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BOOK REVIEW

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ABSTRACTS

ARTICLE

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.

NOTES

In 1901, the Supreme Court held that the United States could control territorial land possessions indefinitely, without plans to eventually grant statehood. Over the next twenty-one years, the Court handed down what are infamously known as the Insular Cases*: a series of decisions that reaffirmed the distinctions between "incorporated territories"—those destined for statehood—and "unincorporated territories," the fates of which remained unclear. Artificially distinguishing these two types of territories, the* Insular Cases *carved out certain provisions of the U.S. Constitution that would not extend to the unincorporated territories. In reaching this conclusion, the Court created the territorial incorporation doctrine: the judicial means by which to incorporate (or limit) constitutional rights in the unincorporated territories.*

This Book Review suggests that Spence's approach is necessary, but not sufficient, to ensure sound climate policy. Highlighting the knowledge-producing functions of federal agencies, it emphasizes the critical role that government research on climate science, climate impacts, and new technologies plays in the policy conversations Spence seeks. The Book Review outlines recent actions by the executive branch to undercut knowledge production and dissemination at the National Oceanic and Atmospheric Administration, the Department of Energy, and other federal agencies. Concluding that substitutes are unlikely to be sufficient, it suggests approaches that Congress and other actors might take to defend agency knowledge production, promote transparency, and strengthen the integrity of federal-agency-produced data.

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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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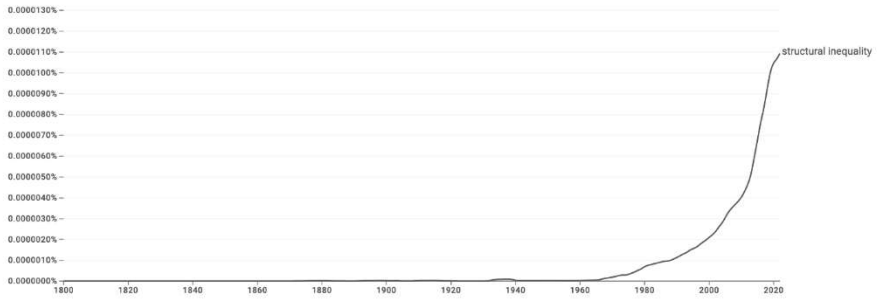
102. See supra section I.A.

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.

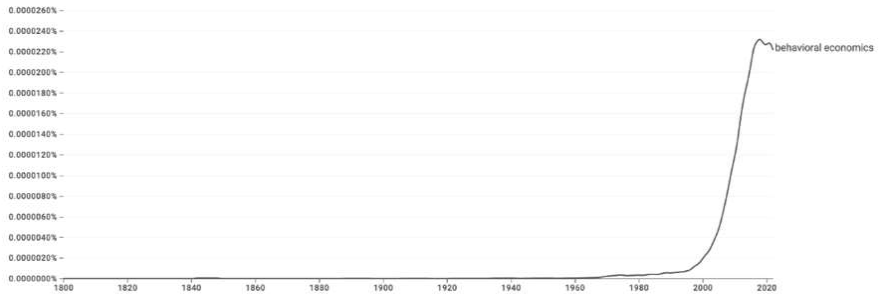
110. Renata Grossi, What Can Contract Law Learn From #MeToo?, 49 J.L. & Soc'y 263, 276 (2022); see also id. at 275 ("Just as patriarchy makes a mockery of consent in negotiating sexual encounters, so too do free market economics, liberalism, and neoliberalism make a mockery of consent and freedom to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

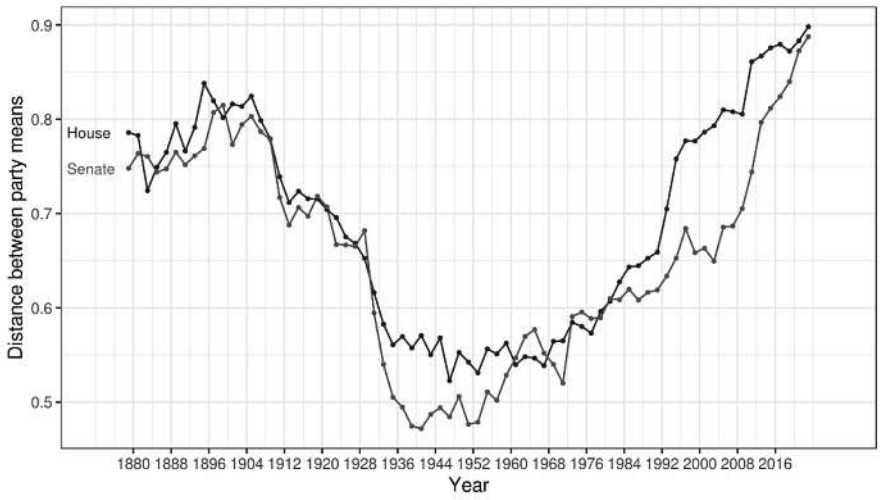
124. Cf. David A. Westbrook, Liberal Environmental Jurisprudence, 27 U.C. Davis L. Rev. 619, 689 n.178 (1994) ("To consent, one must be at least rational, that is, in possession of some capability to ratiocinate and to communicate. One must also possess some sense of being distinct from others.").

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

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 marketplace."[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

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

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

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

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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).

NOTES

JURY TRIALS AND THE TERRITORIAL INCORPORATION GAP

*Nicolas Tabio**

In 1901, the Supreme Court held that the United States could control territorial land possessions indefinitely, without plans to eventually grant statehood. Over the next twenty-one years, the Court handed down what are infamously known as the Insular Cases*: a series of decisions that reaffirmed the distinctions between "incorporated territories"—those destined for statehood—and "unincorporated territories," the fates of which remained unclear. Artificially distinguishing these two types of territories, the* Insular Cases *carved out certain provisions of the U.S. Constitution that would not extend to the unincorporated territories. In reaching this conclusion, the Court created the territorial incorporation doctrine: the judicial means by which to incorporate (or limit) constitutional rights in the unincorporated territories.*

While the incorporation of constitutional rights against the unincorporated territories has largely stalled over the last century, incorporation of such rights against the states has emerged and solidified itself as an ever-expanding doctrine under the Fourteenth Amendment. Thus, as selective incorporation continues to march forward, rights now applicable against the states remain inapplicable against the territories—an asymmetrical result that propagates colonial attitudes, permits disparate treatment, and denies U.S. citizens in the unincorporated territories the full significance of their citizenship.

This asymmetry is the "territorial incorporation gap." This Note aims to bridge that gap by arguing that the Seventh Amendment's civil jury trial right should be incorporated in Puerto Rico. To that end, this Note proposes an unlikely and reluctant solution: judicial application of the territorial incorporation doctrine, the lasting vestige of the rightly maligned Insular Cases.

* J.D. Candidate 2026, Columbia Law School; Articles Editor, *Columbia Law Review*. I would like to thank Professor Christina D. Ponsa-Kraus for her valuable guidance throughout the writing process. For their helpful suggestions, thank you to James Campbell, Professor Emmanuel Hiram Arnaud, and Neil Weare. Finally, I would like to thank the members of the *Columbia Law Review* for their tireless and thoughtful editorial work.

"The basic right to a civil jury trial is a fundamental liberty interest . . . . The Seventh Amendment applies within the states, commonwealths, and territories of the United States."

— *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.* (D.P.R. 2014).[1]

"[T]he inescapable conclusion [is] that trial by jury in American Samoa as of the time when Jake King went to trial on the criminal charges here involved would not have been, and is not now, 'impractical and anomalous'."

— *King v. Andrus* (D.D.C. 1977).[2]

INTRODUCTION

At the turn of the twentieth century, the Supreme Court released a series of infamous opinions known as the *Insular Cases*. Littered with racist diatribes, the opinions addressed the legal status of the territories acquired in the aftermath of the Spanish–American War and, in doing so, laid the foundations of American imperialism. Guam, the Philippines, and Puerto Rico were placed in a legal purgatory: part of the United States, but with limited constitutional rights and privileges. Thus, these territories—labeled "unincorporated territor[ies]"[3]—were relegated to second-class

1. Gonzalez-Oyarzun v. Caribbean City Builders, Inc., 27 F. Supp. 3d 265, 275 (D.P.R. 2014), vacated and remanded, 798 F.3d 26 (1st Cir. 2015).

2. King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977).

3. Rassmussen v. United States, 197 U.S. 516, 525 (1905); see also Christina Duffy Ponsa-Kraus, The *Insular Cases* Run Amok: Against Constitutional Exceptionalism in the Territories, 131 Yale L.J. 2449, 2452 n.2 (2022) (noting that "[t]he Court first used the term 'unincorporated' with respect to U.S. territories in *Rassmussen*").

status within our newfound colonial empire.[4] The result of this second-class status has been a constitutional rights gap, whereby territorial residents receive fewer protections than their state counterparts.

Along with many political and sovereign rights, two constitutionally secured individual rights have been neglected in the territories: the rights to civil and criminal jury trials. These protections, guaranteed by Article III,[5] the Sixth Amendment,[6] and the Seventh Amendment,[7] have been applied inconsistently (if at all) throughout the territories and mark two of the few rights not guaranteed by the Constitution to all territorial inhabitants.[8]

While territorial inhabitants have been consistently denied their legal equality, resistance to this jurisprudential thread has increased in recent years, perhaps most pointedly by Justice Neil Gorsuch, who has called for the *Insular Cases* to be overruled.[9] Similarly, the Department of Justice announced in July 2024 that it no longer considers the *Insular Cases* in its work.[10] These government actors join the list of academics who have long argued that the *Insular Cases* must be overturned to promote legal equality

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4. Today, after Filipino and Cuban independence and additional acquisitions, the current list of unincorporated territories is: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. Developments in the Law: The U.S. Territories, 130 Harv. L. Rev. 1616, 1617 (2017).

5. U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .").

6. Id. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

7. Id. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

8. See Andrew Kent, The Jury and Empire: The *Insular Cases* and the Anti-Jury Movement in the Gilded Age and Progressive Era, 91 S. Cal. L. Rev. 375 app. (2018) (detailing how most constitutional rights were guaranteed in Puerto Rico either by constitutional incorporation, congressional legislation, local legislation, or military or executive order); id. at 382 ("[J]ury guarantees were the only rights which U.S. policymakers in Washington actually wanted to withhold from residents of unincorporated territories."); Ponsa-Kraus, supra note 3, at 2472 ("[N]early every right [the Supreme Court] considered [in the *Insular Cases* and their progeny] turned out to be fundamental in every unincorporated territory, with the exception of the federal rights to an indictment by a grand jury and a jury trial."); Michael D. Ramsey, The Originalist Case Against the *Insular Cases*, 77 Fla. L. Rev. 517, 589–90 (2025) (arguing that overruling the *Insular Cases* would extend the Constitution's criminal and civil jury trial rights to the unincorporated territories).

9. See United States v. Vaello Madero, 142 S. Ct. 1539, 1557 (2022) (Gorsuch, J., concurring) ("[T]he time has come to recognize that the Insular Cases rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them.").

