automated technology.[190] The rise and entrenchment of neoliberalism was both a cause of union decline and a consequence, as the diminishing economic and political power of labor reduced resistance to increasing deregulation, globalization, and inequality.[191] With union density down from a peak of one-third of American workers to the current level of less than 10% (and less than 7% of private sector workers), economic inequality is as high as it has been since the last time unionization rates were this low, during the original Gilded Age.[192]

The vast majority of American workers now find themselves in the position of their nineteenth-century counterparts, relegated to a regime of individual contracting based on the foundational premise of employment at will.[193] Employees are free to quit, and employers are free to fire them.

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186. Nelson Lichtenstein, State of the Union: A Century of American Labor 35 (rev. & expanded ed. 2013).

187. See Kate Andrias, The New Labor Law, 126 Yale L.J. 2, 19–20 (2016).

188. See Benjamin I. Sachs, The Unbundled Union: Politics Without Collective Bargaining, 123 Yale L.J. 148, 168–71 (2013) [hereinafter Sachs, Unbundled Union].

189. See Henry S. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, Unions and Inequality Over the Twentieth Century: New Evidence From Survey Data, 136 Q.J. Econ. 1325, 1326–27 (2021) ("Over the past 100 years, measures of inequality have moved inversely with union density[,] . . . and many scholars have posited a causal relationship between the two trends.").

190. Andrias, supra note 187, at 21–22; Sachs, Unbundled Union, supra note 188, at 178.

191. Cf. Harvey, Brief History, supra note 72, at 76 (describing "labour control and maintenance of a high rate of labour exploitation" as "central to neoliberalization all along").

192. Andrias, supra note 187, at 5.

193. See Garth Coulson, At-Will Employment, Betterteam (Jan. 7, 2025), https://www.betterteam.com/at-will-employment [https://perma.cc/66N3-Q9HD] ("About 74% of U.S. workers are considered at-will employees.").

That superficial symmetry, however, masks inequalities of bargaining power that are in some ways more severe in contemporary labor markets than they were in the nineteenth century.[194] The same forces that have led to the decline of unions have simultaneously eroded the labor market power of employees. As Professor Cynthia Estlund describes, "Some of the most important labor market trends in recent decades effectively expand firms' ability . . . to replace their own employees either with machines (through automation) or with other workers (through fissuring)."[195] At the same time, labor markets in many industries have become highly concentrated and cartelized, allowing employers to leverage market power to suppress wages and worsen working conditions.[196] The result for many American workers, especially those without higher education or advanced skills, has been "lower wages and benefits, less opportunity for advancement, less life-friendly schedules, less job security and physical safety, less privacy and freedom from intrusion both on and off the job, and greater vulnerability to abuse."[197]

Workers have not been left entirely without protection. Starting in the New Deal with the Fair Labor Standards Act of 1938, employment law has developed alongside labor law, mandating terms and conditions of employment and protecting the rights of all employees, unionized or not.[198] This body of law now sets minimum wages, regulates workplace safety, provides for family and medical leave, prohibits various kinds of employment discrimination, and establishes minimum standards for retirement and health plans.[199] Employment law serves to protect workers

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194. See Lawrence Mishel, The Goliath in the Room: How the False Assumption of Equal Worker–Employer Power Undercuts Workplace Protections, 3 J.L. & Pol. Econ. 4, 9 (2022); cf. Marietta Auer, Bargaining With Giants and Immortals: Bargaining Power as the Core of Theorizing Inequality, 86 Law & Contemp. Probs., no. 4, 2024, at 53, 56 (arguing that "bargaining power" is "the analytic key to explaining how markets and capitalism cause and maintain inequality").

195. Cynthia Estlund, Losing Leverage: Employee Replaceability and Labor Market Power, 90 U. Chi. L. Rev. 437, 441 (2023) [hereinafter Estlund, Losing Leverage]; see also Cynthia Estlund, What Should We Do After Work? Automation and Employment Law, 128 Yale L.J. 254, 262 (2018) (discussing the interaction of "the still-contested challenge of automation" with "the more certain challenges of fissuring, inequality, and deteriorating labor standards").

196. See Eric A. Posner, How Antitrust Failed Workers 24–29 (2021) [hereinafter Posner, How Antitrust Failed]; Suresh Naidu, Eric A. Posner & Glen Weyl, Antitrust Remedies for Labor Market Power, 132 Harv. L. Rev. 536, 537–95 (2018).

197. Estlund, Losing Leverage, supra note 195, at 437–38 (citing Jenn Hagedorn, Claudia Alexandra Paras, Howard Greenwich & Amy Hagopian, The Role of Labor Unions in Creating Working Conditions that Promote Public Health, 106 Am. J. Pub. Health 989, 989, 992–94 (2016); Martin H. Malin, Alt Labor? Why We Still Need Traditional Labor, 95 Chi.-Kent L. Rev. 157, 164 (2020)).

198. 29 U.S.C. §§ 201–219 (2018).

199. See Cynthia Estlund, Regoverning the Workplace: From Self-Regulation to Co-Regulation 52–74 (2010).

against some of the most severe downsides of contracting under conditions of unequal bargaining power.

The conventional wisdom among labor scholars, however, is that what employment law can offer is not enough. Employment law was originally conceived as a secondary complement to labor law, setting a floor for collective bargaining and extending at least some protection to nonunionized workers.[200] On their own, "[u]niform minimum standards invariably demand too little of some firms that can do better and provide too little for workers who want more."[201] And even these low standards often are not met. Unions have always been the primary political and workplace proponents of employment law. As unions have weakened, so has the regulatory stringency of the law, which has been increasingly underenforced and evaded by employers—resulting in gaping holes created, for instance, by mandatory arbitration and independent contractor agreements notorious for conscripting consent.[202]

Even if these holes could be filled, employment law cannot give workers the power to decide to any meaningful extent how they want to structure their working lives. In the view of legions of scholars and advocates, not to mention millions of workers, that power can come only from the kind of collective bargaining—and collective consent—that the collapse of unions has now made impossible.

D. *Criminal Punishment*

The gears of the American criminal law machine are greased by consent. Police routinely rely on consent to conduct searches without warrants, probable cause, or reasonable suspicion.[203] They obtain incriminating evidence and confessions through custodial investigations after suspects consensually waive their *Miranda* right to remain silent.[204] And, especially crucial to the workings of the system, prosecutors in most criminal cases bargain with defendants to elicit consent to guilty pleas.[205] If police and prosecutors could not rely on the shortcut of consent to search, arrest, interrogate, and convict defendants, it would be impossible

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200. Id. at 54–60. Estlund presents the possibility that the growth of employment law may have "hastened the decline of collective bargaining by dampening employee desires for unionization." Id. at 59–60.

201. Id. at 20.

202. See Andrias, supra note 187, at 39–40.

203. See Christopher Slobogin & Kate Weisburd, Illegitimate Choices: A Minimalist(?) Approach to Consent and Waiver in Criminal Cases, 101 Wash. U. L. Rev. 1913, 1917–24 (2024) (providing an overview of consent-based doctrines in the criminal process).

204. Id. at 1920–21.

205. See Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

under our Bill of Rights to maintain the scale of incarceration that currently exists.

Beyond its contribution to the efficiency of the criminal law system, consent also plays a crucial role in legitimating that system. By consenting to confessions and pleas, criminal suspects and defendants are said to validate the veracity of their guilt and the justice of their punishments.[206] That validation is especially meaningful in light of the broader ideology of market liberalism that pervades American constitutional culture and political economy. A society that places paramount value on personal liberty, free choice, and free markets will be more inclined to find fairness in a criminal system that relies on quasi-contractual consent.[207]

Yet the paradoxical result of applying those (neo)liberal values to the system of criminal law has been to facilitate the growth of "an unusually expansive and intrusive exercise of state power in its most coercive form."[208] As critical condemnation of the cruelty, racism, and inefficacy of mass incarceration has become the norm among scholars and advocates,[209] the legitimating force of consent in the criminal system has correspondingly been called into question. While courts routinely validate consent to criminal searches, interrogations, and guilty pleas as "knowing" and "voluntary," critics contend that the massive imbalance of power and resources between the carceral state and its subjects often vitiates any possibility of free or autonomous choice.

Take so-called consent searches, which have been subject to particularly withering criticism in recent years.[210] Many people who consent to police stops and searches have no idea that they are free to leave or withhold consent, and the Supreme Court has repeatedly held that the police are under no obligation to inform them.[211] Even when people know

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206. See Louis Michael Seidman, *Brown* and *Miranda*, 80 Calif. L. Rev. 673, 719–21 (1992); see also Zohra Ahmed, The Right to Counsel in a Neoliberal Age, LPE Project: Blog (Oct. 20, 2022), https://lpeproject.org/blog/the-right-to-counsel-in-a-neoliberal-age/ [https://perma.cc/Z4RN-CF98] ("The Court offers defendants the false panacea of greater choice with the effect of pacifying their grievances against the carceral state.").

207. See Brown, Free Market Criminal Justice, supra note 87, at 3 (arguing that free-market ideals "lie at the heart of how American courts, lawyers, and legislatures define fairness, due process, and the rule of law" in the criminal system and beyond).

208. Id. at 4.

209. See, e.g., Marc Mauer, Long-Term Sentences: Time to Reconsider the Scale of Punishment, 87 UMKC L. Rev. 113, 113 (2018) ("In recent years, there has been a growing bipartisan consensus that the uniquely American policy of mass incarceration is both fiscally and morally unsustainable.").

210. See supra note 107 and accompanying text; see also Kate Weisburd, Criminal Procedure Without Consent, 113 Calif. L. Rev. 697, 703–10 (2025) (reviewing these criticisms and reforms adopted in certain jurisdictions, including requirements that police inform people they are free to refuse, heightened evidentiary requirements to prove voluntariness, and partial or complete bans on consent searches).

211. See Devon W. Carbado, Unreasonable: Black Lives, Police Power, and the Fourth Amendment 50–56, 88–90 (2022). There are good reasons to doubt whether adding the

they have a choice, the authority of police officers and their implicit threat of violence render their requests "inherently coercive."[212] Members of racial minority groups, who are disproportionately stopped and searched, have especially good reason to fear the consequences of noncooperation and to view "consenting [as] a survival tactic, not a choice."[213] For all these reasons, people often say yes to the police when they would prefer to say no.[214]

Similar problems of information, cognition, and coercion cast doubt on the value of consent throughout the criminal system. Plea bargaining is the example with the highest stakes. As anyone familiar with the American criminal system knows, the vast majority of convictions are obtained not through guilty verdicts following trials but through plea bargains in lieu of trials.[215] While the practice of plea bargaining dates back to the early years of the republic, it was not until the twentieth century that it became the predominant method of resolving criminal cases, and not until the 1970s that the Supreme Court finally declared that plea bargaining was constitutional[216]—indeed "highly desirable," "an essential component of the administration of justice," and "to be encouraged."[217] Since the 1980s, the prevalence of pleas has taken a pronounced upward turn, rising in recent years to over 95% of adjudicated cases.[218]

The primary reason for the rise and acceptance of plea bargaining is clear. The criminal system lacks the resources to provide full trials to more

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equivalent of a *Miranda* requirement for searches would significantly bolster the ability to withhold consent. *Miranda* itself does not seem to have had a large impact on empowering suspects to invoke their rights or to avoid involuntary confessions. See Roseanna Sommers & Vanessa K. Bohns, The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance, 128 Yale L.J. 1962, 2014–15 (2019).

212. Marcy Strauss, Reconstructing Consent, 92 J. Crim. L. & Criminology 211, 242 (2001); see also Richard M. Re, Fourth Amendment Fairness, 116 Mich. L. Rev. 1409, 1447 (2018) (recognizing that "consent may be impossible in many contexts involving police-suspect interactions"); Strauss, supra, at 242 ("[T]here is strong support for the conclusion that people will view requests from the police as commands.").

213. Kaylah Alexander, Josephine Ross, Patrice Sulton & Leah Wilson, DC Just. Lab & STAAND, Eliminate Consent Searches 2 (2020), https://dcjusticelab.org/wp-content/uploads/2022/04/EliminateConsentSearches.pdf [https://perma.cc/CL57-763P].

214. The same is true of consent searches in the family law system. See Anna Arons, Family Regulation's Consent Problem, 125 Colum. L. Rev. 769, 776, 795 (2025) (explaining that "consent powers the family regulation home search apparatus" and detailing ways in which such searches are "inevitably coercive").

215. See supra note 205 and accompanying text.

216. See Carissa Byrne Hessick, Punishment Without Trial: Why Plea Bargaining Is a Bad Deal 18–23 (2021).

217. Santobello v. New York, 404 U.S. 257, 260–61 (1971); see also Rachel Elise Barkow, Prisoners of Politics: Breaking the Cycle of Mass Incarceration 129–30 (2019) (explaining that *Santobello* gave plea bargaining "the official stamp of approval").