10. See DOJ, Just. Manual § 1-21.100 (2024) ("[I]t is the Department's view that the racist language and logic of the Insular Cases deserve no place in our law. Department litigators can and should include similar statements, as appropriate, in filings addressing the Insular Cases."). While the second Trump Administration has not yet indicated if it intends to continue this practice, the policy remains a part of the DOJ *Justice Manual*. Id.

between the states and unincorporated territories.[11] Yet despite these efforts, the *Insular Cases* remain untouched to this day.

This territorial incorporation gap, whereby individual rights have been unequally incorporated in the states and territories, must be reconsidered and bridged. But given the staying power of the *Insular Cases*, it has become clear that both courts and litigating parties need to approach this issue from a new perspective to achieve lasting change. While much scholarship is focused on overturning the *Insular Cases*,[12] this Note argues that the solution to closing the rights gap between the states and the territories can be found in the unlikeliest of places: the *Insular Cases* themselves. Despite their imperial thrust, the *Insular Cases* and their progeny provide a clear set of judicial standards that are familiar to the constitutional incorporation analysis. This Note argues that courts and litigating parties should reconsider these judicial standards and use them to argue for the incorporation of constitutional rights in unincorporated territories.

The starting point should be jury trial rights. The incorporation of the Sixth or Seventh Amendments against the territories has not been examined by the Supreme Court since 1922, when it explained in *Balzac v. Porto Rico* that neither applied in Puerto Rico.[13] Since then, the Sixth Amendment's criminal jury trial right has been incorporated against the states and only one of the territories.[14] And while the Seventh Amendment

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11. See, e.g., Adriel I. Cepeda Derieux, To Lift a Dark Cloud: The *Insular Cases*' Stubborn Vitality, Their Place in Civil Rights Law, and the Need to Overrule Them, 56 Suffolk U. L. Rev. 503, 514–19 (2023) (arguing that the *Insular Cases* and the territorial incorporation doctrine should be overruled); Adriel I. Cepeda Derieux & Rafael Cox Alomar, Saying What Everyone Knows to Be True: Why Stare Decisis Is Not an Obstacle to Overruling the *Insular Cases*, 53 Colum. Hum. Rts. L. Rev. 721, 728–29 (2022) ("The *Insular Cases*—and, specifically, the territorial incorporation doctrine that they commonly stand for—meet every factor that the Supreme Court has said might merit the Court to overrule its own precedent."); Sarah M. Kelly, Toward Self-Determination in the U.S. Territories: The Restorative Justice Implications of Rejecting the *Insular Cases*, 28 Mich. J. Race & L. 109, 142–43 (2023) (noting that congressional overturning of the *Insular Cases* would be a "meaningful symbolic step" toward restorative justice); Ramsey, supra note 8, at 590–91 (arguing that the Constitution's text and relevant history contradict the Court's reasoning in the *Insular Cases*); Neil Weare, Why the *Insular Cases* Must Become the Next *Plessy*, Harv. L. Rev. Blog (Mar. 28, 2018), https://harvardlawreview.org/blog/2018/03/why-the-insular-cases-must-become-the-next-plessy/ [https://perma.cc/V5NW-CWZM]; see also Gary Lawson & Guy Seidman, The First "Incorporation" Debate, *in* The Louisiana Purchase and American Expansion, 1803–1898, at 19, 36 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005) ("[T]he doctrine of the *Insular Cases* simply makes no sense.").

12. See supra note 11.

13. 258 U.S. 298, 304–07 (1922).

14. See Duncan v. Louisiana, 391 U.S. 145, 149 (1968) ("Because . . . trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment[] . . . ."); King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977) (incorporating the Sixth Amendment's jury trial right against American Samoa) .

has not yet been incorporated,[15] it is a question of when, not if, considering the Court's increasingly successful project of fully incorporating the Bill of Rights against the states.[16]

To incorporate the jury trial right in the remaining territories, the courts need only look to the 1977 case, *King v. Andrus*, in which the U.S. District Court for the District of Columbia applied the *Insular Cases* and held that the Sixth Amendment jury trial right applied in American Samoa.[17] Undisturbed to this day, *King* marks the only standing federal judicial opinion incorporating a jury trial right against an unincorporated territory.[18] To reach this conclusion, the district court did not deride the *Insular Cases*, nor did it repurpose them.[19] Rather, the court merely applied the judicial standard laid out in the *Insular Cases* and incorporated a constitutional right.

About forty years later, the District Court for the District of Puerto Rico issued a similar opinion in *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*, holding that the civil jury trial right was fundamental "within the states, commonwealths, and territories of the United States" and, therefore, was incorporated against both the territories and the states.[20] This opinion was "unsurprising[ly]"[21] overturned by the First Circuit

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15. See, e.g., Chicago, Rock Island & Pac. Ry. Co. v. Cole, 251 U.S. 54, 56 (1919) (holding that the Seventh Amendment was not incorporated against the states).

16. See Richard Boldt & Dan Friedman, Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation, 76 Md. L. Rev. 309, 325 (2017) ("[B]y the early decades of the twenty-first century, virtually all of the protections in the Bill of Rights had been incorporated against the states."); see also Thomas v. Humboldt County, 223 L. Ed. 2d 141, 141 (2025) (mem.) (statement of Gorsuch, J., respecting the denial of certiorari) (arguing that the Court should revisit incorporation of the Seventh Amendment but conceding that this case was an inadequate vehicle).

17. 452 F. Supp. at 17.

18. The U.S. District Court for the District of Puerto Rico incorporated the Seventh Amendment's civil jury trial right against Puerto Rico, but the First Circuit vacated the decision. Gonzalez-Oyarzun v. Caribbean City Builders, Inc., 27 F. Supp. 3d 265, 275 (D.P.R. 2014), vacated and remanded, 798 F.3d 26 (1st Cir. 2015).

19. The "repurposing project" argues that the *Insular Cases* should be maintained and built on to achieve two goals: "cultural accommodation and continued U.S. sovereignty." Ponsa-Kraus, supra note 3, at 2457 (emphasis omitted); see also Russell Rennie, Note, A Qualified Defense of the *Insular Cases*, 92 N.Y.U. L. Rev. 1683, 1707 (2017) (arguing that the *Insular Cases* can be repurposed to protect cultural traditions in the unincorporated territories). While this Note does argue that the *Insular Cases* can provide some utility, its goals are distinct from the repurposing project. The repurposing project suggests that the constitutional inequality inherent in the *Insular Cases* can be useful. This Note, however, argues that the *Insular Cases* can be used to escape constitutional inequality. Thus, while the repurposing project embraces the counterintuitive benefits of second-class legal status, this Note wholly rejects anything less than equality under the law.

20. 27 F. Supp. 3d at 280.

21. Arturo V. Bauermeister, LinkedIn, Civil Jury Trials in Puerto Rico Courts? No, Says the First Circuit. (Aug. 17, 2015), https://www.linkedin.com/pulse/civil-jury-trials-puerto-rico-courts-says-first-bauermeister/ [https://perma.cc/TUF4-VG3S].

Court of Appeals,[22] but the district court's opinion nonetheless shows a viable means by which courts can apply the terms of the *Insular Cases* to pursue what the *Insular Cases* sought to prevent: constitutional equality.

Many judges, litigators, and academics have rightfully lambasted the racist roots that undergird the *Insular Cases*.[23] This Note does not disagree with that impulse; every day that the *Insular Cases* remain good law is another day in which territorial inhabitants live in a state of "separate and unequal."[24] Yet identifying the "rotten foundation[s]" of the *Insular Cases*, it seems, is not enough.[25] Instead, this Note will argue that the best path forward is a reluctant embrace of the *Insular Cases*, which, if applied correctly to Puerto Rico, can bridge the inequality inherent in the territorial incorporation gap. And while it is outside the scope of this analysis, there is no reason why this argument could not be revised and applied to advocate for jury trial rights—among other constitutional rights—in other unincorporated territories.

This Note proceeds in three parts. Part I explores the *Insular Cases* and their historical backdrop. Departing from centuries of American expansionism, the annexation of the unincorporated territories in 1898 was the first major foray outside mainland North America.[26] The territories' geographic distances and cultural divides led politicians and the courts to squabble over how these territories should—or constitutionally must—be governed. Against this backdrop, the Supreme Court stumbled through the *Insular Cases*: by first inventing the territorial incorporation doctrine—under which certain constitutional protections would not apply in the territories—then reworking and reiterating this confused legal standard over decades.[27] Fifty years later, the Court would

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22. *Gonzalez-Oyarzun*, 798 F.3d at 30.

23. See, e.g., United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring) ("The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law."); Consolidated Opening Brief for Petitioner Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. at 59, Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-1521), 2019 WL 4034611 ("The *Insular Cases* reflect outdated theories of imperialism and racial inferiority that have outlived their usefulness."); Ponsa-Kraus, supra note 3, at 2455 ("[T]he Court implicitly embraced the view that the theory of political legitimacy underlying the Constitution allowed for an exception, born of practical necessity and motivated by racism, permitting a representative democracy to govern people deemed inferior indefinitely without representation.").

24. Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal 5 (1985).

25. *Vaello Madero*, 142 S. Ct. at 1557 (Gorsuch, J., concurring).

26. See infra note 54 and accompanying text.

27. What exactly the *Insular Cases* legally stand for is debated even now. An early formulation of the constitutional question was whether the Constitution "followed the flag." Ponsa-Kraus, supra note 3, at 2466 (internal quotation marks omitted). Answers to this question have varied. Contemporary theorists argued across the spectrum: from "absolute congressional power, totally unfettered by other constitutional constraints" to the entire Constitution applying in full. Pedro A. Malavet, "The Constitution Follows the Flag . . . But

crystallize the main elements of the doctrine: For a right to be judicially incorporated against unincorporated territories, the right must be (1) "fundamental"[28] and (2) neither "impracticable" nor "anomalous."[29]

Part I then considers how the Court's application of the territorial incorporation doctrine has departed from its sibling project: state incorporation of constitutional rights. The territorial incorporation doctrine is territory-specific, considering the factual background of the territory where the right may be incorporated.[30] As a result, it is fruitful to compare state and territorial incorporation through the lens of Puerto Rico, which, despite its extensive colonial history and integration of Anglo-American common law features,[31] still features a glaring incorporation gap: the Sixth Amendment criminal jury trial right. And while the incorporation gap has remained static in recent years, recent case law suggests that the Seventh Amendment may be incorporated against the states,[32] which would only further widen the incorporation gap. Thus, Part I moves on to evaluate the jury trial right in Puerto Rico and in the states today.

Part II details how the incorporation gap, and specifically the denial of jury trial rights, adversely affects Puerto Rican residents. In civil cases,

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Doesn't Quite Catch Up With It": The Story of *Downes v. Bidwell*, *in* Race Law Stories 111, 135 (Rachel F. Moran & Devon Wayne Carbado eds., 2008). As it relates to this Note, it is clear from the case law that "fundamental limitations" on congressional action "certainly apply within unincorporated territories." Ponsa-Kraus, supra note 3, at 2453. So long as the *Insular Cases* exist, expanding the list of "fundamental" territorial rights is the central goal of this Note.

28. Downes v. Bidwell, 182 U.S. 244, 268 (1901) (plurality opinion) ("Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments . . . ."); id. at 291 (White, J., concurring) ("[T]here may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.").

29. See Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring) ("[T]here is no rigid and abstract rule that Congress . . . must exercise [congressional power overseas] subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous."). As discussed in section I.A, some courts have evaluated both elements of this test, while others have held that the territorial incorporation doctrine is satisfied if either element is met. Given the uncertainty among the courts, this Note assumes the more restrictive formulation of the test—which requires that both elements be met—for the sake of completeness.

30. Balzac v. Porto Rico, 258 U.S. 298, 309–10 (1922) (explaining that constitutional jury trial rights had been incorporated in Alaska but not Puerto Rico or the Philippines in part because of "the needs or capacities of the people" and the historical lack of jury trials in the unincorporated territories (internal quotation marks omitted) (quoting Dorr v. United States, 195 U.S. 138, 148 (1904))).

31. See infra text accompanying notes 204–217.

32. See Thomas v. Humboldt County, 223 L. Ed. 2d 141, 142 (2025) (mem.) (statement of Gorsuch, J., respecting the denial of certiorari) (noting that the Court "should confront its Seventh Amendment" incorporation denial "soon"); McDonald v. City of Chicago, 561 U.S. 742, 765 & n.13 (2010) (noting that the Court would likely find in favor of Seventh Amendment incorporation if the question were squarely before the Court).

plaintiffs are more likely to receive favorable results—such as larger awards and punitive damages—in front of a jury; therefore, the inability to present a civil case to a jury leads to unequal *and worse* outcomes.[33] Furthermore, the Puerto Rican Constitution guarantees only an incomplete right to a criminal jury trial: Only nine of twelve jurors are required to render a guilty verdict.[34] While the Puerto Rican Supreme Court has tried to artificially incorporate the Sixth Amendment's unanimity right into territorial jurisprudence,[35] the lack of territorial incorporation of the Sixth Amendment leaves criminal defendants' liberty interests at risk, even when a quarter of the jury believes them to be not guilty.

Part III argues that the solution is a clear statement from the Supreme Court incorporating jury trial rights against Puerto Rico. While overturning the *Insular Cases* may be a more direct path to constitutional equality for Puerto Ricans and other residents of the unincorporated territories, the Court does not have to unravel the *Insular Cases* to hold that jury trial rights apply to Puerto Rico. Instead, the Court could take this small step toward constitutional equality in the territories by taking the *Insular Cases* and their progeny on their face and applying the two relevant legal standards—"fundamental" and "impracticable and anomalous"—to the Seventh Amendment jury trial right in Puerto Rico.[36]

In sum, this Note argues that the *Insular Cases* themselves provide the opportunity to move toward constitutional equality in Puerto Rico, despite the attempts of Congress and the Court to relegate Puerto Ricans to second-class status. To make its argument, this Note will evaluate American influence on the Puerto Rican legal system, consider Puerto Rican legal history from before the Spanish–American War to the present, and

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33. See Harry Kalven, Jr. & Hans Zeisel, The American Jury 62–63 (1966) (finding that judges and juries disagree on verdicts in 19% of criminal cases and 22% of civil cases); Reid Hastie, David A. Schkade & John W. Payne, A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages, 22 Law & Hum. Behav. 287, 306 (1998) ("In the cases we studied individual jurors exhibited a persistent tendency to favor the plaintiffs, concluding that punitive damages were warranted when judges had concluded they were not. These verdicts are not anomalies; they were consistently obtained for the factual circumstances and with standard instructions on the law . . . ."); W. Kip Viscusi, Do Judges Do Better? [hereinafter Viscusi, Do Judges Do Better?], *in* Punitive Damages: How Juries Decide 186, 207 (Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade & W. Kip Viscusi eds., 2002) [hereinafter Punitive Damages] (noting that jurors were more "predisposed toward excessive awarding of punitive damages" than judges).

34. P.R. Const. art. II, § 11.

35. See Pueblo v. Torres Rivera, 204 P.R. Dec. 288, 300–01 (2020) (holding that the U.S. Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020)—in which the Court incorporated the Sixth Amendment's unanimity requirement against the states—applied to Puerto Rican criminal proceedings); Pueblo v. Santa Vélez, 177 P.R. Dec. 61, 65 (2009) (holding that *because* the Sixth Amendment's jury trial right applies against the states through the Due Process Clause of the Fourteenth Amendment, it *therefore* applies to Puerto Rico—thus circumventing the territorial incorporation doctrine).

36. Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring); Downes v. Bidwell, 182 U.S. 244, 268 (1901) (plurality opinion).

conclude that Puerto Ricans (almost all of whom are U.S. citizens[37]) are and always have been worthy of the right to jury trials. While this solution would not disturb the larger constitutional relationship between the United States and Puerto Rico—a relationship that must also be reevaluated—it would help bridge constitutional inequality in Puerto Rico and potentially all of the unincorporated territories.

I. THE TERRITORIAL INCORPORATION GAP DEFINED

A. *The* Insular Cases*, Their Context, and Their Progeny*

Under the Constitution's Territorial Clause,[38] Congress has retained plenary power to govern U.S. territories since the Founding.[39] Yet, the concept of American territories predates the Founding. Congress, still acting under the Articles of Confederation, passed the Northwest Ordinance—setting up a "temporary government" for American-owned lands "North West of the river Ohio"[40]—at the same time as the Founders assembled in Philadelphia to reinvent the American republic.[41] While the

37. The Jones–Shafroth Act of 1917 established qualifications for wholesale naturalization of Puerto Rican residents, many of whom accepted—perhaps reluctantly—Congress's offer of citizenship. An Act to Provide a Civil Government for Porto Rico, and for Other Purposes (Jones–Shafroth Act), ch. 145, § 5, 39 Stat. 951, 953 (1917); see also José Trías Monge, Puerto Rico: The Trials of the Oldest Colony in the World 79 (1997) [hereinafter Trías Monge, Oldest Colony] (noting that only 288 people refused American citizenship out of Puerto Rico's entire population, which during the implementation of the Jones–Shafroth Act was "well over one million" people).

38. See U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

39. See Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890) (noting that "[t]he power of Congress over the Territories of the United States is general and plenary" and derives from the Territories Clause). But see Veneno v. United States, 223 L. Ed. 2d 216, 218 (2025) (mem.) (Gorsuch, J., dissenting from denial of certiorari) ("Nor, for that matter, does the [Territories] Clause, rightly understood, endow the federal government with plenary power even within the Territories themselves." (citing United States v. Vaello Madero, 142 S. Ct. 1539, 1554–55 (2022) (Gorsuch, J., concurring))); Neil Weare, Conservative Justices Question the Foundation of U.S. Colonial Rule, SCOTUSblog (Nov. 24, 2025), https://www.scotusblog.com/2025/11/conservative-justices-question-the-foundation-of-u-s-colonial-rule/ [https://perma.cc/2UL9-ANLH] (analyzing Justice Gorsuch's dissent from denial of certiorari in *Veneno*).

40. 32 Journals of the Continental Congress 1774–1789, at 334, 336–37 (Roscoe R. Hill ed., 1936) [hereinafter Northwest Ordinance]. The First Congress passed equivalent legislation five months into its first session. See An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50 (1789).

41. Compare Northwest Ordinance, supra note 40, at 334, 336–37 (noting that the Continental Congress passed the Northwest Ordinance on July 13, 1787), with Richard R. Beeman, The Constitutional Convention of 1787: A Revolution in Government, Nat'l Const. Ctr., https://constitutioncenter.org/the-constitution/white-papers/the-constitutional-convention-of-1787-a-revolution-in-government [https://perma.cc/R65W-T9FV] (last visited Sep. 11, 2025) (noting that the Constitutional Convention took place from May 25, 1787, to September 17, 1878).

Constitution did not include the words "conquest" or "empire," the Framers left Philadelphia having structured a government capable of both—as was clear to leaders of the Founding Era.[42] Since then, the United States has increased through treaty and conquest from thirteen colonies occupying approximately 430,000 square miles[43] to fifty states today occupying approximately 3.5 million square miles.[44]

For more than one hundred years of expansion, every inhabited territory that the United States acquired would in time achieve statehood status.[45] This was intuitive: The point of expansion was for racially homogenous Americans to extend national borders.[46] Therefore, western American territories were not intended to be politically or legally distinct from the eastern states during their transitions from territories to states.[47]

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42. See The Federalist No. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The subject [of these essays] speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world."); 2 Joseph Story, Commentaries on the Constitution of the United States § 1324 (Melville M. Bigelow ed., Bos., Little, Brown & Co. 5th ed. 1891) (1833) ("[T]he general government possesses the right to acquire territory, either by conquest, or by treaty . . . ."); Letter from Thomas Jefferson to James Madison (Apr. 27, 1809), https://founders.archives.gov/documents/Jefferson/03-01-02-0140 [https://perma.cc/YW3Z-WVN7] ("I am persuaded no constitution was ever before so well calculated as ours for extensive empire & self government."); see also Juan F. Perea, Denying the Violence: The Missing Constitutional Law of Conquest, 24 U. Pa. J. Const. L. 1205, 1238–41 (2022) (arguing that, despite not using the word "conquest," the Constitution included numerous clauses that facilitated American imperialism).

43. American War of Independence: Outbreak, Nat'l Army Museum, https://www.nam.ac.uk/explore/american-war-independence-outbreak [https://perma.cc/4UVQ-MMEM] (last visited Sep. 11, 2025).

44. Profiles: United States, U.S. Census Bureau, https://data.census.gov/profile [https://perma.cc/UPZ6-HJX7] (last visited Sep. 27, 2025) (including the District of Columbia, which occupies approximately sixty square miles).

45. See Ponsa-Kraus, supra note 3, at 2453 ("Before 1898, territories annexed by the United States were presumed to be on a path to statehood."). But see Ramsey, supra note 7, at 542–43 (arguing that while "many drafters and ratifiers [of the Constitution] likely assumed Congress would admit new states from the territories[,] . . . nothing in the text [of the Territories Clause] imposes a constitutional obligation on Congress"). For an early example of a territorial acquisition never destined for statehood, see infra note 54 (describing the authorization of U.S. occupation in the Guano islands).

46. See Sam Erman, Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire 12 (2019) (noting that Senators faced with the prospect of governing alongside Caribbean representatives "[e]quat[ed] Americanness and whiteness" and feared the inclusion of multiple Caribbean states that would add "people of the Latin race mixed with Indian and African blood" to the American electorate (internal quotation marks omitted) (quoting Cong. Globe, 41st Cong., 3d Sess. app. at 30 (1871) (statement of Sen. Schurz))); Ponsa-Kraus, supra note 3, at 2454 n.8 ("Earlier territories had nonwhite inhabitants as well, but on these contiguous lands, the United States pursued a combined policy of white settlement and forceful removal.").

47. While an utterly horrific moment in the Court's history, the Court said this clearly in its reprehensible *Dred Scott* decision. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 446 (1857) (enslaved party) ("There is certainly no power given by the Constitution to the

The Confederation Congress made this clear in the Northwest Ordinance by making numerous guarantees to inhabitants of the Northwest Territories[48] that would later appear in the Bill of Rights, including a prohibition against cruel and unusual punishments,[49] a guarantee of just compensation for government takings,[50] and the right to a trial by jury.[51] And as territorial advancements continued in the American West, federal courts stepped in to ensure that constitutional rights remained securely incorporated.[52]

Uniform constitutional protections in the territories ceased soon after the end of the Spanish–American War. In the negotiated peace, Spain agreed to cede Cuba, Guam, the Philippines, and Puerto Rico to the United States.[53] This was not the first time the United States had acquired territory outside the contiguous North American continent, but the territorial spoils of the Spanish–American War represented the United States' first true foray into extracontinental colonial expansion and subsequent imperial rule.[54]

Federal Government to establish or maintain colonies . . . at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States."), superseded by constitutional amendment, U.S. Const. amend. XIV; see also James Lowndes, The Law of Annexed Territory, 11 Pol. Sci. Q., 672, 676 (1896) ("[T]he power to acquire new territory is derived from the power to admit new states into the Union.").