218. Hessick, supra note 216, at 20.

than a small fraction of the millions of defendants it processes each year.[219] In the era of mass incarceration, from the 1980s through the present, federal and state governments have invested heavily in police, prosecutors, and prisons, but not in courts and public defenders.[220] The result has been an enormous increase in the number of defendants coming into the system without a corresponding increase in the capacity to try them. The post-1970 boom in the prison population testifies to the efficiency of plea bargaining in converting charges to sentences. By making punishment "cheap, simple, and predictable," plea bargaining has made mass incarceration possible.[221]

Consistent with the model of market contracting, plea bargains are cast as consensual transactions between criminal defendants and the state. When the Supreme Court gave plea bargaining its stamp of approval in the early 1970s, it did so with the caveat that guilty pleas must be "voluntary," "knowing," and "intelligent."[222] But courts seldom invalidate plea deals for falling short of these requirements. Courts rubber-stamp deals made by defendants who have not been informed of the evidence against them, the strength of their defense, or the consequences of a conviction.[223] And courts have steadfastly refused to find coercion when prosecutors threaten severe trial penalties, or offer tremendously enticing plea discounts, for defendants who initially refuse to cut a deal.[224] So long as the prosecutor is threatening a legislatively authorized sentence, there

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219. The need for plea bargaining could be reduced if the costs of trials were reduced by truncating procedures. See John Rappaport, Unbundling Criminal Trial Rights, 82 U. Chi. L. Rev. 181, 198–99 (2015); Stephen J. Schulhofer, Is Plea Bargaining Inevitable?, 97 Harv. L. Rev. 1037, 1106–07 (1984). One predictable cost of removing procedural protections, however, would be an increase in the error rate, raising the proportion of innocent defendants who are convicted of crimes (and perhaps also of guilty defendants who are acquitted). See Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1950 (1992).

220. See Hessick, supra note 216, at 20–24.

221. Id. at 33–34; see also Rachel Elise Barkow, Justice Abandoned: How the Supreme Court Ignored the Constitution and Enabled Mass Incarceration 49 (2025) ("You cannot get mass incarceration without mass case processing, and you cannot get mass case processing without destroying the constitutional right to a jury."); Albert W. Alschuler, Plea Bargaining and Mass Incarceration, 76 N.Y.U. Ann. Surv. Am. L. 205, 205 (2021) (arguing that "plea bargaining was a major cause of the United States' mass incarceration"); Andrew Manuel Crespo, No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action, 90 Fordham L. Rev. 1999, 2004 (2022) [hereinafter Crespo, No Pleas] ("Plea bargaining lies at the root of American mass incarceration.").

222. Brady v. United States, 397 U.S. 742, 748 (1970); accord *Santobello*, 404 U.S. at 261–62 ("The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known.").

223. See Ram Subramanian, Léon Digard, Melvin Washington II & Stephanie Sorage, Vera Inst. of Just., In the Shadows: A Review of the Research on Plea Bargaining 8 (2020), https://vera-institute.files.svdcdn.com/production/downloads/publications/in-the-shadows-plea-bargaining.pdf [https://perma.cc/MC3R-F9Y3].

224. See Hessick, supra note 216, at 39–48.

is no problem—even if that sentence is death, and even if it is obvious that the aim is to maximize the prosecutor's bargaining leverage.[225] Emphasizing "the mutuality of advantage" between prosecution and defense, the Court has explained that plea bargains do not penalize people for exercising their right to a jury trial but instead invite a "give-and-take negotiation" between parties who "arguably possess relatively equal bargaining power."[226]

The many critics of plea bargaining reject this premise. In their view, the vastly unequal relationship between the state and criminal defendants makes plea deals inherently coercive.[227] Armed with an ever-expanding arsenal of overlapping and stackable criminal charges, draconian sentences, and collateral consequences of conviction, prosecutors can threaten such severe trial penalties that even innocent defendants feel they have no choice but to negotiate a plea.[228] Moreover, plea deals are typically entered into by defendants who are poorly informed, poorly educated, and represented by poorly resourced public defenders. Innocent defendants, in particular, have a hard time anticipating the evidence that prosecutors would present against them at trial.[229] And all criminal defendants are subject to an array of cognitive biases in this context that distort rational decisionmaking and create further opportunities for prosecutorial manipulation.[230] Under these conditions, critics argue, the ideal of informed and voluntary consent is illusory.

The U.S. criminal system's embrace of plea bargaining has been explained as a reflection of "the market rationalities that lead [Americans] to view plea agreements as closely analogous to private contracts, negotiated by autonomous, self-interested parties in a free market-place."[231] The same may be true of consent-based criminal law more broadly. Yet here again, the premises of autonomy and rational self-

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225. See Andrew Chongseh Kim, Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study, 84 Miss. L.J. 1195, 1209–11 (2015).

226. Bordenkircher v. Hayes, 434 U.S. 357, 362–63 (1978) (internal quotation marks omitted) (first quoting *Brady*, 397 U.S. at 752; then quoting Parker v. North Carolina, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting)).

227. See, e.g., Andrew Manuel Crespo, The Hidden Law of Plea Bargaining, 118 Colum. L. Rev. 1303, 1311 (2018) ("[M]ost knowledgeable observers describe [plea bargaining] as . . . a fundamentally coercive practice (occasionally analogized to torture) that produces involuntary pleas, sometimes to crimes the defendant did not commit.").

228. Cf. Brian Sanders, Comment, Exculpatory Evidence Pre-Plea Without Extending *Brady*, 86 U. Chi. L. Rev. 2243, 2247 (2019) (arguing that Supreme Court case law "strongly supports the conclusion that due process does not require pre-plea disclosure" of exculpatory or impeachment evidence).

229. See Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2494 (2004).

230. See id. at 2496–527.

231. Brown, Free Market Criminal Justice, supra note 87, at 16.

interest—and the conditions of meaningful consent—have been increasingly undermined by the power imbalances and perceived incapacities that have accompanied market liberalism's imaginative hold.

E. *Intellectual Property*

The focus thus far has been on challenges to making consent morally efficacious. But recent social and economic changes have also created new challenges for the feasibility of consent, even while increasing demands for obtaining it. The proliferation of IP rights, and the rising transaction costs of exchange, provides an initial example.

As the economy has transformed from industrial to informational, IP rights have followed tangible property rights as a foundational legal form. "Patents, copyrights, and trademarks are the deeds to the property of the informational age."[232] The growth of IP in recent decades has been driven not just by the material demands of this new age but also by neoliberal "ideological pressures" pushing toward "propertization" of knowledge and market frameworks for incentivizing its production and exchange.[233] Political economy has also played a major role. "Where companies can claim monopoly rights to information, they can become extraordinarily profitable," which is why "IP-based industries [have] lobbied hard over the past few decades for expanded IP rights, and often obtained them."[234] At a global level, as the United States evolved in the late-twentieth century from a net consumer of IP to a net producer, it became "the world's most vigorous and effective champion" of strong IP rights,[235] including through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[236] IP rights are now at "the core of the neoliberal restructuring of the regulatory architecture of global capitalism."[237]

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232. Amy Kapczynski, Why "Intellectual Property" Law?, LPE Project: Blog (Nov. 6, 2017), https://lpeproject.org/blog/why-intellectual-property-law/ [https://perma.cc/2YTX-8VSA] [hereinafter Kapczynski, Why "IP" Law]; see also Cohen, Between Truth and Power, supra note 144, at 16–19 (describing how "the movement to an informational political economy has both relied on and reshaped the legal rules governing propertization of intangible intellectual goods").

233. William W. Fisher III, The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States, *in* 1 Intellectual Property Rights: Critical Concepts in Law 72, 79–81, 84 (David Vaver ed., 2006) (internal quotation marks omitted); see also Jessica Litman, Digital Copyright 80 (2001) (describing recent copyright legislation as "a one-way ratchet" toward "more and stronger and longer copyright protection," owing in part to the fact that "we're trapped in a construct" of an economic model "in which there's no good reason why copyrights shouldn't cover everything and last forever").

234. Kapczynski, Why "IP" Law, supra note 232.

235. Fisher, supra note 233, at 78.

236. Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299.

237. David Tyfield, Science, Innovation and Neoliberalism, *in* The Handbook of Neoliberalism 340, 344 (Simon Springer, Kean Birch & Julie MacLeavy eds., 2016); see also

Yet even from the perspective of the economic interests and corporate actors who were meant to benefit, the proliferation of IP rights may have gone too far.[238] Our market-based system of IP relies on contractual sales and licenses from the owners of patents and copyrights to the most productive users. The density and fragmentation of these rights, however, have made consensual exchange prohibitively costly in a number of important settings.

In the patent context, this basic problem is commonly described using the metaphor of a thicket. As IP has become an "unrelenting organic force," the now-standard story goes, "business people more often than not encounter a tangled, twisted mass of [patent rights], which criss-cross the established walkways of commerce."[239] The problem of patent thickets is a particular threat to the information economy,[240] both because the information technology sector is disproportionately dense with patents and because innovation tends to be cumulative, requiring developers of new products to make use of hundreds or thousands of patents.[241] Navigating through this thicket requires costly contracting with multiple, independent right holders, if they can even be identified. Because those costs are often prohibitive, many companies choose instead to simply ignore patents and expose themselves to liability for infringement. To reduce this risk, as well as to bolster negotiating leverage, companies are also driven to increase patenting around their path of innovation, engaging in patent mining, patent portfolio races, and defensive patenting—exacerbating the thicket problem. The end result, in the view of many economists and legal scholars, is that the patent system has been "broken," with the costs of contracting and litigating around patents now outweighing the benefits of patent rights in spurring innovation.[242]

Yochai Benkler, Law, Innovation, and Collaboration in Networked Economy and Society, 13 Ann. Rev. L. & Soc. Sci. 231, 244 (2017) ("[M]uch of present patent and copyright law, particularly as informed by the international trade and IP regime, was designed at the height of the atomistic, market-based intellectual moment.").

238. For an early recognition of this possibility from the perspective of the leading legal economist of his day, see Richard A. Posner, Do We Have Too Many Intellectual Property Rights?, 9 Marq. Intell. Prop. L. Rev. 173 (2005).

239. Robert P. Merges, Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations, 84 Calif. L. Rev. 1293, 1294–95 (1996).

240. The problem is intensifying elsewhere as well. See, e.g., Michael Heller, The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives 48, 53 (2008) (describing a similar "gridlock" or "anticommons" problem in biotech, resulting from the "sheer multiplicity of [IP] rights that must be acquired to undertake innovation of any sort, including drug development").

241. See Dan L. Burk & Mark A. Lemley, The Patent Crisis and How the Courts Can Solve It 26–32 (2009). To make matters worse, "it is far from simple to decide *which* five hundred or five thousand patents might cover your new technology" because patent claims "are notoriously poor at telling the world exactly what a patent in the IT field actually covers." Id. at 27.

242. Id. at 30.

Similar problems have arisen with copyright. Platforms such as YouTube, Meta, and TikTok have made it cheap and easy for ordinary people to generate and disseminate content. With "more content, diffuse and varied individual creators, and new distribution platforms for the amateur creator," we are living in what some see as a democratized "golden age of creativity."[243] Yet a great deal of this creativity is illegal. A world in which "every man, woman, corporation and child has the technological ability to copy and distribute" is also a world in which everyone has the ability "to potentially infringe copyright in ways both harmful and harmless."[244] A large share of the user-created content on digital platforms "incorporate[s] bits and pieces of others' copyrighted content," much of it owned by large copyright holders such as Disney, Warner Music Group, and Sony.[245] The sheer volume of copyright violations makes it hard to imagine how all of these uses could be individually licensed. And indeed, contemporary battles over copyright take for granted the absence of consensual transfers and legal uses, leaving scholars and policymakers to weigh the costs of permitting rampant piracy that "threatens the very livelihood of the artist and creative industries" against the costs of aggressively enforcing copyright and stifling "those who would borrow from others to create."[246]

The high cost of consensual exchange of IP has created pressure to permit more nonconsensual uses. One way of doing so in copyright law is by expanding the domain of "fair use." Fair use doctrine, which allows certain kinds of copying without permission, has long been understood as a solution to the problem of high transaction costs,[247] and the doctrine has been stretched in settings in which large-scale dissemination and use of copyrighted works through the internet would be broadly beneficial but contractual consent is too costly to obtain. In *Authors Guild v. Google, Inc.*, for example, the Second Circuit decided that Google's unlicensed digitization of millions of copyrighted books and creation of a search tool that allows "snippet" views qualifies as fair use, giving effect to the novel view that a use can be "transformative" just because it expands the utility of the original.[248] Fair use might also be

243. Xiyin Tang, Privatizing Copyright, 121 Mich. L. Rev. 753, 807–08 (2023).

244. Tim Wu, Tolerated Use, 31 Colum. J.L. & Arts 617, 618 (2008).

245. Tang, supra note 243, at 755–56.

246. Timothy Wu, Copyright's Communications Policy, 103 Mich. L. Rev. 278, 279 (2004).

247. See Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and Its Predecessors, 82 Colum. L. Rev. 1600, 1620 (1982).

248. 804 F.3d 202, 207 (2d Cir. 2015); see also Jacob Victor, Utility-Expanding Fair Use, 105 Minn. L. Rev. 1887, 1901 (2021) (noting "the increased frequency of utility-expanding fair use findings").

interpreted or extended to cover much of the user-generated content online.[249]

Another method of bypassing the consent of copyright holders is to impose compulsory licensing regimes, allowing users access to copyrighted works in exchange for payment at a preset price.[250] Historically, U.S. copyright law has made limited use of compulsory licensing in the recorded music and cable broadcasting industries, where there is demand for "efficient en masse licensing of content and subsequent scalability of service" but "individual negotiation with numerous, disparate rights holders would be both time and cost prohibitive."[251] A number of scholars believe this is an idea whose time has come again, as digital technologies create new demands to bypass costly licensing negotiations for facilitating access to copyrighted works at scale.[252]

In this vein, Congress recently amended the Copyright Act to allow music streaming services such as Spotify to obtain blanket licenses for music composition rights by paying a royalty rate set by a regulatory agency, without having to deal with the copyright holders.[253] Compulsory licensing has also been proposed as a solution to the emerging "copyright crisis" generated by artificial intelligence (AI) technologies, which draw upon massive amounts of copyrighted videos, photos, and text as training data while learning to produce content that threatens to make the human authors of those creative works obsolete.[254] Thousands of authors have

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249. See Fair Use Principles for User Generated Video Content, Elec. Frontier Found., https://www.eff.org/pages/fair-use-principles-user-generated-video-content [https://perma.cc/K2R4-HL9C] (last visited Sep. 10, 2025).

250. Compulsory licensing is also a feature of the TRIPS agreement. See Compulsory Licensing of Pharmaceuticals and TRIPS, World Trade Org., https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm [https://perma.cc/H3HE-MUEA] (last visited Sep. 10, 2025). In that context, nonconsensual transfers are a response to the prohibitively high price of many patent-protected drugs for the people of poor countries. See Jerome H. Reichman, Compulsory Licensing of Patented Pharmaceutical Inventions: Evaluating the Options, 37 J.L. Med. & Ethics 247, 252–56 (2009); Eduardo Urias & Shyama V. Ramani, Access to Medicines After TRIPS: Is Compulsory Licensing an Effective Mechanism to Lower Drug Prices? A Review of the Existing Evidence, 3 J. Int'l Bus. Pol'y 367, 372–75 (2020).

251. Kristelia A. García, Penalty Default Licenses: A Case for Uncertainty, 89 N.Y.U. L. Rev. 1117, 1127 (2014).

252. See Jacob Victor, Reconceptualizing Compulsory Copyright Licenses, 72 Stan. L. Rev. 915, 991–93 (2020) (suggesting that compulsory licensing "could serve as a model for addressing innovative technologies that enhance access to existing copyrighted works, especially as these new forms of dissemination come into tension with the entrenched interests of copyright owners").

253. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 102(a)(1)(B), 132 Stat. 3676, 3680 (2018) (codified at 17 U.S.C. § 115(c)(1)(F) (2018)).

254. See Frank Pasquale & Haochen Sun, Consent and Compensation: Resolving Generative AI's Copyright Crisis, 110 Va. L. Rev. Online 207, 240–41 (2024), https://virginialawreview.org/wp-content/uploads/2024/08/PasqualeSun_Book.pdf [https://perma.cc/6GMT-SZYG] (proposing a version of compulsory licensing for AI providers with an "opt-out mechanism" for "dissatisfied copyright owners").

signed a letter to leading AI executives, calling "attention to the inherent injustice in exploiting our works as part of your AI systems without our consent, credit, or compensation."[255] A compulsory licensing regime, imposing a levy on AI companies and distributing the funds to copyright owners, would at least address the compensation issue.[256]

The consent issue, however, remains a problem. In the digital economy, neoliberal imperatives for the promulgation and enforcement of extensive IP rights have overrun the capacity for individualized consensual exchange of the sort that neoliberalism itself demands. It has become increasingly apparent that one or the other will have to give.[257]

F. *Structural Constitutional Law*

The high costs of attaining systemically necessary consent—and the resulting pressure to accept lower-quality forms of consent as legally sufficient—have become a conspicuous problem for U.S. public law as well. The primary source of the problem on the public law side is polarization, which has made political agreement across party lines more difficult to achieve. As this section will go on to describe, the challenges of partisanship for constitutional consent go beyond the difficulty of achieving agreement. In a constitutional system that was not built for political parties, hyperpartisanship has upended structural premises of

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255. Open Letter to Generative AI Leaders, Authors Guild, https://actionnetwork.org/petitions/authors-guild-open-letter-to-generative-ai-leaders [https://perma.cc/NP7J-93WP] (last visited Sep. 10, 2025).

256. See Pasquale & Sun, supra note 254, at 230–42.

257. Those who hope to restore market contracting for IP rights have looked for ways of lowering transaction costs. For instance, collective rights organizations (CROs) offer a market-based solution to the problem of high-volume IP exchange by aggregating and licensing rights as a package. See Merges, supra note 239, at 1328 ("[CROs] might be called organizations for 'bulk contracting, by committee.'"). This is the approach of the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), which manage the vast majority of musical performance copyrights, selling blanket licenses to radio and television broadcasters and distributing the receipts to their members. Patent pools operate on a similar model, enabling firms to license their pooled patents to one another and to outsiders for a set price. See id. at 1340. But collective IP contracting comes with risks of its own to private ordering. In particular, CROs can be a vehicle for collusion and the anticompetitive exercise of market power. See id. at 1354–58. Antitrust scrutiny nearly shut down patent pools from the 1940s through the late 1990s. ASCAP and BMI, with their established duopoly over performance rights, have operated under antitrust consent decrees since the 1940s, requiring judicial oversight of their royalty rates. See Makan Delrahim, Assistant Att'y Gen., Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees (Jan. 15, 2021), https://www.justice.gov/atr/page/file/1355391/dl?inline [https://perma.cc/TQC5-PKYY]. Although collectivizing IP rights can lower the transaction costs of consensual exchange, it can thus also impede exchange by cartelizing markets. See Erik Hovenkamp & Herbert Hovenkamp, Patent Pools and Related Technology Sharing, *in* The Cambridge Handbook of Antitrust, Intellectual Property, and High Tech 358, 367–72 (Roger D. Blair & D. Daniel Sokol eds., 2017); Jacob Noti-Victor & Xiyin Tang, Antitrust Regulation of Copyright Markets, 101 Wash. U. L. Rev. 851, 859–63 (2024).

interbranch cooperation and competition, rerouted decisionmaking into less consensual channels, and called into question what the consent of government institutions actually means.

To start, partisan polarization has made it harder to achieve the form of consent that is supposed to be the keystone of the system: the consent of legislative majorities, expressed through lawmaking. Simply put, polarization has made it increasingly challenging for Congress to enact statutes.[258] During periods of party-divided government, which in recent decades has become the norm, legislative output has been hampered by partisan disagreement between and within the House and Senate, or between Congress and the President.[259] And even during sporadic periods of unified government, the Senate filibuster and other minoritarian veto points have stood in the way of ambitious legislative agendas.[260] Landmark regulatory statutes such as the National Labor Relations Act, the Clean Air Act, the Voting Rights Act, and the Affordable Care Act have become fewer and further between, and pressing problems such as immigration and climate change go without legislative solutions.[261]

The struggles of a polarized Congress to play its primary constitutional role as lawmaker have contributed to a politically and constitutionally contentious reshaping of the structure of government, shifting power toward the states, the courts, and, perhaps most consequentially, the executive.[262] Congressional gridlock has been a contributing factor in the

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258. See Sarah Binder, The Dysfunctional Congress, 18 Ann. Rev. Pol. Sci. 85, 95–97 (2015); Nolan McCarty, Polarization, Congressional Dysfunction, and Constitutional Change, 50 Ind. L. Rev. 223, 231–37 (2016).

259. See James M. Curry & Frances E. Lee, The Limits of Party: Congress and Lawmaking in a Polarized Era 11–16 (2020); Stephen Ansolabehere, Maxwell Palmer & Benjamin Schneer, Divided Government and Significant Legislation: A History of Congress From 1789 to 2010, 42 Soc. Sci. Hist. 81, 95–104 (2018).

260. See Nolan McCarty, Polarization: What Everyone Needs to Know 135–40 (2019) [hereinafter McCarty, Polarization] (analyzing the gridlock-inducing impact of polarization on Congress during periods of divided and unified government). But cf. David R. Mayhew, Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–2002, at 208–13 (2d ed. 2005) (finding that the rate of enactment of "[i]mportant" laws has not declined since the mid-twentieth century); Josh Chafetz, The Phenomenology of Gridlock, 88 Notre Dame L. Rev. 2065, 2085–86 (2013) (arguing that complaints about congressional dysfunction and incapacity tend to be overstated). For a recent assessment of the empirical evidence, see Samuel Issacharoff & Richard H. Pildes, Participation Versus Effective Government, 26 Theoretical Inquiries L. (forthcoming 2025) (manuscript at 21), https://ssrn.com/abstract=5163201 [https://perma.cc/8BKZ-AEWH] (concluding that there has been a meaningful "decline in the ability of Congress to deliver effective policy," which "corresponds to the dramatic dissatisfaction of citizens . . . with the capacity of Congress to respond to the issues citizens care most urgently about").

261. See Jonathan S. Gould, A Republic of Spending, 123 Mich. L. Rev. 209, 220–24 (2024) (documenting the decline of ambitious regulatory statutes).

262. See, e.g., McCarty, Polarization, supra note 260, at 141–49; Gillian E. Metzger, Agencies, Polarization, and the States, 115 Colum. L. Rev. 1739, 1742, 1752–53 (2015).

rise of "the imperial presidency" and executive-centered governance.[263] To be sure, polarization is not the whole story. Executive power has been on the rise since the New Deal for a set of familiar reasons, including the political incentives that drive legislators to inertia and Presidents to action, the distinctive institutional capabilities of the President to respond swiftly and decisively in times of crisis, and the executive branch's greater capacity to bring expertise to bear on complex policy problems.[264] But polarization has exacerbated Congress's institutional tendencies toward inaction, and the power vacuum created by congressional paralysis has been filled by Presidents, increasingly cast as "the nation's problem-solvers in chief."[265]

In an effort to play this role more effectively, Presidents have asserted greater control over the executive branch, directing it toward their preferred policies by means of White House czars, Office of Management and Budget review of proposed regulations, and political appointments—the phenomenon of "presidential administration."[266] And Presidents have stretched the constitutional and statutory authorities of the executive branch and its agencies, sometimes past the breaking point. For example, handed a broken immigration system that Congress has had no inclination or ability to fix, Presidents of both parties have tried to take matters into their own hands. President Barack Obama's Deferred Action for Parents of Americans program was invalidated in court.[267] President Trump's border wall narrowly survived legal challenges before being abandoned.[268] After Congress ignored President Joe Biden's proposed U.S. Citizenship Act, Biden attempted to impose a series of immigration reforms through executive action, all of which were blocked or delayed by lawsuits led by Republican states.[269]

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263. See, e.g., Jack M. Balkin, The Last Days of Disco: Why the American Political System Is Dysfunctional, 94 B.U. L. Rev. 1159, 1195 (2014) ("A dysfunctional Congress tempts the executive to begin to act more and more unilaterally . . . ."); Neal Devins, Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives, 45 Willamette L. Rev. 395, 396 (2009) ("[T]he real story of the Bush presidency was the inability of a polarized Congress to check the President.").

264. See, e.g., Eric A. Posner & Adrian Vermeule, The Executive Unbound 18–61 (2010); Terry M. Moe & William G. Howell, The Presidential Power of Unilateral Action, 15 J.L. Econ. & Org. 132, 133–35 (1999).

265. William G. Howell & Terry M. Moe, Relic: How Our Constitution Undermines Effective Government and Why We Need a More Powerful Presidency, at xvii (2016).

266. Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001).

267. United States v. Texas, 579 U.S. 547, 548 (2016) (per curiam).

268. See David Landau, Rethinking the Federal Emergency Powers Regime, 84 Ohio St. L.J. 603, 640–45 (2023).

269. See Hamed Aleaziz & Michael D. Shear, With Court Victories, Conservatives Push Back on Biden Policies, N.Y. Times (Aug. 29, 2024), https://www.nytimes.com/2024/08/29/us/politics/biden-courts-immigration-student-loans-title-ix.html (on file with the *Columbia Law Review*).

With the executive branch increasingly bypassing legislative consent and supplanting Congress as the regulator of first resort, longstanding conflicts over the legitimacy and legality of the administrative state have escalated.[270] For proregulatory progressives, Congress's inability to enact or update statutes is a good reason for executive branch officials to take matters into their own hands. "In a period of congressional deadlock, federal agencies often have to take the lead in responding to urgent social problems."[271] But that approach is anathema to antiregulatory conservative and libertarian critics of administrative governance, who inveigh against rule by unelected bureaucrats and insist that only Congress can make the laws—knowing full well that Congress has limited capacity to do so. This view is now ascendant on the Supreme Court. The Justices have expanded the major questions doctrine to prevent "agencies [from] asserting highly consequential power beyond what Congress could reasonably be understood to have granted,"[272] making it significantly harder for the Environmental Protection Agency to address climate change and blocking the Biden Administration's efforts to compel COVID-19 vaccinations and place a moratorium on evictions during the pandemic.[273] The Court has also reversed the *Chevron* rule of judicial deference to reasonable agency interpretations of ambiguous statutes,[274] impairing the executive's ability "to respond to serious national challenges" that Congress has failed to address.[275]

We have been emphasizing what Congress cannot do, given the difficulty of achieving bipartisan consent. But there is at least one big thing that Congress can still do, and increasingly has done in recent decades, which is spend money. The most high-profile legislative achievements of recent Congresses have been spending bills, allocating "trillions of dollars to respond to emergencies, expand social safety net programs, spur scientific research and technological innovation, and strengthen the nation's physical infrastructure," as well as "to address some policy problems traditionally thought to be more fitting subjects for regulation,

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270. See Cass R. Sunstein & Adrian Vermeule, Law & Leviathan: Redeeming the Administrative State 1–37 (2020); Gillian E. Metzger, The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 3–4 (2017).

271. Cass R. Sunstein, Who Should Regulate?, N.Y. Rev. Books (May 26, 2022), https://www.nybooks.com/articles/2022/05/26/who-should-regulate-the-chevron-doctrine-thomas-merrill/ (on file with the *Columbia Law Review*) [hereinafter Sunstein, Who Should Regulate?]; see also Jody Freeman & David B. Spence, Old Statutes, New Problems, 163 U. Pa. L. Rev. 1, 19–20, 63–69 (2014) (describing challenges faced by regulatory agencies in dealing with new problems that a polarized Congress cannot address).