48. Northwest Ordinance, supra note 40, at 339–417.

49. Compare id. at 340 (outlawing cruel and unusual punishments in the Northwest Territories), with U.S. Const. amend. VIII (prohibiting cruel and unusual punishments).

50. Compare Northwest Ordinance, supra note 40, at 340 (requiring full compensation in the Northwest Territories for the taking of property or services), with U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

51. Compare Northwest Ordinance, supra note 40, at 340 (guaranteeing the right to trial by jury to inhabitants of the Northwest Territories), with U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."); see also id. amends. VI, VII (guaranteeing criminal and civil jury trials).

52. See Thompson v. Utah, 170 U.S. 343, 346 (1898) (noting that the Seventh Amendment's civil jury trial right applied in the territories); Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1850) (same); see also Reynolds v. United States, 98 U.S. 145, 162 (1878) ("Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned.").

53. Treaty of Peace Between the United States and the Kingdom of Spain, Spain–U.S., arts. I–III, Dec. 10, 1898, 30 Stat. 1754.

54. Forty-two years before the post–Spanish–American War annexations, Congress passed the Guano Islands Act of 1856, permitting U.S. citizens to occupy any uninhabited island that contained deposits of guano, a kind of fertilizer. An Act to Authorize Protection to Be Given to Citizens of the United States Who May Discover Deposites of Guano, ch. 164, 11 Stat. 119, 119 (1856). This led to the American occupation of nearly one hundred uninhabited islands. Evan Garcia, How Guano Islands Helped Build an American Empire, WTTW (Apr. 16, 2019), https://news.wttw.com/2019/04/16/how-guano-islands-helped-build-american-empire [https://perma.cc/AU23-ER89]. One of these islands, the Midway

Divisive political and legal questions immediately arose: What were these new territories? And how would American law apply to them?[55] The Supreme Court quickly intervened to begin answering these and other questions in two cases, both decided on the same day in 1901: *De Lima v. Bidwell*[56] and *Downes v. Bidwell*.[57] In these cases, a fractured Court struggled to articulate a clear position. The issue before the Court in *De Lima* was whether Puerto Rico was a domestic territory or a foreign country after the Treaty of Paris. In a 5-4 decision, the Court held that "Porto Rico [is] not a foreign country . . . but a territory of the United States."[58] This settled the "in or out" question, confirming that Puerto Rico was "in" the United States' sovereign domain.

But if Puerto Rico was a domestic territory, what was its relationship with the United States? Was Puerto Rico truly *in* the United States legally and politically, or merely owned by it? Would it be governed like the Northwest Territories and the many mainland territories that followed? And most importantly, would Puerto Rico eventually become a state like the similarly situated territories before it?

Without wasting a day, the Court dispelled the notions of guaranteed statehood and equal constitutional governance in *Downes*. At issue in *Downes* was whether the Uniformity Clause and the No Preferences Clause were applicable in Puerto Rico, given that Puerto Rico was no longer a foreign country under *De Lima*.[59] In a plurality opinion joined only by its

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Atoll, which would become a key battleground in World War II, was formally annexed in 1867. Homer C. Votaw, Midway—The North Pacific's Tiny Pet, U.S. Naval Institute: Proceedings, Nov. 1940, https://www.usni.org/magazines/proceedings/1940/november/midway-north-pacifics-tiny-pet (on file with the *Columbia Law Review*). But the Midway Islands today comprise 2.4 square miles of land and were ostensibly uninhabited in 1867—incomparable to the combined size and population of Cuba, Guam, the Philippines, and Puerto Rico in 1898. Midway Islands, Britannica (Dec. 5, 2025), https://www.britannica.com/place/Midway-Islands (on file with the *Columbia Law Review*).

55. While it took the Court less than three years to begin the project of answering these questions, legal scholars had already begun to unpack them in the immediate aftermath of the Spanish–American War. See Juan R. Torruella, Why Puerto Rico Does Not Need Further Experimentation With Its Future: A Reply to the Notion of "Territorial Federalism", 131 Harv. L. Rev. Forum 65, 69 n.24 (2018), https://harvardlawreview.org/forum/vol-131/a-reply-to-the-notion-of-territorial-federalism/ [https://perma.cc/L2YZ-53GM] (detailing five articles published in the *Harvard Law Review* immediately after the United States' post–Spanish–American War annexation in which legal scholars debated how the Constitution would apply to the country's new territories).

56. 182 U.S. 1 (1901).

57. 182 U.S. 244 (1901).

58. *De Lima*, 182 U.S. at 200.

59. *Downes*, 182 U.S. at 248–49 (plurality opinion). The Uniformity Clause of the Constitution states: "[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . . ." U.S. Const. art. I, § 8, cl. 1. The No Preferences Clause states: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." Id. art. I, § 9, cl. 6. These constitutional provisions were particularly important to U.S. interests in the immediate aftermath of the United

author,[60] the Supreme Court held that these constitutional provisions were not applicable. While the acquisition of Puerto Rico was "solely a political question" over which "[p]atriotic and intelligent men may differ," the Court held that Puerto Rico was "not a part of the United States" for purposes of the provision at issue unless "Congress shall so direct [it]"[61]—a nod to Congress's plenary authority under the Territorial Clause.[62] In this system, Puerto Rico and the other newly acquired territories existed in political and legal purgatory. For some purposes—the Court struggled to say which exactly—the territories were part of the United States. [63] But according to the plurality, territorial inhabitants could only benefit from the rights secured by the U.S. Constitution if Congress was willing to grant those rights to these territorial residents.[64]

Infamously, the plurality opinion hurled racist epithets at the inhabitants of the territories, suggesting that they were "savages" and an "alien race[], differing from us in religion, customs, laws, methods of taxation, and modes of thought."[65] This cultural divide, the Court argued, meant that "the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible."[66] Thus, the opinion provides insight into the racism and fearmongering that guided the

States' acquisition of Puerto Rico, considering Puerto Rico's strategic value for the mainland's economic and military interests. Marisabel Brás, The Changing of the Guard: Puerto Rico in 1898, *in* World of 1898: International Perspectives on the Spanish American War, Libr. Cong.: Rsch. Guides (2022), https://guides.loc.gov/world-of-1898/puerto-rico-overview [https://perma.cc/PB68-6FG4]. In *Downes*, a merchant imported goods from Puerto Rico in a New York port and was levied $659.35. *Downes*, 182 U.S. at 247 (plurality opinion). Before the Court was the question of whether Congress could impose a separate tariff rate—which generally amounted to a 25% increase—for goods shipped from a Puerto Rican port to a mainland port. See id. at 247–48; see also An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes, ch. 191, 31 Stat. 77, 77–78 (1900); Tariff for Puerto Rico: House Committee Decides for Duties on a 25 Per Cent. Basis., N.Y. Times, Feb. 3, 1900, at 6, https://timesmachine.nytimes.com/timesmachine/1900/02/03/issue.html (on file with the *Columbia Law Review*).

60. *Downes*, 182 U.S. at 247 (plurality opinion).

61. Id. at 279, 286–87.

62. But see Veneno v. United States, 223 L. Ed. 2d 216, 218 (2025) (mem.) (Gorsuch, J., dissenting from denial of certiorari) (arguing that Congress's authority over the territories is not plenary).

63. See *Downes*, 182 U.S. at 277 (plurality opinion) ("We do not wish . . . to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.").

64. In the case of Puerto Rico, Congress has enacted legislation granting the territory a constitutional right or power only two times. See An Act to Amend the Organic Act of Puerto Rico, ch. 490, sec. 7, § 2, 61 Stat. 770, 772–73 (1947) (codified at 48 U.S.C. § 737 (2018)) (applying the Article IV Privileges and Immunities Clause to Puerto Rico); An Act to Provide a Civil Government for Porto Rico, and for Other Purposes (Jones–Shafroth Act), ch. 145, § 2, 39 Stat. 951, 951–52 (1917) (incorporating numerous constitutional rights, including due process, a prohibition on government takings without just compensation, and equal protection under the laws).

65. *Downes*, 182 U.S. at 279, 287 (plurality opinion).

66. Id. at 287.

Court—and perhaps the nation[67]—when it came to governing the territories.

Nevertheless, the Court's approach, which centered primarily on whether Congress had expressly incorporated a constitutional provision through its authority under the Territorial Clause, did not prevail. Instead, Justice Edward Douglass White's concurrence would become the Court's framework for approaching federal law in the newly acquired territories. Justice White noted that the United States was familiar with territorial expansion—starting with the Northwest Ordinance and continuing through more than a hundred years of expansion.[68] Yet, as new territories joined the Union, Congress quickly acted to incorporate them into statehood. The key question in these instances, then, was whether Congress had expressly chosen to incorporate the given territory in its organic act.

The most recent example cited by Justice White was Hawaii, which had been annexed in 1898 and "given the status of an incorporated territory" in 1900 by an act of Congress.[69] Unlike Hawaii, Justice White explained, Congress had not granted Puerto Rico incorporated status in its organic act.[70] As a result, Puerto Rico would remain unincorporated,[71] and Congress would have no obligation to ensure constitutional protections within the now-unincorporated territory[72]—an obligation the government maintained in the incorporated territories at the time.[73] Thus,

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67. See Kent, supra note 8, at 452 (noting that "racism and cultural chauvinism" influenced U.S. policymakers in their attempts to more widely limit the role of juries).

68. *Downes*, 182 U.S. at 304 (White, J., concurring).

69. Id. at 305 (emphasis omitted).

70. See id. at 304–05, 341–42 (explaining that Hawaii had been "given the status of an incorporated territory" but that Puerto Rico "had not been incorporated" (emphasis omitted)); see also An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes (Foraker Act), ch. 191, 31 Stat. 77 (1900).

71. The term "unincorporated territory" is not used in *Downes*. Rather, the Court would coin the phrase four years later in Rassmussen v. United States, 197 U.S. 516, 525 (1905).

72. *Downes*, 182 U.S. at 305–06 (White, J., concurring).