272. West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2609 (2022).

273. See Mila Sohoni, The Major Questions Quartet, 136 Harv. L. Rev. 262, 262–76 (2022).

274. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

275. Sunstein, Who Should Regulate?, supra note 271.

most notably climate change."[276] There are many explanations for Congress's turn to spending, but one is straightforward. Whereas partisan polarization in a closely divided Senate has made enacting regulatory legislation all but impossible, spending legislation may be able to evade the filibuster through the budget reconciliation process.[277] And spending bills can be "potent tools" for advancing regulatory policy objectives, not only by making strategic use of subsidies but also by conditioning the receipt of federal funds on compliance with regulatory requirements.[278]

That latter strategy has had yet another hydraulic effect on structural constitutional law and put pressure on another kind of constitutional consent. Congress, among other units of government, sometimes conditions funding on consent by individuals, firms, or subnational governments to regulatory requirements that arguably threaten constitutional rights or structural constitutional principles.[279] Constitutional law has long been confused about when such conditions, or the consensual waiver of constitutional entitlements in exchange for government benefits, should be permissible. In the realm of individual rights, the perplexing doctrine of "unconstitutional conditions" in some cases prohibits the government from "penalizing" the exercise of rights by withholding funds—finding in effect that the consensual exchange of these entitlements for discretionary benefits is unfairly coercive or exploitative.[280]

The Supreme Court has recently taken a similar approach to conditional funding by Congress of state governments. In *National Federation of Independent Business v. Sebelius* (*NFIB*), the Court for the first time in history invalidated a conditional spending measure—the Affordable Care Act's requirement that states expand eligibility to continue receiving Medicaid funding—on the view that the measure coerced states to consent to federal terms.[281] Although the Court found itself unable to offer any clear explanation or guidance as to how to draw the line between permissible

276. Gould, supra note 261, at 211–12 (footnotes omitted).

277. See Molly E. Reynolds, Exceptions to the Rule: The Politics of Filibuster Limitations in the U.S. Senate 79–124 (2017).

278. Gould, supra note 261, at 215–16.

279. See, e.g., Brian Galle, Federal Grants, State Decisions, 88 B.U. L. Rev. 875, 876–77 (2008) (describing, and critiquing, the widespread view that "so-called 'conditional' federal spending" threatens "federalism values," given the extent to which "states bargain from a position of weakness").

280. See Alan Wertheimer, Exploitation 123–57 (1996); Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293, 1298–99 (1984); Sullivan, supra note 112, at 1415–17. Oddly, plea bargaining and the coerced exchange of criminal procedure rights more generally have gone categorically missing from unconstitutional conditions analysis. See Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, The Unconstitutional Conditions Vacuum in Criminal Procedure, 133 Yale L.J. 1401, 1428–55 (2024).

281. 567 U.S. 519, 581–88 (2012) (plurality opinion).

funding conditions and unconstitutional coercion,[282] the Justices concluded that in this instance Congress had put "a gun to the head" of states,[283] leaving them "no choice" but to accept.[284]

It remains to be seen how the Court will elaborate this "anticoercion principle."[285] But the problem the Court confronts in cases like *NFIB* is plain enough; it is a version of the same problem the Court has long recognized in unconstitutional conditions cases involving individual rights. Just as individual Americans have come to rely on an array of government benefits—public employment, public education, public services, entitlement programs, and much else—American states have become heavily reliant on financial support from the federal government, which has increased dramatically over the past fifty years and now comprises about one-third of state budgets.[286] The worry arises that this degree of dependence creates sufficient leverage for the federal government to induce state compliance, and for governments at both levels to induce individual and civil-society compliance, with pretty much any regulatory condition, including those that sacrifice constitutional guarantees. As in other settings of severe power imbalance, consent to such transactions is subject to moral, political, and legal challenge. In the words of one constitutional opponent of conditional spending, the "purchase of submission" has become a coercive "mode of power" and "transactional . . . control" in the modern era,[287] one that has rendered consent "irrelevant."[288]

Finally, the rise and recognition of partisan polarization have led constitutional law to a more fundamental rethinking of what it means when government institutions give or withhold their consent. The standard Madisonian model of separation of powers and federalism was built on the premise that the branches and units of government would be

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282. Id. at 585; see also Mitchell N. Berman, Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions, 91 Tex. L. Rev. 1283, 1285 (2013) ("While candidly acknowledging that they could provide no guidance regarding how the line between inducement and compulsion would be assessed going forward, seven Justices nonetheless deemed the conditional offer that the Medicaid expansion embodied impermissibly coercive . . . .").

283. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 581 (plurality opinion).

284. Id. at 578. As Professors Katie Eyer and Karen Tani have explained, it was not clear prior to the 1980s that the Court would view Spending Clause legislation as substantively contractual in nature, much less insist that "true (uncoerced) consent is foundational to such legislation's validity." Katie Eyer & Karen M. Tani, Disability and the Ongoing Federalism Revolution, 133 Yale L.J. 839, 878–79, 926–27 (2024).

285. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 679–81 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

286. See Philip Hamburger, Purchasing Submission: Conditions, Power, and Freedom 6–7 (2021).

287. Id. at 1.

288. Philip Hamburger, Unconstitutional Conditions: The Irrelevance of Consent, 98 Va. L. Rev. 479, 481–83 (2012).

motivated to act in their own self-interest, competing for power and checking and balancing one another in a dynamic of "[a]mbition . . . counteract[ing] ambition."[289] As partisan polarization has made painfully clear, however, the primary lines of political rivalry in the American system of government are not between the branches or units of government but between the two major parties. As even the most casual observer of politics will immediately recognize, the willingness of Congress to cooperate with the White House in enacting the President's preferred policies and confirming appointees—or in the other direction blocking, investigating, impeaching, and otherwise checking and balancing the executive—depends heavily on whether the two branches are controlled by the same party.[290] Similar dynamics prevail in the context of federalism, where the primary determinant of cooperation or conflict between states and the national government is whether the states are Red or Blue.[291]

One implication of this partisan perspective on the structural constitution is that the consent of the branches or units of government to some political action or arrangement is not a good proxy for what Madison called "the constitutional rights of the place."[292] In particular, when party control is unified across the relevant government institutions, we should generally expect cooperation among copartisans even at the expense of institutional, and constitutional, interests. As lawyers have begun to recognize, this fundamental breakdown of the Madisonian system threatens to undermine a number of the most important doctrinal and theoretical premises of structural constitutional law. For example, from the Civil War to the post-9/11 War on Terror, the Supreme Court has appeared to believe that requiring congressional authorization for the actions of the Commander-in-Chief will serve as a meaningful check in protecting civil rights and liberties.[293] But any prospect of Congress playing such a role disappears during periods of unified government, when even more than usual, "[l]egislative action . . . consists predominantly of ratifications of what the executive has done, authorizations of whatever it says needs to be done, and appropriations so that it may continue to do

289. The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

290. See Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2312, 2329 (2006). In the words of a frustrated Democrat serving as the lead House manager in the first Senate impeachment trial of President Trump: "If the GOP fails to stand up to Trump's unconstitutional act, we will have moved dangerously from a separation of powers, to a mere separation of parties." Adam Schiff (@SenAdamSchiff), X (Feb. 17, 2019), https://x.com/RepAdamSchiff/status/1097151787973386240 [https://perma.cc/N9Z2-YMDW].

291. See Jessica Bulman-Pozen, Partisan Federalism, 127 Harv. L. Rev. 1077 (2014).

292. The Federalist No. 51, supra note 289, at 319.

293. See Samuel Issacharoff & Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, *in* The Constitution in Wartime: Beyond Alarmism and Complacency 161, 167–72, 188–89 (Mark Tushnet ed., 2005).

what it thinks is right."[294] Courts and constitutional lawyers in the executive branch routinely rely on Congress's consent, or acquiescence, to validate exercises of presidential power over war and foreign affairs as a matter of historical practice or "gloss."[295] But here again, "[c]laims about acquiescence are typically based on a Madisonian conception of interbranch competition, pursuant to which Congress and the Executive are each assumed to have the tools and the motivation to guard against encroachments on their authority."[296] Congress's acquiescence in a presidential power grab may merely reflect partisan cooperation or congressional dysfunction, rather than a considered judgment about the allocation of power between the branches. In these and other contexts, the consent of government institutions to empower their constitutional "rivals" has been sapped of normative significance.

In short, as the structural constitution has evolved into a system of separation of parties, not powers, basic premises of constitutional consent have collapsed. The consent of the branches and units of government has become either too difficult or too easy to obtain, because such consent has become detached from the constitutional interests of the institutions it was designed to protect. Meanwhile, growing power imbalances between the national government and state governments, between the executive branch and Congress, and between the regulatory state and private parties have increasingly blurred the line between consent and coercion even where partisanship does not dictate outcomes.

G. *Global Governance*

The system of international law, too, has been plagued in recent decades by the difficulty of achieving meaningful consent among states, and also by the deeper difficulty of coming to terms with what state consent represents. One precipitating cause, analogous to partisan polarization at the domestic level, is disagreement among states with divergent interests in contexts such as climate change, where collective action is widely recognized to be imperative. Another is the particular interest of the United States and its allies over the past generation in pressing a program of neoliberal globalization.

The stakes of this consent breakdown are high, not only because of the issues involved but also because of the central role played by consent in the international legal system. For centuries, state consent has been "the foundation of international law."[297] Pursuant to the principle of pacta sunt

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294. Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty, and the Courts 47 (2007).

295. See Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 417–24 (2012).

296. Id. at 414.

297. Louis Henkin, International Law: Politics and Values 27 (1995). But cf. Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 1–

servanda, states can bind themselves through their voluntary consent. The flip side of this principle is that states cannot be bound involuntarily. Consent is what transforms international legal obligations from illegitimate constraints on state sovereignty into legitimate exercises of that sovereignty.[298]

Yet recent decades have seen a pronounced "decay of consent" in international lawmaking.[299] A growing number of treaty arrangements effectively bind nonconsenting parties. The International Criminal Court, for instance, is authorized to prosecute nationals of nonparties who commit crimes in the territories of party states.[300] In the domain of human rights, the modern doctrine of jus cogens has made an array of prohibitions and obligations binding on all states without regard to their consent.[301] And armed interventions into states that have perpetrated human rights violations or failed to protect their populations are increasingly justified by doctrines that sidestep sovereign consent.[302]

More pervasively, a web of treaty-created global governance bodies—the World Trade Organization (WTO), International Monetary Fund (IMF), International Court of Justice, and numerous others—routinely bind states to regulatory requirements, which, in many cases, are consensual only at the level of states' agreement to join the treaties that created the bodies in the first place.[303] The same is true of the authority of the European Union (EU) to issue directives binding on member states.[304] States that have joined these organizations, or at least the more powerful

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22 (2006) (dissecting how international legal argument oscillates between appeals to state "behaviour, will or interest," including consent, and transcendent claims to justice).

298. The consent principle has always been somewhat slippery. Norms of customary international law, for instance, have long been inferred from "general and consistent" state practice that at best reflects a kind of tacit consent by a critical mass of states but need not be unanimous. Goldsmith & Levinson, supra note 3, at 1848–49 (internal quotation marks omitted) (quoting Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (A.L.I. 1987)).

299. Krisch, supra note 134; see also Laurence R. Helfer, Nonconsensual International Lawmaking, 2008 U. Ill. L. Rev. 71 , 72–74 (describing the recent "erosion of [the] consensual approach to treaty making" that had been a "bedrock understanding" of the international legal system for centuries).

300. Rome Statute of the International Criminal Court art. 12(2)(a), July 17, 1998, 2187 U.N.T.S. 90.

301. See Goldsmith & Levinson, supra note 3, at 1848–49 (describing "[t]he modern doctrine of *jus cogens*," including prohibitions on slavery and torture, as "a striking example of the drift away from a consent-based conception of [customary international law]").

302. See Oona A. Hathaway, Julia Brower, Ryan Liss, Tina Thomas & Jacob Victor, Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign, 46 Corn. Int'l L.J. 499, 519–35 (2013) (critically surveying examples of and justifications for such interventions).

303. See Goldsmith & Levinson, supra note 3, at 1849–51.

304. Consolidated Version of the Treaty on the Functioning of the European Union, art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 47.

ones, do maintain some measure of control through formal voting procedures, conditional funding, or threats of withdrawal. And there is always the argument that, while "the state might not anticipate . . . every individual decision that the international body to which authority is delegated might make," it has "intentionally accede[d] to a process that [it] must realize will lead to an evolution in [its] legal obligations over time."[305] But the simple fact is that many of these bodies can effectively bind states to disagreeable rules and judgments and have been delegated more and more power to do so. Recognizing the mounting "sovereignty costs" of involuntary international obligations, scholars have increasingly justified global governance in terms of "output legitimacy" or "comparative benefits," giving up on legitimation through diluted and dubious sovereign consent.[306]

The rise of global governance and the concomitant decline of state consent are typically explained as functional responses to the imperatives of interdependence in a globalizing world, which have made traditional requirements of consent too costly to maintain. Solving problems like climate change, pandemic diseases, and unmanaged migration flows requires collective action on a global scale. If states retain the unfettered discretion to withhold their consent from multilateral schemes to address these problems, efforts to deliver "global public goods" will be undermined by the predictable difficulties of obtaining consensus or critical mass among self-serving and heterogenous states.[307] Individual states will have incentives to hold out and free ride, and no state will have an incentive to sacrifice its own interests for the good of others.[308] For the same reasons that states rely on coercion domestically to deliver collective goods, the argument goes, pursuing these goods on a global scale requires some sacrifice of state consent.

Over the past generation, one such good, in particular, has driven the rise of global governance. That good, or at least goal, has been the globalization of the neoliberal economic agenda. Starting in the 1980s with the "Washington Consensus," the United States has led the world toward international regimes supporting free trade and financial flows across borders—the project of "neoliberal hyper-globalization."[309] Global governance institutions like the WTO, IMF, and World Bank have played a central role in this project, binding most of the countries in the world to a regime of economic integration. The project of European unification

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305. Oona A. Hathaway, International Delegation and State Sovereignty, 71 Law & Contemp. Probs., no. 1, 2008, at 115, 136.

306. Krisch, supra note 134, at 6, 29 (internal quotation marks omitted).

307. Id. at 1.

308. See Andrew T. Guzman, Against Consent, 52 Va. J. Int'l L. 747, 756–75 (2012).

309. Dani Rodrik, What's Next for Globalization?, Project Syndicate (Mar. 9, 2023), https://www.project-syndicate.org/commentary/failure-of-hyper-globalization-creates-need-for-new-economic-narrative-by-dani-rodrik-2023-03 [https://perma.cc/YT4F-L9BQ].

has proceeded within its boundaries on a parallel path, achieving transnational economic integration by vesting supranational governance authority in the EU, a formally consensual, treaty-based organization that has come to possess the de facto power to govern its member states regardless of their individual consent to its directives.[310] Extending the neoliberal "consensus" throughout Europe and the globe has required, as a matter of law and politics, expanding and stretching state consent.

Perhaps to the breaking point. Support for neoliberal globalization, which had already begun to wobble in the wake of the 2008 financial crisis, now appears to be collapsing. Integrating China into the world economy did not lead it to democratize and align its interests with the West's, but instead to develop into a powerful geopolitical rival. Free trade and pro-market policies did not create prosperity for all; gains in Western countries were concentrated among educated elites, while the working class suffered from the loss of manufacturing jobs and the scaling back of redistributive, labor, and social welfare policies. Political backlash against growing economic inequality and open borders has led to the rise of populism and Brexit. Politics and policy in the United States and other countries are moving away from free trade and investment toward protectionism and nationalist industrial policy.[311]

The perceived failures of neoliberal globalization have drawn attention to its shaky grounding in multilateral state consent.[312] In particular, the inescapable economic power wielded by global governance institutions, and the effective control over these institutions by their wealthiest members, have cast doubt on the extent to which weaker states

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310. See Daniel Bodansky, The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?, 93 Am. J. Int'l L. 596, 608 (1999) (describing "[t]he use of non-consensus mechanisms" of governance as "furthest advanced in the European Union").

311. On all points in this paragraph, which was drafted before the second Trump Administration took office and pushed these trends to new heights, see Stewart Patrick, Carnegie Endowment for Int'l Peace, Rules of Order: Assessing the State of Global Governance 2–3 (2023), https://carnegie-production-assets.s3.amazonaws.com/static/files/202309-Patrick_Global%20Order_final-1.pdf [https://perma.cc/6CY7-MR2H]; David Singh Grewal, A World-Historical Gamble: The Failure of Neoliberal Globalization, Am. Affs. (Winter 2022), https://americanaffairsjournal.org/2022/11/a-world-historical-gamble-the-failure-of-neoliberal-globalization/ [https://perma.cc/93SD-NGPV].

312. This is not to claim that international state consent is in fact more coercive than it has been in the past. See Eyal Benvenisti & George W. Downs, Comment on Nico Krisch, "The Decay of Consent: International Law in an Age of Global Public Goods", 108 Am. J. Int'l L. Unbound 1, 1 (2014) ("For better or worse, we believe that consent was never a major impediment to the dominant powerful states that could manipulate the global archipelago of treaty regimes to their benefit, relegating consent to a mere formal legitimating tool of submission to power."). What is now different, in Benvenisti and Downs's view, is "the *exposure* of the decay of consent." Id. at 2 (emphasis added). The enhanced expectations of sovereign autonomy created by the UN system and by decolonization have shone a harsh spotlight on the myriad coercive and quasi-coercive interstate dynamics that persist.

ever had much of a choice. Once those states joined organizations empowered to impose regulatory requirements, there was little they could do to object. During the 2008 debt crisis, for instance, Greece's consent to the severe austerity regime imposed by the EU and IMF could only be understood as compelled.[313] But even the initial decisions of weaker states to subject themselves to the obligations of membership were far from free. States that failed "to conform to the neoliberal program" knew they would "be denied international support and private capital flows," creating "[e]normous pressure" on "poor, debtor nations."[314] And very few nations of any size or strength could afford to isolate themselves from the global economy by refusing to participate in the prevailing governance frameworks. Given the WTO's "near total control of world trade," "the only credible option for almost every country" was to sign up.[315]

As Professor Joseph Weiler recognized from the outset, the consent that national governments grant to take-it-or-leave-it offers of membership in global governance organizations like the WTO is as "fictitious" as the consent that their citizens grant to Big Tech companies' terms of service.[316] "The consent given by these 'sovereign' states is not much different to the 'consent' that each of us gives, when we upgrade the operating system of our computer and blithely click the 'I Agree' button on the Microsoft Terms and Conditions."[317] Another hollow formality.

Consensual participation in global governance has come to appear questionable not just at the level of states but also at the level of populations within and across states. Large segments of the world's population have lodged complaints that *they* did not consent to the international regimes that have significantly affected their lives.[318] Citizens

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313. Greece, which joined the IMF in 1945, did consent specifically to its loan agreements, but that consent, too, is easy to view as coerced given the economic crisis and lack of better options. See David Singh Grewal, Network Power: The Social Dynamics of Globalization 253 (2008) (describing the "arm-twisting," "direct force," and "coercion" inherent in "crisis-driven conditionality agreements imposed by the IMF as a requirement for receiving needed loans").

314. Id. at 254. Grewal highlights a kind of ideological indoctrination—imposed by "persuasive advocates [of the neoliberal agenda] in the media, academia, and prominent multilateral institutions, as well as, of course, in Washington"—that further calls into question the value of debtor nations' consent. Id. at 253.

315. Id. at 229.

316. Weiler, supra note 3, at 557.

317. Id.; see also Zohra Ahmed, The Price of Consent, 49 Yale J. Int'l L. 208, 215–21 (2024) (arguing that institutions like the IMF routinely "manufacture" the consent of lower-income states through economic pressure and that the international law of consent "does not take into account the reality of interstate inequality").

318. See, e.g., Edward D. Mansfield, Helen V. Milner & Nita Rudra, The Globalization Backlash: Exploring New Perspectives, 54 Compar. Pol. Stud. 2267, 2268 (2021) (reviewing "key forces driving the anti-globalization furor"). For an earlier articulation of this complaint framed around the value of consent, see George Monbiot, The Age of Consent:

of developing countries whose governments have minimal influence over international institutions, exploited workers in global supply chain factories, people without access to life-saving medications because of international IP protections, refugees and victims of despots propped up by international funding, and the working classes of wealthier countries whose jobs and wages have suffered as a result of globalization and free trade—these and other groups have good reason to object that their interests have been disregarded and disserved by global governors. That their states may have legally consented to global governance institutions is little consolation when domestic political representation breaks down and state decisionmakers, too, disregard the interests of disempowered groups.[319]

Such dramatic disconnects between the decisionmaking of states and the interests of their populations have called into question whether states can legitimately consent to international law on behalf of the people they are supposed to represent. That question has been pressed most forcefully in the context of international humanitarian interventions and human rights protections, where the case for disregarding the nonconsent of states that are oppressing or failing to protect their own residents seems especially compelling.[320] But a similar case can be made for downgrading the consent of states, such as it has been, to economic globalization. The growing number of critics and citizens who believe that "[e]conomic elites [have] designed international institutions to serve their own interests," while "[o]rdinary people were left out," view the neoliberal economic order not as legitimated by state consent but rather as "rigged."[321]

H. *Democratic Decline*

At the turn of the millennium, the American economic and political system of market liberalism and democracy appeared to have triumphed. But this moment, of course, turned out not to be the "end of history."[322] Over the past decade, the United States has joined many other countries

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A Manifesto for a New World Order 1 (2003) ("Everything has been globalized except our consent.").

319. Cf. Jonathan Gienapp, Against Constitutional Originalism: A Historical Critique 50 (2024) (discussing the constitutional Framers' belief that if political representation were working as it should—if "the government represented the people . . . by *re-presenting* them in a legislative assembly"—then the problem of governmental coercion would go away, in principle and in practice).

320. See, e.g., Michael Walzer, The Moral Standing of States: A Response to Four Critics, 9 Phil. & Pub. Affs. 209 (1980); see also Charles R. Beitz, The Moral Standing of States Revisited, 23 Ethics & Int'l Affs. 325 (2009).

321. Jeff D. Colgan & Robert O. Keohane, The Liberal Order Is Rigged, Foreign Affs. (Apr. 17, 2017), https://www.foreignaffairs.com/articles/world/2017-04-17/liberal-order-rigged (on file with the *Columbia Law Review*).

322. Francis Fukuyama, The End of History?, Nat'l Int., Summer 1989, at 3, 4.

in confronting the risk of democratic backsliding, decline, or collapse.[323] Liberal democracy, which once seemed inevitable, now finds itself "under severe threat around the world."[324]

This now-familiar story is also one about the failings of consent, albeit consent of a somewhat different kind. Democratic elections are supposed to be the vehicle through which citizens give their collective consent to the identity and authority of their governors. For elections to play this role, however, voters must be willing to allow the collective judgment to direct their own consent. The stability and survival of democracy depend on the willingness of partisans to accept election results, even while believing that they are right and their opponents are wrong.[325] Democracy, in short, relies on the "losers' consent."[326] When losers withhold their consent—disputing the fairness of the vote, rejecting the authority of the winner, or refusing to leave office—election outcomes lose their legitimizing force and fail to settle the crucial question of who should govern.[327] Analogous to the failures of individual consent, collective consent retains its form but loses its value.[328]

The refusal of democratic losers to consent has been on vivid display in this country during the Trump era. As exemplified in extreme form by the mob that stormed the Capitol on January 6, 2021, in an effort to prevent Congress from counting the Electoral College ballots, most Republican voters and officeholders have never accepted Trump's loss in

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323. See Tom Ginsburg & Aziz Z. Huq, How to Save a Constitutional Democracy (2018); Samuel Issacharoff, Democracy Unmoored: Populism and the Corruption of Popular Sovereignty (2023); Steven Levitsky & Daniel Ziblatt, How Democracies Die (2018) [hereinafter Levitsky & Ziblatt, How Democracies Die]; Yascha Mounk, The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It (2018).

324. Francis Fukuyama, Liberalism and Its Discontents, at vii (2022); cf. Emma Planinc, Liberalism in Search of Itself, Mod. Intell. Hist. FirstView, Dec. 9, 2024, at 1, 3 (book review), https://www.cambridge.org/core/journals/modern-intellectual-history/article/liberalism-in-search-of-itself/EE519580F58489C664895D8CE25D5584 [https://perma.cc/4JJH-3W96] (critically reviewing the burgeoning literature on the crisis of liberal democracy).

325. See Jan-Werner Müller, Democracy for Losers, Bos. Rev. (Aug. 6, 2020), https://www.bostonreview.net/articles/jan-werner-muller-democracy-losers/ (on file with the *Columbia Law Review*) [hereinafter Müller, Democracy for Losers] ("[L]osers in a democratic contest have to hold two seemingly contradictory views: that the policies of the winners are misguided *and* that these policies should be implemented . . . .").

326. Anderson et al., supra note 133, at 4–7.

327. See Jedediah Purdy, Two Cheers for Politics: Why Democracy Is Flawed, Frightening—And Our Best Hope 209 (2022) ("[E]lections do not produce binding decisions if the losers take shelter in the idea that they have not *really* lost and so the country has not really acted.").

328. The analogy is imperfect, of course. With losers' consent, unlike most acts of individual consent, there is no discrete bargain or transaction and no goal of advancing the preferences of each party in the near term; the touchstone is not personal choice but political obligation. To support the larger project of democratic governance and collective consent, electoral losers are asked to accept an outcome that, by definition, they dislike.

the 2020 election.[329] They seemed no more inclined to accept defeat in 2024.[330] More generally, public polling suggests that Americans of every political stripe have been losing faith in democracy. While two-thirds of older Americans continue to believe it is extremely important to live in a democracy, less than one-third of millennials share that view.[331] In another recent poll, nearly 70% of Democrats and Republicans alike expressed the belief that democracy is "in danger of collapse."[332] 62% of Americans said they were concerned about violence surrounding the 2024 election,[333] for good reason. Just before the assassination attempt on Trump in July 2024, a nationwide survey found that 10% of Americans believed "use of force is justified to prevent Donald Trump from becoming president," while 7% said they "support force to restore Trump to the presidency."[334]

How did we get to this point? As it happens, the leading explanations for rising democratic discontent line up with the general reasons why consent has become dubious or difficult to achieve across a range of other contexts discussed in this Article: a combination of neoliberal policy and ideology, power imbalances, cognitive distortions, and polarization.

In the democratic context as well, legitimate consent is threatened by structural inequality. As Professors Daron Acemoglu and James Robinson summarize, the success of democracy "throughout the [twentieth] century boils down to the presence of political egalitarianism . . . and economic

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329. See Purdy, supra note 327, at 7 (noting that two-thirds of Republican voters maintain that Biden did not legitimately win the 2020 election); see also Steven Levitsky & Daniel Ziblatt, Tyranny of the Minority: Why American Democracy Reached the Breaking Point 72–100 (2023) (exploring "Why the Republican Party Abandoned Democracy").

330. See, e.g., Patrick Svitek, Top Republicans, Led by Trump, Refuse to Commit to Accept 2024 Election Results, Wash. Post (May 8, 2024), https://www.washingtonpost.com/elections/2024/05/08/trump-republicans-2024-election-results/ (on file with the *Columbia Law Review*) (last updated May 9, 2024). Before the 2024 election, a majority of Republicans said they were not confident that officials in Democratic-controlled states would accept the election results if their party lost, and a supermajority of Democrats said the same about Republican state officials. See Richard H. Pildes, Election Law in an Age of Distrust, 74 Stan. L. Rev. Online 100, 102 (2022), https://review.law.stanford.edu/wp-content/uploads/sites/3/2022/05/74-Stan.L.-Rev.-Online-100-Pildes.pdf [https://perma.cc/B2CV-TFRT] [hereinafter Pildes, Age of Distrust].