73. See, e.g., New Mexico Organic Act, ch. 49, § 17, 9 Stat. 446, 447, 452 (1850) (implying that New Mexico would eventually become a state and that, until then, "the Constitution . . . shall have the same force and effect within the said Territory of New Mexico as elsewhere within the United States"). The Supreme Court did, however, issue an interesting decision in Hawaii v. Mankichi, 190 U.S. 197 (1903). In that case, the defendant was indicted after the U.S. annexation of Hawaii but before its incorporation in 1900. Id. at 209–11, 234. Despite Hawaii's subsequent incorporation, the Court applied the fundamentality test, holding that the grand jury and unanimous criminal jury trial rights of the Fifth and Sixth Amendments "are not fundamental in their nature, but concern merely a method of procedure." Id. at 217–18. Four Justices dissented, with Chief Justice Melville Fuller writing that the rights "to be free from prosecution for crime unless after indictment by a grand jury, and . . . to be acquitted unless found guilty by the unanimous verdict of a petit jury of twelve" were "fundamental rights of every person living under the sovereignty of the United States." Id. 226 (Fuller, C.J., dissenting). Had Chief Justice Fuller obtained one more vote, jury rights may have been incorporated against the territories in full

Justice White's concurrence both permitted and empowered American imperialism by creating a new legal status: the unincorporated territory.[74] And unlike the plurality opinion, which focused on whether a particular constitutional provision had been congressionally incorporated, Justice White's concurrence purported to define the relationship between the entire Constitution, the unincorporated territories, and their long-term political and legal futures in the United States.[75]

Thus, through two opinions released in a single day, the Supreme Court laid the foundations for the most ambitious chapter of American imperialism to date. The United States could own domestic territories that were categorically different from territories on track for statehood, and the inhabitants of these newly acquired lands could be governed without full constitutional protections. Over the next twenty years, the Supreme Court continued down this path, consistently distinguishing the unincorporated territories' inhabitants from those in both mainland states and incorporated territories[76] in what would, over time, comprise the *Insular Cases*.[77]

(although this holding was arguably cabined to incorporated territories). See id. at 225–26 (noting that Congress had incorporated Hawaii in 1900 and that its citizens were entitled to the "[f]undamental rights of every person living under the sovereignty of the United States," which included the rights to a grand jury indictment and unanimous jury verdicts).

74. Justice White's opinion essentially adopted one of the frameworks initially proposed in a series of legal articles published in the aftermath of the Spanish–American War. See Abbott Lawrence Lowell, The Status of Our New Possessions—A Third View, 13 Harv. L. Rev. 155, 176 (1899) (arguing that territories acquired with the intention of being "a part of the United States" must receive full constitutional protections, while territories "so acquired as not to form part of the United States" need not receive full constitutional protections); supra note 55 and accompanying text.

75. *Downes*, 182 U.S. at 344 (White, J., concurring) (affirming as constitutional that "the sovereignty of the United States may be extended over foreign territory to remain paramount until in the discretion of the political department of the government of the United States it be relinquished").

76. Including Hawaii and Alaska, which would attain statehood in the mid-twentieth century. The Last Time Congress Created a New State, Nat'l Const. Ctr.: Blog (Mar. 12, 2024), https://constitutioncenter.org/blog/the-last-time-congress-created-a-new-state-hawaii [https://perma.cc/W6X8-33VW].

77. There is scholarly "disagreement" about which rulings constitute the *Insular Cases*. Ponsa-Kraus, supra note 3, at 2460 n.32. Judge Juan R. Torruella argued that only six cases, all decided in 1901, should be included: De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); *Downes*, 182 U.S. 244; and Huus v. N.Y. & P.R. Steamship Co., 182 U.S. 392 (1901). Juan R. Torruella, One Hundred Years of Solitude: Puerto Rico's American Century, *in* Foreign in a Domestic Sense: Puerto Rico, the American Expansion, and the Constitution 241, 248 (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter Foreign in a Domestic Sense]. Puerto Rico Supreme Court Chief Justice José Trías Monge included three more cases: Dooley v. United States, 183 U.S. 151 (1901); Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); and Crossman v. United States, 182 U.S. 221 (1901). José Trías Monge, Injustice According to Law: The *Insular Cases* and Other Oddities, *in* Foreign in a Domestic Sense, supra, at 226, 239 n.1. Professor Efrén Rivera Ramos has noted that scholars have expanded past the 1901 decisions to include

Among these denied liberties was the right to a trial by jury. In *Dorr v. United States*, the Court held that the right to a jury trial in a criminal case did not apply in the Philippines.[78] Relying on a case that had been decided the prior year—*Hawaii v. Mankichi*[79]—the Court reaffirmed two principles of the nascent territorial incorporation doctrine: For a constitutional right to be applicable in the U.S. territories, the right in question must be "fundamental"[80] to the jurisdiction in question[81] or, alternatively, Congress

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numerous cases related to territorial legal issues decided over the following two decades: Hawaii v. Mankichi, 190 U.S. 197 (1903); Gonzales v. Williams, 192 U.S. 1 (1904); Kepner v. United States, 195 U.S. 100 (1904); Dorr v. United States, 195 U.S. 138 (1904); Mendezona v. United States, 195 U.S. 158 (1904); Rassmussen v. United States, 197 U.S. 516 (1905); Trono v. United States, 199 U.S. 521 (1905); Grafton v. United States, 206 U.S. 333 (1907); Kent v. Porto Rico, 207 U.S. 113 (1907); New York ex rel. Kopel v. Bingham, 211 U.S. 468 (1909); Dowdell v. United States, 221 U.S. 325 (1911); Ochoa v. Hernandez, 230 U.S. 139 (1913); Ocampo v. United States, 234 U.S. 91 (1914); and Balzac v. Porto Rico, 258 U.S. 298 (1922). Efrén Rivera Ramos, Deconstructing Colonialism: The "Unincorporated Territory" as a Category of Domination, *in* Foreign in a Domestic Sense, supra, at 104, 115 n.4; see also Christina Duffy Burnett, A Note on the *Insular Cases*, *in* Foreign in a Domestic Sense, supra, at 389, 389 (noting that scholarly literature varies on which cases comprise the *Insular Cases*).

This Note refers to the *Insular Cases* as Professor Rivera Ramos's expanded list of cases. While overbreadth is the enemy of precision, the consistent reaffirmation of the *Insular Cases* over two decades is instructive. This passage of time shows the Court evolving past its early fractured roots and eventually coalescing around Justice White's framework for analyzing territorial legal issues. This thread of case law shows how notions of an American empire gradually seeped into and solidified the Court's understanding of the extraterritorial Constitution—one that allowed and embraced American imperialism.

78. 195 U.S. at 138.

79. 190 U.S. at 197.

80. E.g., *Dorr*, 195 U.S. at 148.

81. Ponsa-Kraus, supra note 3, at 2487–89; see also id. at 2453 ("[F]undamental limitations certainly apply within unincorporated territories, though what counts as 'fundamental' may vary from one unincorporated territory to the next."); Robert A. Katz, Comment, The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories, 59 U. Chi. L. Rev. 779, 796–97 (1992) (noting that lower courts' application of the Constitution in the territories "may vary from territory to territory"). Lower courts have struggled to consistently interpret this element in recent years. Citing *Dorr* and *Downes*, the U.S. courts of appeals have interpreted the "fundamental" requirement to "extend[] only to the narrow category of rights and 'principles which are the basis of *all* free government.'" Tuaua v. United States, 788 F.3d 300, 308 (D.C. Cir. 2015) (quoting *Dorr*, 195 U.S. at 147); see also Fitisemanu v. United States, 1 F.4th 862, 878 (10th Cir. 2021) ("[O]nly those 'principles which are the basis of all free government' establish the rights that are 'fundamental' for Insular purposes." (quoting *Dorr*, 195 U.S. at 147)); Wabol v. Villacrusis, 958 F.2d 1450, 1460 (9th Cir. 1992) (articulating the same formulation of the fundamentality standard). While Justice Gorsuch characterized these decisions as an example of how lower courts "feel constrained to apply [the *Insular Cases*'] terms," United States v. Vaello Madero, 142 S. Ct. 1539, 1555 (2022) (Gorsuch, J., concurring), what the lower courts are really doing is mistakenly broadening the "fundamental" requirement. In *Dorr*, which both the *Tuaua* and *Fitisemanu* courts cite as the basis for their "all free government" standard, the Court explained that fundamental rights would depend on "the needs or capacities of the people" in question. *Dorr*, 195 U.S. at 147–48. While this paternalistic formulation is but another condescending, racist way to distinguish the unincorporated territories, it is still binding on lower courts. See *Vaello Madero*, 142 S. Ct. at

must have expressly incorporated the right against a given territory.[82] Again implying that territorial inhabitants were "savages,"[83] the Court concluded that the jury trial right was neither fundamental to the law in the Philippines—previously governed by Spanish civil law, which does not guarantee a jury trial[84]—and that Congress had not expressly granted the jury trial right.[85] Therefore, the Court held the criminal jury trial right guaranteed by the Sixth Amendment did not apply in the Philippines.[86] Nearly twenty years later, the Court would cite and reaffirm *Dorr* as applied to Puerto Rico in *Balzac v. Porto Rico*, expanding the argument to include the Seventh Amendment jury trial right for civil cases.[87]

1555 (Gorsuch, J., concurring). And in *Duncan v. Louisiana*, the Supreme Court explained that the Fourteenth Amendment incorporation doctrine—a distinct but related theory of constitutional incorporation—properly understood, considers the context of the relevant community. 391 U.S. 145, 149 n.14 (1968); see also Ponsa-Kraus, supra note 3, at 2488 ("An accurate reading of *Duncan* would have recognized that *Duncan* itself requires a fact-based, contextual inquiry into whether a right is fundamental in the context of an actual legal system."). This further underscores that the fundamentality question is one that considers local conditions, such as the territory's legal system.

Instead of muddying what is already an "uncomfortable inquiry," *Fitisemanu*, 1 F.4th at 878, courts should return to the correct formulation of *Dorr*'s "fundamental" element: an inquiry that depends on characteristics and "capacities" of the territory's legal system. *Dorr*, 195 U.S. at 147–48; see also infra text accompanying notes 201–204. This type of inquiry also conveniently mirrors the impracticable-and-anomalous element, which requires a territory-specific analysis. See supra note 30; infra note 100 and accompanying text.

82. See *Dorr*, 195 U.S. at 148 (holding that Congress can establish the right to trial by jury through two channels, one of which is "affirmative legislation").

83. Id.

84. See Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil [Royal Decree of July 24 1889 By Which the Civil Code Is Published] (B.O.E. 1889, 4763) (Spain). The system of law played a role in other early *Insular Cases*. In *Hawaii v. Mankichi*, the Court grappled with the fact that "the common law of England had been adopted in Hawaii" in 1897. 190 U.S. 197, 217 (1903). The Court, however, noted that Hawaii—which featured no grand juries and nonunanimous petit juries—had reserved the right to maintain its criminal procedures when it adopted a common law system. Id. at 197. Ultimately, the Court determined unanimous juries and grand jury indictments were not fundamental, despite four Justices dissenting. Id. at 218, 225–26. The relevance of legal systems in the fundamentality analysis is explored in section III.A.