331. Mounk, supra note 323, at 5.

332. David Leonhardt, 'A Crisis Coming': The Twin Threats to American Democracy, N.Y. Times (Sep. 17, 2022), https://www.nytimes.com/2022/09/17/us/american-democracy-threats.html (on file with the *Columbia Law Review*) (last updated June 21, 2023).

333. Pildes, Age of Distrust, supra note 330, at 102.

334. Alan Feuer, Recent Poll Examined Support for Political Violence in U.S., N.Y. Times (July 13, 2024), https://www.nytimes.com/2024/07/13/us/politics/a-poll-last-month-examined-support-for-political-violence-in-the-us.html (on file with the *Columbia Law Review*) (internal quotation marks omitted). One-third of the first group and one-half of the second reported owning guns. Id.

egalitarianism."[335] Broad enfranchisement promised historically marginalized groups an equal measure of political voice, and in the aftermath of World War II democracy "delivered what people wanted—wage growth, good jobs, low unemployment, education and reasonable public services."[336] After decades of neoliberal economic policy, however, economic and political egalitarianism have pulled apart. Soaring income inequality since the 1980s has created a chasm between the wealth and life prospects of economic elites and working-class Americans. And as the economic winners have used their resources to buy political influence, economic inequality has gone hand-in-hand with political inequality. Political scientists today find that "government policy bears absolutely no relationship to the degree of support or opposition among the poor" and that "the preferences of the vast majority of Americans . . . have essentially no impact on which policies government does or doesn't adopt."[337] It is no wonder, then, that many have come to believe the political "game is rigged . . . to work for those who have money and power."[338] A version of democracy captured by multinational corporations, wealthy donors, and global elites, with not "much left of rule by the people or rule for the people,"[339] may not be a game most people want to play. Meanwhile, the relentlessly individualistic and consumerist ontology of neoliberalism calls into question the very idea of collective consent and, with it, the sense of an obligation to accept the game's outcomes.[340]

Worse still for democracy, economic and political inequality have opened the door to a form of demagogic populism that stokes resentment and distorts reality. Following the playbook of autocratic populists around the world, President Trump has succeeded in convincing large numbers of Americans that democratic power has been stolen from "the people" by a corrupt and criminal cabal of elites supported by racial and immigrant outsiders. As Professor Jan-Werner Müller explains, populist leaders like Trump "appeal[] to a 'real people,' claiming to be their sole and genuine voice," and "they argue that all other contenders for power are fundamentally illegitimate."[341] It follows that "a system in which they lose

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335. Daron Acemoglu & James A. Robinson, Opinion, Our Solution to the Crisis of Democracy, N.Y. Times (July 19, 2024), https://www.nytimes.com/2024/07/19/opinion/inequality-democracy-trump-solutions.html (on file with the *Columbia Law Review*).

336. Id.

337. Martin Gilens, Affluence and Influence: Economic Inequality and Political Power in America 1, 81 (2012).

338. Elizabeth Warren, A Fighting Chance 2 (2014).

339. Acemoglu & Robinson, supra note 335.

340. Cf. Purdy, supra note 327, at 209–10 (discussing the "aversion to democratic results" caused by a combination of hyperpartisanship and a "hyperindividualistic" culture that "treats voting as an expression of personal identity" and "consumer choice").

341. Müller, Democracy for Losers, supra note 325; see also Jan-Werner Müller, What Is Populism? 103 (2016) (describing "the populist claim that only their supporters are the real people and that they are the sole legitimate representatives").

must, necessarily, be corrupt or dysfunctional."[342] Citizens who are convinced that elections and government are controlled by corrupt elites, the "Deep State," or other shadowy evildoers will have little inclination to respect democratic outcomes that do not go their way. The populist script, as put into play by Trump and his team, undermines collective democratic consent through scapegoating and conspiracism, layered on top of a core of righteous grievance.

An additional impediment to securing democratic consent is partisan polarization.[343] The polarization of the two major political parties over the past several decades, each becoming more ideologically homogenous in its views and more distant from the other's, has made it increasingly difficult for either to accept defeat.[344] The stakes of losing have been further magnified by polarization-induced breakdowns of consent-based governance in between elections—with constitutional hardball displacing compromise in Congress and the party in power driven to maximize its advantage through gerrymandering electoral districts, entrenching laws, packing the judiciary, prosecuting opponents, or other means of stacking the democratic deck in its favor.[345] Faced with these prospects, losing an election becomes not just a short-term setback but a political catastrophe. The equilibrium necessary to sustain democracy, with each party willing to accept periodic defeats in exchange for the mutual benefits of peaceful rotation in office, is harder to maintain under these conditions.

The problem of polarization is exacerbated when partisan affiliation becomes bound up with social and personal identity. That is what has happened in this country in recent years, as the parties have divided Americans along lines of race, religion, education, geography, and

342. Müller, Democracy for Losers, supra note 325.

343. Partisan polarization helps explain support for Trump by establishment Republicans, contributing to demagogic populism through that channel as well. See Klarman, supra note 128, at 153–77.

344. See supra section II.B.3.

345. See Joseph Fishkin & David E. Pozen, Asymmetric Constitutional Hardball, 118 Colum. L. Rev. 915, 921–23 (2018); see also Levitsky & Ziblatt, How Democracies Die, supra note 323, at 204 ("[Partisan] polarization, deeper than at any time since the end of Reconstruction, has triggered the epidemic of norm breaking that now challenges our democracy."). By causing cooperation within government to break down, polarization also makes it tempting for Presidents to assert the authority to bypass dysfunctional institutions and rule unilaterally—threatening democracy on yet another level. See supra section III.F.

Meanwhile, the sense in which our constitutional system writ large reflects the "consent of the governed" has become ever more obscure as a functionally unamendable canonical document grows older and as a culture of judicial supremacy, with an "imperial" Supreme Court at the helm, detaches constitutional interpretation from the views of ordinary people and their elected representatives. See Mark A. Lemley, The Imperial Supreme Court, 136 Harv. L. Rev. Forum 97, 97 (2022), https://harvardlawreview.org/wp-content/uploads/2022/11/136-Harv.-L.-Rev.-F.-97.pdf [https://perma.cc/ACT6-9M4L]; cf. Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It) 11–16 (2006) (discussing ways in which "the Constitution . . . demeans 'the consent of the governed,'" including through the difficulty of amendment).

culture.[346] There is now a "chasm in American political life, between prosperous, diverse major metropolitan areas and more traditional, religious and economically struggling smaller cities and rural areas," with "[t]he first category . . . increasingly liberal and Democratic, the second increasingly conservative and Republican."[347] These two different groups are not just living in different places but in different epistemic universes, as fragmented news and social media feeds create incompatible pictures of the world, stoking outrage, reinforcing biases, and deepening differences.[348] In this climate, "political contest . . . can feel existential to people in both camps," who believe they are "not just voting for a set of policies but for what we think makes us Americans and who we are as a people."[349] For voters with this mindset, losing is very hard to abide—or consent to.

IV. THE FUTURE(S) OF CONSENT

How have legal designers, scholars, and advocates responded to the mounting challenges to consent within a legal system that relies on it so centrally? Across diverse fields, we find that the same basic strategies recur. This Part provides a typology of such strategies, along with a general analysis of the trade-offs each entails.

In some areas of law and life, consent is widely seen as foundational to a social practice or otherwise intrinsically important. It is hard to imagine how, say, nonconsensual contracts would work, or why the legal system would value them. Unable to abandon consent in these areas, reformers may seek to bolster its quality or feasibility—but rarely can they do both. In other areas of law and life, however, the predominant view is that consent is valuable only instrumentally, in the service of another ideal less tightly tied to autonomy and choice. Examples might include data privacy and criminal punishment. In these areas, we suggest that reformers should aim to reduce the law's reliance on individual consent whenever the desired ends can be achieved at reasonable cost through other regulatory means. More broadly and fundamentally, we explain why the crisis of consent cannot be remedied through reforms to consent rules alone.

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346. See Jonathan S. Gould & David E. Pozen, Structural Biases in Structural Constitutional Law, 97 N.Y.U. L. Rev. 59, 80–89 (2022).

347. Leonhardt, supra note 332.

348. See, e.g., Paul Gowder, The Dangers to the American Rule of Law Will Outlast the Next Election, 2020 Cardozo L. Rev. De Novo 126, 148–59, https://cardozolawreview.com/wp-content/uploads/2020/10/GOWDER_de-novo_42.pdf [https://perma.cc/4FVS-N3KC] (discussing "epistemic polarization" in the United States today).

349. Leonhardt, supra note 332 (internal quotation marks omitted) (quoting political scientist Lilliana Mason).

A. *Defining Consent Down*

Among the consent regimes surveyed in Part III, perhaps the most common response to mounting functional challenges has been to water down the standard for what counts as consent. We might call this the default strategy: treating as valid forms of consent that are widely understood to be normatively deficient. Thus, clicking on-screen boxes is deemed sufficient to create contractual obligations, regardless of whether consumers have any idea what they are agreeing to or any realistic choice in the matter. Unwelcome and degrading sexual experiences, or sex that is procured through deception or fraud, qualifies as consensual so long as the participants say yes. Guilty pleas extracted from even the most disempowered criminal defendants are rubber-stamped in an assembly-line process of criminal conviction. States are bound by international legal directives based on assent given decades in the past, and in many cases dubiously voluntary, to membership in a global governance body.

These approaches respond to the crisis of consent by ignoring it or defining it out of existence. In so doing, they subvert the standard consequentialist and deontological rationales for relying on consent in the first place—provoking calls for the kinds of reforms described in the sections that follow. But the reasons for wanting to maintain low-quality consent regimes are clear enough.

For one thing, even highly imperfect consent may retain some of its value in reflecting parties' interests and preserving space for autonomy.[350] In the case of digital contracting, for example, some economically oriented scholars have taken a glass-half-full perspective, emphasizing the benefits of matching terms and prices to heterogeneous consumer demand, the limited evidence of overreaching by many firms, market forces that tend to align contract terms with consumer interests, and the drawbacks of more stringent regulation.[351] And they warn against leaping too quickly to the conclusion that consumers' routine contracting away of privacy that they purport to highly value—the so-called privacy paradox—reflects deficient consent rather than revealed preferences.[352] In the context of sexual consent, even recognizing that "a complete absence of coercion is uncommon,"[353] all but the most radical reformers maintain

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350. Consent may also be valued for more formalistic or ritualistic reasons. See, e.g., Tess Wilkinson-Ryan, Intuitive Formalism in Contract, 163 U. Pa. L. Rev. 2109, 2111 (2015) (describing many laypersons' "formalist intuitions" with regard to consumer contracts).

351. See, e.g., Omri Ben-Shahar & Lior Jacob Strahilevitz, Contracting Over Privacy: Introduction, 45 J. Legal Stud. S1 (Supp. 2016); Omri Ben-Shahar, Regulation Through Boilerplate: An Apologia, 112 Mich. L. Rev. 883 (2014) (book review); Clayton P. Gillette, Rolling Contracts as an Agency Problem, 2004 Wis. L. Rev. 679; Florencia Marotta-Wurgler, Self-Regulation and Competition in Privacy Policies, 45 J. Legal Stud. S13 (Supp. 2016).

352. See, e.g., Ben-Shahar & Strahilevitz, supra note 351, at S5 (hypothesizing that "most people do not care much about data privacy," as evidenced by their unwillingness to pay for it).

353. Tuerkheimer, supra note 177, at 613.

"the premise that there is good, decent, acceptable sex, even in a society still marked by sex discrimination and elements of male power," and "therefore accept that a woman's preferences and her own beliefs about what she wants are genuine."[354]

The other obvious reason for accepting deficient consent is that the costs of doing better are too high. Returning to the example of digital contracting, it is hard to deny that "consent, in the robust sense expressed by the ideal of 'freedom of contract,' is absent in the vast majority of the contracts we enter into these days," for all the reasons discussed above.[355] Nevertheless, setting "the bar too high too often on contractual consent" could make "too many commercial transactions subject to serious challenge" and "undermine the predictability of enforcement that is needed for vibrant economic activity."[356] Likewise, whatever the flaws of plea bargaining, the American criminal justice system, as it is currently structured, cannot function without it.[357] (Which is precisely why those who hope to abolish mass incarceration advocate pulling the plug on plea bargaining: in the words of Michelle Alexander, to "crash the justice system."[358]) Insofar as addressing crises of climate change, pandemics, and poverty requires global governance beyond what can be attained through the meaningful exercise of state consent, compromising consent may be the only realistic option.[359]

"If the global community hopes to make progress," the increasingly familiar argument goes, "we will have to increase our ability to overcome the consent problem."[360] The same argument now echoes throughout domestic law and policy debates. The simplest way to overcome this problem is to set a very low bar for what qualifies as valid consent.

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354. Schulhofer, Unwanted Sex, supra note 163, at 84.

355. Brian H. Bix, Contracts, *in* The Ethics of Consent, supra note 4, at 251, 251; see also supra section III.A.

356. Bix, supra note 355, at 252.

357. See supra section III.D. As long ago as 1970, before incarceration rates skyrocketed, Chief Justice Warren Burger explained that the system lacked the capacity to handle more trials and could only function at then-current resource levels with a plea rate of at least 90%. See Hessick, supra note 216, at 23.

358. Michelle Alexander, Opinion, Go to Trial: Crash the Justice System, N.Y. Times (Mar. 10, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html (on file with the *Columbia Law Review*); see also Crespo, No Pleas, supra note 221, at 2016–24 (exploring the possibility of coordinated "plea bargaining strikes" by defendants as a strategy for combating mass incarceration).

359. Cf. Kate Whiting & HyoJin Park, This Is Why 'Polycrisis' Is a Useful Way of Looking at the World Right Now, World Econ. F. (Mar. 7, 2023), https://www.weforum.org/stories/2023/03/polycrisis-adam-tooze-historian-explains/ [https://perma.cc/KYV8-UREH] (describing the contemporary global "polycrisis" and suggesting that it might be mitigated by limiting the range of issues on which "genuine political agreement" is sought).

360. Guzman, supra note 308, at 788.

B. *Abandoning Consent*

Instead of diluting the legal standard for consent, reformers who believe that consent is failing to fulfill its intended objectives or imposing excessive externalities may choose to shrink its domain by getting rid of consensual norms or by restricting the range of situations in which legally valid consent may be given. In place of consent, legal regimes can substitute mandates, prohibitions, penalties, incentives, prescriptive regulations, and inalienability rules of all sorts.[361] These replacements for consent can be designed or understood as replicating the terms that would have been consented to under ideal conditions, on the model of hypothetical consent. Or they can simply dictate or encourage preferred outcomes, regardless of what anyone would have consented to.

For example, the domain of operative consent in digital contracting could be circumscribed by mandatory rules prohibiting (or prohibiting a wider range of) unfair conditions or particularly worrisome forms of data collection and use.[362] Consumers might be further protected against exploitation by imposing fiduciary duties on tech firms, limiting what the firms can extract from consensual transactions.[363] Regulating sexual consent, universities and other employers have categorically banned sexual relationships in situations where conspicuous power imbalances between teachers and students or supervisors and employees call into question the value of expressed assent.[364] The regime of employment law that has served as a partial substitute for the decline of collective bargaining could continue to expand its domain, prohibiting arbitration agreements and pulling in gig workers.[365] The range of permissible plea bargains in criminal cases could be limited by more hands-on judicial scrutiny of the factual bases for guilt and the fairness of sentences.[366] When the transaction costs of consensually disseminating intellectual property

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361. See supra notes 40–41 and accompanying text.

362. See, e.g., Kevin E. Davis & Florencia Marotta-Wurgler, Contracting for Personal Data, 94 N.Y.U. L. Rev. 662, 665–66 (2019) (discussing mandatory rules as a regulatory option for protecting consumers in digital contracting for the collection, use, and transfer of personal data).

363. See, e.g., Jack M. Balkin, Information Fiduciaries and the First Amendment, 49 U.C. Davis L. Rev. 1183, 1205–09 (2016); Jack M. Balkin & Jonathan L. Zittrain, A Grand Bargain to Make Tech Companies Trustworthy, The Atlantic (Oct. 3, 2016), https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346/ (on file with the *Columbia Law Review*).

364. See Vicki Schultz, The Sanitized Workplace, 112 Yale L.J. 2061, 2087–136 (2003) (describing the development of regulations on workplace sexual relations); Amia Srinivasan, Sex as a Pedagogical Failure, 129 Yale L.J. 1100, 1104–19 (2020) (describing the development of university regulations on sexual relationships between faculty and students).

365. See supra notes 198–202 and accompanying text.

366. See Albert W. Alschuler, The Trial Judge's Role in Plea Bargaining (pt. 1), 76 Colum. L. Rev. 1059, 1064–66 (1976).

have become too high, the law has responded, as we have seen, with doctrines of fair use and regimes of compulsory licensing that permit users to bypass consent.[367] The public law parallel has been the replacement of hard-to-attain congressional consent by executive unilateralism.[368]

These kinds of approaches respond to the crisis of consent not by denying its existence, as with the watering-down strategies reviewed above, but rather by *regulating it out of existence*—displacing consent as a touchstone of legality in favor of top-down, substantive prescriptions or permissions to proceed nonconsensually. Such approaches may well produce superior outcomes in certain contexts. As discussed in Part I, a refusal to accept the presumptive preferability of consent-based governance was a hallmark of the critical legal studies movement and remains a prominent theme in communitarian, Marxist, and religious and social conservative thought.[369]

These reforms achieve their goals, however, at the potential cost of abandoning the values of autonomy and choice that were thought to make the consent paradigm attractive in the first place. In the context of digital privacy, replacing notice and consent with substantive regulation of the collection and use of personal data could invite "extensive government control and micromanagement," undermining the preferences of those who "gladly accept the prevailing business model of . . . free information and services in exchange for monetizing personal data."[370] And recall the consensus view of labor experts that the uniform minimum standards of employment law are a poor substitute for what workers could achieve through collective bargaining, both in terms of material gains and autonomous choice.[371] Analogous (if not equally sympathetic) complaints about the limitations of choice and control will predictably come from IP right-holders whose entitlements are involuntarily taken on terms they would not have consented to in market transactions, or from objectors to an administrative state unloosed from congressional control.

Of course, what one thinks about the prospect of abandoning consent in any of these areas will depend not only on one's priors but also on what is likely to take its place. As explained in Part I, distrust of alternative decisionmaking institutions is one of the reasons consent-based regulation has become so attractive.[372] Skeptics of government regulation will

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367. See supra section III.E.

368. See supra section III.F.

369. See supra notes 55–62 and accompanying text.

370. Solove, Murky Consent, supra note 30, at 597–98; see also Daniel J. Solove, Introduction: Privacy Self-Management and the Consent Dilemma, 126 Harv. L. Rev. 1880, 1894–900 (2013) (framing as a "consent dilemma" the regulatory choice between accepting cognitively and informationally deficient decisions about personal data and adopting paternalistic measures that restrict freedom and ignore preferences).

371. See supra notes 200–202 and accompanying text.

372. See supra notes 100–101 and accompanying text.

continue to lean toward preferring markets even when contractual consent is imperfect or costly to attain. If the alternative to losers' consent is autocratic populism, then we might follow Winston Churchill in defending an admittedly flawed system of electoral democracy. Giving up on state consent as the foundation of the Westphalian international system could lead us to a future of pacific cosmopolitanism and global cooperation through mutually beneficial institutions, or it could give rise to the "soulless despotism" of a world state and "the graveyard of freedom."[373]

It is hard to generalize about the effects of moving from consensual to nonconsensual or less consensual regulatory approaches, given the endless contextual variables that might matter. But the most important constraint on moving away from consent altogether, so that it no longer plays any role in determining parties' legal rights or obligations, is that in some domains consent is widely considered intrinsic to or inseparable from the value of the underlying social practice. Sexual intimacy law without consent would be barbaric. Contract law without consent would not be recognizable as contract law.[374]

In other domains, by contrast, consent tends to be valued on more contingent instrumental grounds, as a means to increase parties' welfare, protect them from exploitation, build buy-in for government policies, or advance other consent-independent ends.[375] Laws on data privacy and criminal procedure, for example, could rely almost exclusively on mandates, prohibitions, and permissions and still serve the goals of privacy and due process—potentially much better than they do now.[376] People will disagree on the exact circumstances in which consent should be seen as an intrinsic good, an instrumental good, or a hybrid of the two,[377] and we

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373. Immanuel Kant, Toward Perpetual Peace: A Philosophical Sketch (1795), reprinted in Toward *Perpetual Peace* and Other Writings on Politics, Peace, and History 67, 91–92 (Pauline Kleingeld ed., David L. Colclasure trans., 2006).

374. Cf. Omri Ben-Shahar, Contracts Without Consent: Exploring a New Basis for Contractual Liability, 152 U. Pa. L. Rev. 1829, 1830 (2004) (describing "the consensus-or-nothing structure" of contract law). Professor Ben-Shahar does not actually envision contract law ever going "without consent," as per his article's title, but rather proposes that contractual liability should not be limited to cases in which consent was manifested. Id. at 1838–53.

375. Cf. Bietti, supra note 33, at 386–87 (distinguishing between "instrumental and intrinsic reasons for valuing consent as a regulatory device in the platform economy," though noting that these reasons cannot be "entirely separate[d]" insofar as the intrinsic case for consent presupposes its instrumental value); Sean Devine, Kevin da Silva Castanheira, Stephen M. Fleming & A. Ross Otto, Distinguishing Between Intrinsic and Instrumental Sources of the Value of Choice, Cognition, Apr. 2024, at 1, 8 (reporting experimental evidence suggesting that people's preference for choice "depends importantly on the instrumental relationship between one's choices and their ultimate consequences").

376. See, e.g., Weisburd, supra note 210, at 727–38 (exploring the potential benefits of "criminal procedure without consent").

377. See, e.g., Robin West, Consensual Sexual Dysphoria: A Challenge for Campus Life, 66 J. Legal Educ. 804, 816–18 (2017) (contrasting libertarian and liberal views that "consent is emblematic of as well as constitutive of autonomy," and therefore "a sort of

cannot begin to resolve these debates here. What we can say is that whenever there is broad agreement that consent is (1) primarily serving an instrumental function in a certain legal domain, and yet (2) systematically failing to deliver the desired ends on account of inhospitable extralegal conditions, the case for sticking with consent-based governance is at its weakest.

C. *Strengthening Consent-Protecting Rules*

What can scholars and reformers do if they are worried about the meaningfulness of consent in some area of law but are unable or unwilling to abandon it altogether? Among those who acknowledge normative deficiencies with a given form of consent, perhaps the most commonly advocated, and frequently implemented, solution is to try to improve its quality by strengthening the relevant "consent-protecting rules."[378] This is the approach the EU has taken to protecting data privacy, for example. The EU's General Data Protection Regulation (GDPR) requires that consent be a "freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data."[379] This general aspiration, and the regulatory framework designed to implement it, breaks down into several components. The first is an effort to ensure that consent has been unambiguously expressed and sustained, prohibiting inferences from use or silence and permitting the withdrawal of consent at any time.[380] Requirements of affirmative and ongoing consent to sex operate in much the same way.[381]

Beyond the clear expression of consent, efforts can be made to ensure that decisions about consent are adequately informed, fully considered, and cognitively undistorted. The GDPR requires disclosure of various kinds of information in intelligible forms, with guardrails against deception.[382] Informed consent regimes in healthcare impose comparable obligations on physicians.[383] In the context of criminal plea bargaining,

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intrinsic as well as instrumental good," with the more "distrustful" view of consent taken by "Marxists and other critical thinkers" as well as "[c]onservative moral theorists and traditionalists").

378. See supra note 46 and accompanying text.

379. Council Regulation 2016/679, art. 4(11), 2016 O.J. (L 119) (EU).

380. See Bietti, supra note 33, at 338–42; Solove, Murky Consent, supra note 30, at 602–03.

381. See Gruber, supra note 57, at 429–58; see also Mary Graw Leary, Affirmatively Replacing Rape Culture With Consent Culture, 49 Tex. Tech L. Rev. 1, 6–8 (2016).

382. See Solove, Murky Consent, supra note 30, at 605–27.

383. See Steven Joffe & Robert D. Truog, Consent to Medical Care: The Importance of Fiduciary Context, *in* The Ethics of Consent, supra note 4, at 347, 348–50. Proposals to make patients' informed consent an iterative, interactive process rather than a one-shot deal would push this effort further. See, e.g., Richard Delgado, Shadowboxing: An Essay on Power, 77 Corn. L. Rev. 813, 816 n.18 (1992) (collecting such proposals).

defendants' decisionmaking deficits might be similarly ameliorated by giving them access to more information—for instance, by requiring prosecutors to disclose exculpatory evidence in advance of plea negotiations[384]—or to better-trained and better-resourced defense lawyers.[385] Along the same lines, democratic consent to electoral outcomes might be fortified by creating more consistency and clarity in vote tabulation or by reducing the flow of false information, in the hope of reducing distrust, disagreement, and opportunities for manipulation.[386]

Consent can also be bolstered by taking steps to limit particular sources of compulsion or exploitation. In the context of plea agreements, reformers have advocated placing a ceiling on trial penalties, prohibiting charge-stacking and strategic threats by prosecutors, and eliminating cash bail and protracted pretrial detention.[387] In the context of individual employment contracts, the Federal Trade Commission recently issued a rule banning noncompete clauses that lock workers into jobs they may wish to leave.[388] On the other side of the ledger, the capacity of individual workers to protect themselves from exploitation might be increased through government programs to support worker mobility or other social welfare policies that make workers less economically dependent on their current employers.[389] On the international plane, reformers have looked for ways to enable weaker states, and underrepresented constituencies within and across states, to play a greater role in the deliberations of global governance institutions.[390]

These approaches respond to the crisis of consent on its own terms, trying to remedy the deficiencies that have prevented specific forms of consent from carrying their assigned weight. Even when they have been implemented in earnest, however, the success of such ameliorative interventions has been limited. Some of these limitations are by design.

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384. See Bibas, supra note 229, at 2531.

385. See id. at 2476–86, 2539–40.

386. See Pildes, Age of Distrust, supra note 330, at 103–08.

387. See Hessick, supra note 216, at 183–213.

388. Non-Compete Clauses, 16 C.F.R. § 910 (2025); see also Eric Posner, Why Non-Compete Clauses Should Be Banned, Project Syndicate (May 3, 2024), https://www.project-syndicate.org/commentary/ftc-non-compete-ban-is-justified-business-lobby-arguments-unconvincing-by-eric-posner-2024-05 (on file with the *Columbia Law Review*) ("[T]he FTC's rule is based on a mountain of empirical evidence showing that non-compete clauses harm workers, consumers, innovation, and employee mobility.").

389. See Brishen Rogers, Employment Rights in the Platform Economy: Getting Back to Basics, 10 Harv. L. & Pol'y Rev. 479, 517–18 (2016).