85. See *Dorr*, 195 U.S. at 148–49.

86. Id.

87. See Balzac v. Porto Rico, 258 U.S. 298, 304–07, 313 (1922) ("[I]t is . . . clearly settled that [the Sixth and Seventh Amendments] do not apply to territory belonging to the United States which has not been incorporated into the Union." (citing *Dorr*, 195 U.S. at 145; *Mankichi*, 190 U.S. at 197)). The Seventh Amendment question was not squarely before the Court in *Balzac* and, therefore, is nonbinding dicta. See id. at 304 (noting that the Court was addressing whether "the defendant had been denied his right as an American citizen under the Sixth Amendment to the Constitution"). Furthermore, the relevance of *Balzac* is debatable. While the Court has never overruled it, *Balzac* was decided nearly fifty years before *Duncan v. Louisiana*, in which the Court held that the Sixth Amendment jury trial right is "fundamental to the American scheme of justice" and, therefore, incorporated the right against the states. 391 U.S. 145, 149 (1968). While state incorporation doctrine and

The *Insular Cases* then collected dust for more than a quarter century, rarely applied or expounded. This changed, however, thirty-five years later, when a concurrence breathed new life into the territorial incorporation doctrine. In *Reid v. Covert*, two women were accused of killing their husbands while living on American military bases abroad.[88] In each instance, they were tried by a military court without a jury trial.[89] The two defendants were convicted, and they appealed their convictions on the basis that they had not been afforded their jury trial rights.[90]

A majority of the Court agreed that the convictions needed to be overturned, but the Court could not articulate a majority position, resulting—much like in *Downes*—in a fractured set of opinions.[91] The plurality chose to distinguish the *Insular Cases*, instead focusing on the Constitution's applicability on military bases and ignoring the consolidated cases' potential effect on territorial jurisprudence.[92] Rather, as pertains to the territorial incorporation doctrine, the relevant opinion came from Justice John Marshall Harlan,[93] who recentered the then-languishing *Insular Cases*.[94]

According to Justice Harlan, the *Insular Cases* did not stand for the proposition that the "safeguards of the Constitution are never operative" outside of the United States mainland.[95] Rather, the cases stood for what he considered to be a less sweeping proposition: that "there are provisions

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territorial incorporation doctrine involve different inquiries, whether *Duncan* applies in Puerto Rico is an open question that is discussed in section I.C.1.

88. 354 U.S. 1, 3–4 (1957) (plurality opinion).

89. Id.

90. Id. at 4–5.

91. Interestingly, the Court had originally upheld the convictions in two 1956 majority opinions and held that military law would apply to Americans living on military bases abroad. Reid v. Covert, 351 U.S. 487, 488 (1956); Kinsella v. Krueger, 351 U.S. 470, 473 (1956). But the Court granted a motion for rehearing in Reid v. Covert, 352 U.S. 901 (1956) (per curiam), leading to their reversals. *Reid*, 354 U.S. at 5 (plurality opinion).

92. See *Reid*, 354 U.S. at 40 ("We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution.").

93. Justice John Marshall Harlan II—rather than his grandfather, Justice John Marshall Harlan. Both affected territorial jurisprudence: The older Justice Harlan dissented in Downes v. Bidwell, 182 U.S. 244, 375 (1901) (Harlan, J., dissenting). On one account, the elder Justice Harlan "expressed his firm conviction that the [*Insular Cases*] were fundamentally wrong in principle, and stated that he intended to dissent from every similar decision by the majority of his brethren." Frederic R. Coudert, The Evolution of the Doctrine of Territorial Incorporation, 26 Colum. L. Rev. 823, 842 (1926). Five months before he died, Justice Harlan dissented in *Dowdell v. United States*, in which the Court reaffirmed that neither the grand jury or petit criminal jury were required in the Philippines. 221 U.S. 325, 332 (1911) (Harlan, J., dissenting).

94. As Justice Harlan noted in his concurrence, "[The plurality opinion] in effect discards . . . the *Insular Cases* as historical anomalies. I believe that those cases, properly understood, still have vitality . . . ." *Reid*, 354 U.S. at 67 (Harlan, J., concurring in the judgment).

95. Id. at 74.

in the Constitution which do not *necessarily* apply in all circumstances in every foreign place."[96] Using *Balzac* as an example, Justice Harlan explained that constitutional rights need not apply in places where their application would be "impracticable and anomalous,"[97] a standard that would require a court to consider "the particular local setting, the practical necessities, and the possible alternatives [that] are relevant to a question of judgment."[98]

While courts have continued to wrestle with and update the territorial incorporation doctrine since *Reid*, the Court has never drastically altered the framework.[99] Therefore, the general steps for adjudicating territorial incorporation doctrine cases can be synthesized as follows. First, courts should ask whether Congress affirmatively endowed the given territory with the right in question pursuant to its Territorial Clause authority. If the answer is yes, the issue is not constitutional but statutory, and the court should instead evaluate the extent to which Congress has granted the constitutional right in question through statute. If not, courts must decide

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96. Id.

97. Id. at 74–76.

98. Id. at 75. Ironically, despite Justice Harlan's claim that he was narrowing the *Insular Cases*, id. at 67 (referring to the plurality's interpretation of the *Insular Cases* as "sweeping"), the "impracticable and anomalous" standard arguably expanded the territorial incorporation doctrine. The plurality opinion in *Downes* suggested that the list of fundamental rights was expansive. See Ponsa-Kraus, supra note 3, at 2468; id. at 2472 ("What counts as fundamental depends on the specific territory at issue, but the *Insular Cases* and their progeny repeatedly arrived at the same answer: nearly every right they considered turned out to be fundamental in every unincorporated territory . . . ."); see also *Downes*, 182 U.S. at 282–83 (plurality opinion) (indicating that the rights to free speech, free exercise, access to courts, equal protection, due process, freedom from unreasonable searches and seizures, and freedom from cruel and unusual punishment were fundamental rights). Yet, by establishing the "impracticable and anomalous" standard, Justice Harlan gave future Justices an *additional* mechanism by which to evaluate extraterritorial constitutional rights. Compare United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (applying only the impractical and anomalous test to argue that the Fourth Amendment's warrant requirement did not apply to a search of a foreign resident's house by federal authorities), with Fitisemanu v. United States, 1 F.4th 862, 877–81 (10th Cir. 2021) (applying *both* the fundamental test and the impractical and anomalous test to hold that birthright citizenship as guaranteed by the Fourteenth Amendment did not apply in American Samoa), and Tuaua v. United States, 788 F.3d 300, 308, 310 (D.C. Cir. 2015) (same). Thus, Justice Harlan did not rework the territorial incorporation doctrine as much as he added to it.

99. The Court did reconsider the impracticable and anomalous test for extraterritorial application of the Constitution in Boumediene v. Bush, 553 U.S. 723 (2008). In that case, the Court measured impracticability and anomaly by asking three questions: (1) Is the person claiming their rights a U.S. citizen? (2) Where did the activity in question take place? (3) What are the practical obstacles inherent in applying the asserted right? Id. at 766. These questions are not particularly insightful for the incorporation of jury trial rights in Puerto Rico. Puerto Ricans are American citizens, and for a legal proceeding to occur, the action must have some close connection to the forum. Thus, the first two questions will almost always favor application of the right. Finally, the third question does not meaningfully depart from the *Reid* test. As a result, despite being a critical step in extraterritorial constitutionalism, *Boumediene* adds little to this discussion.

whether the right is fundamental within the given territory and whether it would be either impracticable or anomalous to incorporate the right against the territory.[100] Under this test, rights that are fundamental and neither impracticable nor anomalous must be incorporated against the unincorporated territories under the territorial incorporation doctrine. This is the framework against which a territorially incorporated jury trial right claim would be resolved.

B. *Constitutional Incorporation in the States and Puerto Rico*

While the territorial incorporation doctrine's two-step analysis emanates from the Territorial Clause at step one and the Court's interpretation of U.S. colonial history and constitutional structure at step two, the doctrine's not-so-distant cousin—state incorporation doctrine—is rooted in the Fourteenth Amendment's Due Process Clause.[101] In many ways, these doctrines overlap. For example, both analyses evaluate whether a particular right is fundamental,[102] and if it is, then this fundamental

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100. There is certainly overlap between the fundamentality and impracticable and anomalous analyses, in part because Justice Harlan's test was meant to rework and revitalize the *Insular Cases*' original framework. See *Reid*, 354 U.S. at 67 (Harlan, J., concurring in the judgment) ("I believe [the *Insular Cases*], properly understood, still have vitality . . . ."); *Tuaua*, 788 F.3d at 308, 310 (holding that the Citizenship Clause was not fundamental in American Samoa and would represent an anomalous application of a constitutional right). But applying both elements—fundamental *and* impracticable or anomalous—appears counterintuitive: How could a right be fundamental but nevertheless impracticable or anomalous? The answer lies in the Court's definition of "fundamentality"—which the Court has tied to the practice's connection to "Anglo-American" common law principles, Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968)—in contrast to its fact-intensive impracticable-and-anomalous test. With this framework, one could imagine a society that has widely adopted an American common law system but has rarely, if ever, protected a particular individual right traditionally protected by common law jurisdictions. This tension is explored in greater depth in Part III. And regardless of the tension, the analysis in Part III will, for the sake of completeness, assume that the fundamental and impracticable and anomalous tests must both be met to satisfy the territorial incorporation doctrine. See infra section III.A.

101. U.S. Const. amend. XIV, § 1, cl. 3 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."). The Due Process Clause overturned *Barron v. City of Baltimore*, which held that the Takings Clause did not apply against action by the states because the first eight amendments "contain no expression indicating an intention to apply them to the state governments." 32 U.S. (7 Pet.) 243, 250 (1833).

102. While both tests use the same word—fundamental—it is worth exploring their jurisprudential roots. In 1823, Justice Bushrod Washington, riding circuit in Pennsylvania, wrote in *Corfield v. Coryell* that the privileges and immunities discussed in Article IV of the Constitution are those "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). After the ratification of the Fourteenth Amendment, the Supreme Court cabined this analysis in *The Slaughterhouse Cases* to apply against the federal government only. 83 U.S. (16 Wall.) 36, 37 (1872). But the Court soon began to ask whether fundamental rights included in the Bill of Rights applied against the states in the context of the Due Process Clause and state

character supports incorporation of the right. And whether a right should be incorporated under either doctrine requires a fact-based, contextual analysis, rather than an abstract discussion.[103]

Yet their separate constitutional roots have led to distinct applications of the two doctrines. As the Court articulated in *Duncan v. Louisiana*, determining whether a right is fundamental requires the court to ask whether the right is "necessary to an *Anglo-American* regime of ordered liberty."[104] This is distinct from the inquiry courts conduct for territorial incorporation, in which the court is tasked with determining whether the right is fundamental within the relevant territory.[105]

As a result of this conceptual disparity, individual liberties protected by the Bill of Rights have been incorporated against the states at different

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incorporation. See U.S. Const. amend. XIV (Due Process Clause). In *Hurtado v. California*, the defendant argued that the denial of his right to a grand jury indictment violated the Fourteenth Amendment's Due Process Clause, which protects all rights that "lie at the foundation of all free government." 110 U.S. 516, 521 (1884). In rejecting Hurtado's claim, the Court explained that a grand jury indictment was not one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Id. at 535. While the *Hurtado* Court did not incorporate the right, its framework enabled the twentieth century's era of expansive selective incorporation. See infra note 106.

Fundamentality also existed in the territorial context before the *Insular Cases*. In *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, the Supreme Court wrote that Congress could not abridge "fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions." 136 U.S. 1, 44 (1890). The Court applied this somewhat obstruse standard, however, to unequivocally explain that the Sixth and Seventh Amendment jury trial rights both applied to the territories. Thompson v. Utah, 170 U.S. 343, 346–47 (1898); see also Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1850). Despite "no longer [being] an open question" in 1898, *Thompson*, 170 U.S. at 346 (citing Springville v. Thomas, 166 U.S. 707 (1897); Am. Publ'g Co. v. Fisher, 166 U.S. 464, 468 (1897); *Webster*, 52 U.S. at 460), the *Downes* Court called this line of jurisprudence "of little value" in 1901. *Downes,* 182 U.S. at 269.