390. See, e.g., Gráinne de Búrca, Developing Democracy Beyond the State, 46 Colum. J. Transnat'l L. 221, 248–56 (2008) (proposing a "democratic-striving approach" to transnational governance); Richard B. Stewart, Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness, 108 Am. J. Int'l L. 211, 212 (2014) (proposing strategies for reconfiguring global governance structures "to enable the disregarded to secure greater regard for their interests and concerns").

Requiring affirmative consent to sex may have any number of benefits, but it does nothing to address the coercive forces that may lead women to say yes while wishing that circumstances allowed them to say no.[391] Other limitations are the result of regulatory or market challenges that are difficult to overcome. Across fields, informed consent and mandatory disclosure requirements often end up providing people with too little, too much, or the wrong kinds of information and fail to improve their decisionmaking or otherwise empower them.[392] Unless they function as mandates, "nudges" cannot be trusted to rectify the behavioral pathologies afflicting individual choice that motivate their adoption.[393] Judicially enforced limits on coercive federal spending programs may spare state governments from being subject to disagreeable conditions, while increasing the likelihood of federal preemption and "state marginalization."[394]

But the main problem with the standard reforms aimed at bolstering individual consent is that they do not go far enough. Providing consumers, workers, criminal defendants, and other vulnerable parties with somewhat more information or legal protection may lead to marginal improvements in their capacity to strike favorable deals. Left untouched are the structural conditions that make meaningful consent ultimately unachievable.

D. *Addressing Background Conditions (and Accepting Consent–Consent Tradeoffs)*

That leads us to the final, first-best solution to the crisis of consent: addressing the background conditions (or preconditions) that are making

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391. See Lise Gotell, Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women, 41 Akron L. Rev. 865, 898 (2008) ("The legal discourse of affirmative consent enacts a separation between discrete events and the power relations constructing vulnerabilities. The latter are silenced . . . ."); see also Janet Halley, The Move to Affirmative Consent, 42 Signs 257, 277 (2016) (arguing that affirmative consent requirements to sex not only fail to address "pervasive conditions of male domination" but also perversely maintain those conditions by "entrench[ing] the protected group in its weakness").

392. On this pattern of failure, see Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure 59–106 (2014); Pozen, Ideological Drift, supra note 75, at 135–41, 162–64; see also, e.g., Carl E. Schneider, The Practice of Autonomy: Patients, Doctors, and Medical Decisions 9 (1998) (reporting that commentators "widely feel that the law [of informed consent] is wretchedly inadequate to its vocation of promoting patients' autonomy"); Brett Frischmann & Moshe Y. Vardi, Better Digital Contracts With Prosocial Friction-in-Design, 65 Jurimetrics J. 1, 40–44 (2025) (acknowledging that the GDPR's informed consent and mandatory disclosure mechanisms have not empowered consumers as intended and urging that they be bolstered by a requirement of "*demonstrably informed consent*").

393. See Bubb & Pildes, supra note 114, at 1597–98 (describing how "choice-preserving" tools are "unlikely to be sufficiently effective").

394. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 630 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); see also supra notes 281–288 and accompanying text.

meaningful consent so difficult to achieve at scale. Reforms that strengthen consent-protecting rules operate at a more retail level, helping to guard against specific threats to the quality of specific transactions. This final approach, by contrast, involves broader changes in law and society that shift the focus away from individual consenting agents in an effort to rehabilitate consent across a range of settings. To this end, we might seek to level as many playing fields as possible so that more or less autonomous, equal, and informed individuals can routinely give morally efficacious consent; to rebuild intermediary institutions that can inculcate shared values; and to lower the barriers to reaching and sustaining collective consent.

One way to do this is to level down the market power of dominant groups and institutions. In the context of digital privacy, for example, enabling fair contractual bargaining between ordinary people and Big Tech firms might require curtailing the latter's economic and informational clout and the incentives that come with their business model to use that clout in exploitative ways. This could be achieved through procompetition rules, public utility regulations, or other kinds of structural reforms.[395] In the context of sex, transforming consent into a reliable guarantor of women's autonomy may not be possible without first dismantling gender-based inequalities of power, wealth, status, and influence. Thus, a better understanding of the pervasiveness of unwelcome sex could lead us to "embrace a moral duty and a political

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395. See Khan & Pozen, supra note 151, at 538–40 (discussing regulatory interventions for Big Tech that would "reshape business incentives through bright-line prohibitions on specific modes of earning revenue" and "creat[e] the conditions for greater competition and consumer autonomy"); see also Case C-252/21, Meta Platforms, Inc. v. Bundeskartellamt, ECLI:EU:C:2023:537, ¶ 154 (July 4, 2023) (holding that national competition authorities may take into account Meta's dominant market position in assessing whether users' consent is "freely given" within the meaning of the GDPR). A comprehensive regulatory regime would have to go beyond individual consumer transactions with tech firms in other ways as well. Some of the most severe harms stemming from these firms' use of data—polarization and political manipulation, the collapse of epistemic and intellectual culture, the erosion of the background conditions for autonomous choice and identity formation—are social, not individual. Because individual users do not fully internalize the costs of their disclosures, individual control over data, no matter how consensual, can never be a fully adequate solution. See Omri Ben-Shahar, Data Pollution, 11 J. Legal Analysis 104, 106 (2019) ("The privacy paradigm is disturbingly incomplete because the harms from data misuse are often far greater than the sum of private injuries to the individuals whose information is taken."); Julie E. Cohen, What Privacy Is For, 126 Harv. L. Rev. 1904, 1927 (2013) ("Privacy rights protect individuals, but to understand privacy simply as an individual right is a mistake."); Viljoen, supra note 80, at 578 (arguing that "individualist" approaches to data governance "are structurally incapable of representing the interests and effects of data production's population-level aims"); Andrew Keane Woods, The New Social Contracts, 77 Vand. L. Rev. 1831, 1839 (2024) ("[T]here is clearly a mismatch between the massive social impact of today's platform terms and the relative silence about that social impact in both contract law and contract scholarship."); see also Daniel J. Solove & Woodrow Hartzog, Kafka in the Age of AI and the Futility of Privacy as Control, 104 B.U. L. Rev. 1021, 1026–29 (2024) (surveying various "societal structure" models of privacy).

imperative to attend to its causes, with an eye toward using both law and politics to eradicate or at least ameliorate those conditions."[396] In addition to resuscitating the labor movement,[397] lawmakers seeking to restore the possibility of meaningful consent by workers could curb the labor market power of employers through antitrust regulation of monopsonies.[398] Recognizing the futility of consensual plea bargaining might lead us to disempower prosecutors not only by forbidding particular tactics but also by scaling back criminal law itself and the statutory basis for mass incarceration.

The flip side of these leveling-down reforms are measures to level up the bargaining power of more vulnerable parties through collective action. Laws in support of labor unions are the paradigmatic example. By reducing asymmetries of resources and capacities between workers and employers, such laws may enhance the moral as well as the material quality of their employment contracts and other consensual agreements.[399] Plea bargaining strikes, class action lawsuits, collective rights organizations in copyright, and developing country coalitions in international institutions operate on a similar logic.[400] They aim to bolster consent not by policing the terms of transactions but by restructuring the relationship between the transacting parties.

These leveling-up measures are not unalloyed goods from the standpoint of consent theory, however. For at the same time that they help disempowered parties strike better deals with powerful institutions, these measures tend to limit the scope for individual negotiation and customization. The result is what we might call a *consent–consent tradeoff*. In the labor context, for instance, mandatory "agency fees" enable unions to attain power at the bargaining table in part by overriding the desires of workers who would prefer not to pay them (even while benefitting from

396. West, Consent, supra note 7, at 33.

397. See, e.g., Andrias, supra note 187, at 78–92 (advocating for a transformed system of sectoral bargaining); Sachs, Unbundled Union, supra note 188, at 198–203 (proposing that unions be restructured as political organizing vehicles).

398. See Posner, How Antitrust Failed, supra note 196, at 61–75.

399. See supra section III.C.

400. See Amrita Narlikar, International Trade and Developing Countries: Bargaining Coalitions in the GATT & WTO 10 (2003) ("The limited bargaining power of developing countries makes coalitions an especially crucial instrument for their effective diplomacy in international negotiations."); John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 881 (1987) ("[T]he class action traditionally served to increase the plaintiff's bargaining power against larger, wealthier defendants."); Crespo, No Pleas, supra note 221, at 2007 (recommending plea strikes as a remedy for the coercive nature of plea bargaining); Kristelia A. García, Facilitating Competition by Remedial Regulation, 31 Berkeley Tech. L.J. 183, 191 (2016) (noting that "the traditional justifications for collective rights organizations" include not only reducing copyright holders' transaction costs but also "consolidati[ng]" and enhancing their "bargaining power").

the bargains negotiated on their behalf).[401] When the Supreme Court decided in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* that "public-sector unions may no longer extract agency fees from nonconsenting employees," it exalted these employees' individual consent over their capacity for collective consent.[402]

In many other contexts as well, it will be exceedingly difficult, if not impossible, to realize the promise of morally transformative consent without sacrificing some degree of private ordering and freedom of contract in favor of communal ordering and bargaining leverage. Put another way, enhancing the voices of individual consenting agents through collective action may entail restricting some of their choices. This is a trade that neoliberalism has been loath to make, given its prioritization of the autonomous "consenting individual,"[403] and that those who wish to rehabilitate consent by cleaving liberalism from neoliberalism must be open to.[404]

Problems of achieving and sustaining consent can also be addressed at a societal level. The hyperpartisan polarization that has deformed constitutional lawmaking and imperiled losers' consent might be reduced through election reforms, as well as sustained efforts to revive norms of cooperation in government and to rebuild mediating organizations in civil society.[405] More broadly, we might confront the "root causes of our discontent" with consent by implementing policies to enhance political representation and reduce inequality,[406] or by building a culture of "inclusive patriotism" that brings more Americans on board with the

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401. See Benjamin I. Sachs, Agency Fees and the First Amendment, 131 Harv. L. Rev. 1046, 1047 (2018) ("Agency fees are the sole means through which unions have been permitted to overcome what otherwise would be an existential collective action problem."); see also supra note 86 and accompanying text (highlighting the tension between mandatory union membership and individual "free labor").

402. 138 S. Ct. 2448, 2486 (2018). Even at the individual level, one might question whether employees who must pay a union to hold certain jobs are coerced in a different or more severe way than nonunionized employees who are driven by economic necessity to accept work on the terms made available in employment markets characterized by unequal bargaining power. See Benjamin I. Sachs, Unions, Corporations, and Political Opt-Out Rights After *Citizens United*, 112 Colum. L. Rev. 800, 829–30 (2012).

403. Britton-Purdy et al., supra note 6, at 1814.

404. Cf. Samuel Moyn, Liberalism Against Itself: Cold War Intellectuals and the Making of Our Times 1–11 (2023) (advocating a return to, and updating of, a social-democratic liberalism that embraces "economic fairness" and recognizes "liberty might require some kind of equal standing in society and politics").

405. See generally Solutions to Political Polarization in America (Nathaniel Persily ed., 2015) (compiling proposed solutions to polarization); Margaret Harris & Carl Milofsky, Mediating Structures: Their Organization in Civil Society, Nonprofit Pol'y F., July 2019, at 1, 8 (describing "the kinds of mediating structures [that] are important for sustaining civil society and pluralist democracy").

406. Acemoglu & Robinson, supra note 335.

project of multiracial democracy.[407] In the international arena, we could create a more robust and equitable system of multinationalism, "global democracy," or even "global constitutionalism."[408]

In contemporary law reform debates, creating the conditions for meaningful consent by addressing root causes is the path most likely to be ignored or dismissed as utopian, much as radical deconstructions of consent were sidelined in prior generations.[409] But without having to wait for any revolution, lawmakers can take concrete steps now to create a world in which meaningful consent, at least in some contexts, is broadly possible—and, not incidentally, a world that is more just. Consent can thus be understood not, per the standard Marxian critiques, as an impediment to justice, but instead as an ideal motivating justice's pursuit. Wherever the law of consent is widely seen to be in crisis, a deeper social ill lurks.

CONCLUSION

In legal field after legal field, commentators increasingly insist that there is a crisis of consent. They are right—indeed, more right than they may suppose. This Article's central claim is that these various crises are interrelated in important ways, so that the crisis is best seen as systemic. From domestic private law to international public law, many of today's most pressing social and political problems are bound up with the crisis of consent.

More than that, this Article has shown that the crisis of consent is both a symptom and cause of the crisis of liberal democracy. If one wants to make sense of the growing discontent with the latter, it is therefore vital to understand how and why consent has been breaking down throughout the law. And if one wants to resist increasingly popular illiberal competitors on the left and the right,[410] it is vital to understand the kinds of reforms that will be needed to redeem the value of consent and, with it, the emancipatory aspirations of the liberal legal order.

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407. Mounk, supra note 323, at 208–10.

408. See, e.g., Joshua Cohen & Charles F. Sabel, Global Democracy?, 37 N.Y.U. J. Int'l L. & Pol. 763 (2005); Mattias Kumm, Anthony F. Lang Jr., James Tully & Antje Wiener, How Large Is the World of Global Constitutionalism?, 3 Glob. Constitutionalism 1 (2014).

409. See supra section I.B.

410. See, e.g., Zack Beauchamp, The Anti-Liberal Moment, Vox (Sep. 9, 2019), https://www.vox.com/policy-and-politics/2019/9/9/20750160/liberalism-trump-putin-socialism-reactionary [https://perma.cc/A6S8-ERNV] (reviewing the "flowering of criticism of American liberalism" in recent years "on both the left and right"); Francis Fukuyama, Liberalism and Its Discontents, Persuasion (Oct. 5, 2020), https://www.persuasion.community/p/liberalism-and-its-discontent [https://perma.cc/F49U-DAP3] (discussing the rise of "parallel" illiberal movements among progressives and conservatives).