Thus, despite similar wording and similar goals—the protection of individual liberties against nonfederal actors—the Fourteenth Amendment's incorporation doctrine has grown ever expansive, while the territorial incorporation doctrine has remained limited and stagnant. See infra note 109 and accompanying text; infra note 110. These similarities further bolster the argument that the question of territorial fundamentality, properly understood, requires consideration of local conditions. See supra notes 81, 100.

103. See King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975) (explaining that a fact-based analysis of American Samoan culture and legal structures was required to determine whether the criminal jury trial was impracticable and anomalous in American Samoa); see also *Duncan*, 391 U.S. at 149 n.14 (noting that determining whether a right is fundamental requires considering "the context of the criminal processes maintained by the American States" and not whether "the limitation in question is . . . necessarily fundamental to fairness in every criminal system that might be imagined"); Ponsa-Kraus, supra note 3, at 2489 ("[T]o follow *Duncan* would not have been to depend on 'key words' like 'fundamental.' Rather, it would have been to ask . . . whether [the criminal jury trial right] is necessary to ensure ordered liberty in the context of American Samoa's legal system.").

104. 391 U.S. at 147–49, 149 n.14 (emphasis added).

105. See supra notes 81, 100.

paces. Interestingly, the *Downes* Court suggested that, as of 1901, territorial constitutional incorporation was leaps and bounds ahead of state incorporation: While incorporation against the states did not "begin in earnest until the mid-twentieth century,"[106] the *Downes* Court implied that certain rights guaranteed by the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments may have already applied against Puerto Rico.[107] And Congress would exercise its plenary power to explicitly incorporate many of these rights against Puerto Rico through the Jones–Shafroth Act in 1917.[108]

Yet, since the Jones–Shafroth Act, constitutional incorporation in Puerto Rico has ground to a halt: No additional provision in the Bill of Rights has since been incorporated by Congress through the Territorial Clause or by the courts through the territorial incorporation doctrine.[109]

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106. Akhil Reed Amar, America's Constitution: A Biography 389 (2005); see also Robinson v. California, 370 U.S. 660, 667 (1962) (incorporation of the freedom from cruel and unusual punishments against the states); Mapp v. Ohio, 367 U.S. 643, 654–55 (1961) (incorporation of freedom from unreasonable searches and seizures against the states); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporation of the right to free exercise against the states); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 707 (1931) (incorporation of the right to free press against the states); Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporation of the right to free speech against the states).

107. *Downes*, 182 U.S. at 282–83 (plurality opinion) (suggesting that the following rights may be incorporated against the territories given their status as "natural rights": freedom of speech, freedom of press, free exercise, due process, just compensation, equal protection, freedom from unreasonable searches and seizures, and freedom from cruel and unusual punishments).

108. An Act to Provide a Civil Government for Porto Rico, and for Other Purposes (Jones–Shafroth Act), ch. 145, § 2, 39 Stat. 951, 951–52 (1917); see also Kent, supra note 8, at app. at 454 tbl. 1 (noting that the Jones–Shafroth Act protects various rights rooted in the First, Fourth, Fifth, Sixth, and Eighth Amendments).

109. The Court has incorporated constitutional protections since the Jones–Shafroth Act—but only rights that were protected by the Jones–Shafroth Act itself. The Jones–Shafroth Act remained in effect from 1917 to 1952, when the Puerto Rican Constitution was ratified. An Act to Provide for the Organization of a Constitutional Government by the People of Puerto Rico (Puerto Rico Federal Relations Act of 1950), ch. 446, § 5(1), 64 Stat. 319, 320 (1950) (repealing the Jones–Shafroth Act upon ratification of the Puerto Rican Constitution). In allowing the creation of a territorial constitution, the United States required that the document contain a Bill of Rights, id. § 2, and many of the rights protected by the Jones–Shafroth Act found a place in the territorial constitution. P.R. Const. art. II (guaranteeing various rights, including freedom of speech, press, and exercise of religion; due process; speedy and public trial; and freedom from double jeopardy, among others). However, in part to emphasize the legacy of the Jones–Shafroth Act and its effect on territorial incorporation, the Court proceeded to "incorporate" constitutional rights that had been previously incorporated by the Jones–Shafroth Act. See Torres v. Puerto Rico, 442 U.S. 465, 471 (1979) ("incorporating" the Fourth Amendment's prohibition on unreasonable searches and seizures in Puerto Rico); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 591–93, 600 (1976) (relying on the Jones–Shafroth Act's equal protection right to hold that the Due Process Clause of the Fifth or Fourteenth Amendments—the Court did not clarify which—and the Fourteenth Amendment's Equal Protection Clause all apply to Puerto Rico); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 675 n.11 (1974) (noting that a Due Process dispute

This contrasts starkly with constitutional incorporation against the states, as since the early twentieth century, constitutional rights have regularly been incorporated such that "[o]nly a handful of the Bill of Rights protections remain unincorporated."[110]

Comparing the list of rights incorporated against the states via the Fourteenth Amendment's Due Process Clause and the list of rights incorporated against Puerto Rico, there is a noticeable gap: The Second Amendment and a large portion of the Sixth Amendment have been incorporated against the states but not against Puerto Rico.[111] And it is reasonable to expect that this gap will only continue to grow. While the Court has long rejected a "total incorporation" theory in favor of selective incorporation of the Bill of Rights,[112] the *McDonald v. City of Chicago* Court noted that full incorporation of the Bill of Rights protections against the states has not occurred in part because the remaining issues have not come squarely before the Court since the period of selective incorporation began.[113] Thus, the incorporation gap between the states and territories will likely widen if these issues come before the Court.

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occurring in Puerto Rico "arises under the Constitution of the United States"); Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs, 81 Tex. L. Rev. 1, 241–43 (2002) (listing instances in which the Court has addressed the territorial incorporation of constitutional rights). Therefore, while the Court has occasionally "incorporated" constitutional rights against Puerto Rico, it has done so by relying on legislative history surrounding the Jones–Shafroth Act—essentially categorizing these rights as congressionally granted through the first step of the territorial incorporation doctrine—instead of considering the Fourteenth Amendment or the second step of the territorial incorporation doctrine. See *Torres*, 442 U.S. at 471 ("[W]e have no occasion to determine whether the Fourth Amendment applies to Puerto Rico directly or by operation of the Fourteenth Amendment."). Apart from the courts, Congress has incorporated a constitutional provision on one occasion since the Jones–Shafroth Act by incorporating Article IV's Privileges and Immunities Clause against the island "as though Puerto Rico were a State of the Union." An Act to Amend the Organic Act of Puerto Rico, ch. 490, sec. 7, § 2, 61 Stat. 770, 772–73 (1947) (codified at 48 U.S.C. 737 (2018)).

110. McDonald v. City of Chicago, 561 U.S. 742, 765 (2010); see also id. 765 n.13 (enumerating the list of constitutional rights not incorporated against the states).

111. Compare id., with Kent, supra note 8, at app. at 454 tbl. 1 (listing the rights that have and have not been incorporated in the states and territories).

112. Justice Hugo Black believed that the Fourteenth Amendment had completely incorporated the Bill of Rights against the states, a theory that would become known as "total incorporation." Adamson v. California, 332 U.S. 46, 74–75 (1947) (Black, J., dissenting) ("In my judgment . . . history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought . . . to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights."). Nevertheless, the Court has never adopted Justice Black's total incorporation theory. *McDonald*, 561 U.S. at 761–63.

113. See *McDonald*, 561 U.S. at 765 n.13 (highlighting that, for example, the Court has "never . . . decided" whether the Third Amendment's protection against quartering soldiers is incorporated against the states); see also Thomas v. Humboldt County, 223 L. Ed. 2d 141, 141 (2025) (mem.) (statement of Gorsuch, J., respecting the denial of certiorari) (arguing

Among the rights that could next be incorporated in the states without a clear path for territorial incorporation is the Seventh Amendment's civil jury trial right. If the Seventh Amendment joined the Second and Sixth Amendments in the list of rights applied in the states but federally denied in Puerto Rico, it would only create a more "major" incorporation gap[114]—one that fully ensures jury trial rights—in the states but wholly ignores them in Puerto Rico.[115]

C. *Jury Trial Rights in Puerto Rico and the States*

To appreciate how unsettling the territorial incorporation gap and its potential for expansion are, it is useful to explore exactly what access to jury trials looks like in Puerto Rico as compared to the states. This section will proceed by comparing the right to a jury trial in criminal proceedings in the states and in Puerto Rico before turning to the Seventh Amendment's right to a jury trial in civil proceedings, again comparing its role in the Puerto Rican legal system to that of the states.

1. *Criminal Jury Trials and Unanimous Verdicts.* — As noted, there are three constitutional guarantees to a trial by jury.[116] The Sixth Amendment, which provides numerous protections for criminal defendants, including

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that the Seventh Amendment should be incorporated against the states but that the case here presented "a number of vehicle problems").

114. *Examining Bd.*, 426 U.S. at 591 n.23.

115. The lack of Second Amendment incorporation certainly also contributes to this gap. For a territorial incorporation analysis of the Second Amendment, see generally Héctor Cordero-Vázquez, The Incorporation of a Fundamental Right in a U.S.A. Territory: An Essay of Intranational Comparative Law, 45 Revista Jurídica de la Universidad Interamericana de Puerto Rico [Rev. Jur. U. Inter. P.R.] 227 (2011) (arguing that while the *Insular Cases* remain good law, "the necessary legal instruments to integrate the fundamental right to keep and bear arms in the Territory of Puerto Rico are in place" (emphasis omitted)). While this Note addresses the constitutional gap created by not incorporating individual rights in the U.S. territories, it is worth noting that reinterpretation of certain constitutional provisions is another viable avenue toward constitutional equality. See generally Guillermo J. Martínez, Note, "The People" Protects the People of Puerto Rico: Giving Meaning to an Uninterpreted Part of the Tenth Amendment, 113 Geo. L.J. 1509 (2025) (arguing that a revitalized Tenth Amendment could protect Puerto Rican sovereignty and constitutional federalism).

116. Absent from this analysis so far has been the fourth constitutional reference to a jury: the Fifth Amendment's Grand Jury Clause. U.S. Const. amend. V. While the right to a grand jury indictment has a similarly lofty purpose to a jury trial right—judgment decided by one's own community and peers—there is greater variation in state grand jury practices, and more than half of the states do not require a grand jury indictment. See Ramos v. Louisiana, 140 S. Ct. 1390, 1435 (2020) (Alito, J., dissenting) (noting that twenty-eight states do not require a grand jury indictment). As a result, there is serious doubt as to whether the grand jury right will be incorporated against the states, making it an unlikely candidate to bridge the territorial incorporation gap. But see Robert W. Frey, Note, Incorporation, Fundamental Rights, and the Grand Jury: *Hurtado v. California* Reconsidered, 108 Va. L. Rev. 1613, 1656 (2022) (arguing that the Court should incorporate the grand jury right against the states).

but not limited to the jury trial right,[117] began to be incorporated against the states in *Duncan v. Louisiana*, in which the Court held that the right to a trial by jury in criminal prosecutions was fundamental to the Anglo-American scheme of justice and was, therefore, incorporated against the states.[118] Since *Duncan*, the Court has steadily incorporated almost the entire Sixth Amendment—provision by provision—most recently holding in *Ramos v. Louisiana* that the right to a unanimous guilty jury verdict, interpreted into the meaning of the Sixth Amendment,[119] was fundamental and therefore incorporated against the states.[120]

Despite the Court's march toward full state incorporation of the Sixth Amendment, its applicability in Puerto Rico has remained long crystallized: Neither Congress nor the federal courts have legislated or ruled on the incorporation of the Sixth Amendment in Puerto Rico since *Balzac v. Porto Rico*[121] in 1922. Nevertheless, there have been developments in both the Puerto Rican legislature and territorial courts that have mimicked the Sixth Amendment's protections—albeit incompletely.

After fifty-two years of territorial annexation, the United States allowed Puerto Rico to develop and enact its own constitution in 1950.[122] Over the course of two years, Puerto Rican representatives held a constitutional convention, eventually ratifying the island's first self-made governing document ("the 1952 constitution"), 459 years after the island was first colonized.[123] Among the enumerated rights guaranteed by the

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117. U.S. Const. amend. VI.

118. 391 U.S. 145, 149 & n.14 (1968).

119. The Court first interpreted the Sixth Amendment to require a unanimous jury verdict in Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (plurality opinion), but, in that case, the Court also held in a fractured set of opinions that the unanimity requirement did not apply in the states. Id. This holding was ultimately overturned in *Ramos v. Louisiana*, where the Court incorporated the unanimity requirement against the states. 140 S. Ct. at 1397.

120. *Ramos*, 140 S. Ct. at 1397. While Puerto Rico was not a party to the suit, it was mentioned frequently at oral argument, given it was one of three American jurisdictions that allowed a nonunanimous jury verdict. P.R. Const. art. II, § 11; Transcript of Oral Argument at 29, 52, 54–55, 65, 69, *Ramos*, 140 S. Ct. 1390 (No. 18-5924). The Court's opinion did not mention Puerto Rico once. *Ramos*, 140 S. Ct. at 1393–408.

121. 258 U.S. 298, 304–06 (1922).

122. Puerto Rico Federal Relations Act of 1950, ch. 446, §§ 1–2, 64 Stat. 319, 319.

123. Trías Monge, Oldest Colony, supra note 37, at 5 (noting that Europeans first landed in Puerto Rico in 1493). While the 1952 constitution's significance should not be understated, colonial vestiges remained. The U.S. government retained a veto power over individual provisions of the territorial constitution. See Puerto Rico Federal Relations Act of 1950 § 3 (requiring approval from the President and Congress of any proposed Puerto Rican Constitution). The federal government infamously exercised this power to veto provisions guaranteeing universal access to work, food, healthcare, and other welfare-based measures. See T. Alexander Aleinikoff, Puerto Rico and the Constitution: Conundrums and Prospects, 11 Const. Comment. 15, 18 n.13 (1994) (noting that Congress "refused to approve" such territorial constitutional protections). The United States then introduced its own provision preventing the Puerto Rican government in perpetuity from reconsidering these measures as future amendments. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 64 (2016). Furthermore, as the Supreme Court recently acknowledged in *Sanchez Valle*, the Puerto

1952 constitution was the right to a jury trial in felony prosecutions.[124] Unlike in the states, where the Sixth Amendment requires unanimity under *Ramos*,[125] the 1952 constitution only required nine of twelve jurors to reach a verdict[126]—a practice that greatly diverged from that of U.S. states.[127] Thus, under the letter of this constitutional regime, a person in Puerto Rico can be convicted of a felony—potentially leading to an effective life sentence[128]—even if three of twelve community members think the defendant is innocent.

The Supreme Court of Puerto Rico, however, ended this procedural quirk soon after *Ramos* was decided. In *Pueblo v. Torres Rivera*, the court was faced with the question of whether the Supreme Court's *Ramos* opinion applied to Puerto Rico—which would invalidate the Puerto Rican Constitution's nine-or-more-juror convictions.[129] The natural answer to this question would be that, because the Sixth Amendment is not incorporated against Puerto Rico, Sixth Amendment jurisprudence from

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Rican Constitution derives its authority from congressional action allowing the island to ratify its constitution. Id. at 73 ("And if we go back as far as our doctrine demands—to the 'ultimate source' of Puerto Rico's prosecutorial power—we once again discover the U.S. Congress." (citation omitted) (quoting United States v. Wheeler, 435 U.S. 313, 320 (1978))). While the 1952 constitution also redefined Puerto Rico as a "commonwealth" rather than merely a territory, P.R. Const. art. 1, § 1, "[t]he actual lines of authority didn't change," with Congress retaining its plenary authority under the Territorial Clause. Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States 257 (2019). Therefore, while the 1952 constitution represented a remarkable step forward in Puerto Rican self-governance, it walks in the shadows of American imperialism.

124. Under the Puerto Rican criminal code, a felony is defined as any crime that may be punished by more than six months in prison. P.R. Laws Ann. tit. 33, § 5022 (2012). Thus, any defendant who faces a penalty of more than six months in prison has a right to a jury trial. This comports with the Sixth Amendment's jury trial right standards. See Baldwin v. New York, 399 U.S. 66, 69 (1970) (holding that while petty offenses do not require a jury trial, no offense could be deemed petty if it results in a punishment of more than six months in prison).

125. *Ramos*, 140 S. Ct. at 1397.

126. P.R. Const. art. II, § 11.

127. Only two states have ever adopted nonunanimous criminal juries: Louisiana and Oregon, adopted in 1898 and 1933, respectively. Jamiles Lartey, How Two States Differ on the Injustice of Non-Unanimous Juries, Marshall Project (Jan. 7, 2023), https://www.themarshallproject.org/2023/01/07/oregon-louisiana-non-unanimous-juries-unconstitutional [https://perma.cc/ZWB8-8VEK]. Both states were parties to the suit in *Ramos*, and both of their nonunanimity rules were rooted in overtly discriminatory practices. See *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring in part) ("In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice . . . ."); Watkins v. Ackley, 523 P.3d 86, 108 (Or. 2022) (Baldwin, J., concurring) ("[R]acist history evolved into Oregon voters' approval and use of the nonunanimous verdict law.").

128. The maximum penalty under the Puerto Rican criminal code is ninety-nine years in prison. See, e.g., P.R. Laws Ann. tit. 33, § 5143 (noting that the penalty for murder in the first degree is ninety-nine years). Thus, while there is no life sentence in Puerto Rico, the maximum penalty is a de facto life sentence.

129. 204 P.R. Dec. 288, 296–300 (2020).

the federal courts also can't apply. But instead, the Puerto Rican Supreme Court held that U.S. Supreme Court decisions—regardless of the topic or substance—are binding against Puerto Rico.[130] Thus, given *Ramos* required unanimity in criminal jury trials, the same rule also applied to Puerto Rican criminal jury trials.[131]

The Puerto Rico Supreme Court similarly employed this rationale to "incorporate" the Sixth Amendment's jury trial right in 2009[132]—more than forty years after the U.S. Supreme Court incorporated the Sixth Amendment jury trial right against the states in *Duncan*—and again in 2022 for the Second Amendment after the U.S. Supreme Court's *McDonald* decision.[133] This line of jurisprudence, however, does not wrestle with the nuances of the territorial incorporation doctrine. It is obvious to say that the Supreme Court's decisions are generally binding against all lower courts, including territorial courts. But this can only be true of Supreme Court decisions that interpret laws *applicable to those lower courts*. Unless the constitutional right in question has been incorporated and is therefore applicable in the territory, Supreme Court precedent cannot be binding.[134]

Nevertheless, this is exactly what the Supreme Court of Puerto Rico held in *Torres Rivera*.[135] So long as the right to a unanimous jury verdict in felony cases rests on this legal foundation, it is insecure in Puerto Rico. And despite the opportunity to clarify the effect of *Ramos* on Puerto Rico, the U.S. Supreme Court has since chosen not to involve itself, only

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130. See id. at 303 ("Después de todo, independientemente de la doctrina jurídica a la que se recurra, las protecciones y garantías que emanan de los derechos que se designan como fundamentales por el Tribunal Supremo de Estados Unidos son extensibles a Puerto Rico." ["After all, regardless of the legal doctrine cited, the protections and guarantees that emanate from the rights designated as fundamental by the United States Supreme Court extend to Puerto Rico."]).

131. Id. at 303–04.

132. See Pueblo v. Santa Vélez, 177 P.R. Dec. 61, 65 (2009) ("El derecho a juicio por jurado de la Enmienda Sexta es un derecho fundamental que aplica a los estados a través de la cláusula del debido proceso de ley de la Enmienda Decimocuarta y, *por lo tanto, a Puerto Rico*." ["The right to a trial by jury under the Sixth Amendment is a fundamental right that applies to the states through the Due Process Clause of the Fourteenth Amendment and, *therefore, to Puerto Rico*."] (emphasis added)).

133. See Pueblo v. Rodríguez López, 210 P.R. Dec. 752, 782 (2022) (holding that the Fourteenth Amendment—rather than the separate territorial incorporation doctrine—required that the Second Amendment was incorporated in Puerto Rico).

134. The tendency of the Supreme Court of Puerto Rico to incorporate rights by holding that the U.S. Supreme Court's Fourteenth Amendment incorporation cases apply fully in Puerto Rico has been met with confusion by at least one court. See Ramos-Cruz v. Puerto Rico, No. 23-1449 (ADC), 2025 WL 2806737, at *5 n.10 (D.P.R. Sep. 30, 2025) (noting that "it is not clear whether [the Supreme Court of Puerto Rico] considered [the Second Amendment] applicable [against Puerto Rico] through the Fourteenth Amendment or through the doctrine of territorial incorporation" in *Rodríguez López*).

135. See *Torres Rivera*, 204 P.R. Dec. at 299–300, 303 (stating that all fundamental rights under U.S. Supreme Court doctrine apply to Puerto Rico).

prolonging the uncertainty.[136] In sum, while there is technically a right to jury trial and a unanimous verdict in Puerto Rico through Puerto Rican Supreme Court case law, access to this right is at risk of disappearing so long as it is propped up by the territorial Supreme Court.[137]

The legal history of criminal jury trial rights in Puerto Rico shows how difficult it can be to bridge the incorporation gap. First, Congress chose not to incorporate the right in either the Jones–Shafroth Act or the Foraker Act.[138] The U.S. Supreme Court then held in *Balzac* that the Sixth Amendment was not fundamental in Puerto Rico and did not incorporate the criminal jury trial right.[139] Outside the incorporation framework, the 1952 constitution then guaranteed a jury trial in criminal prosecutions—albeit without a unanimity requirement.[140] Finally, the right to a unanimous jury verdict was guaranteed by the Puerto Rican Supreme Court[141]—albeit on uncertain legal grounds.

Therefore, despite progress within Puerto Rico toward a criminal jury trial right, the *U.S. constitutional* right remains insecure at best and nonexistent at worst, despite its applicability in the states. More than one hundred years after the *Balzac* decision, no federal court has held that the

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136. See Pueblo v. Centeno, 208 P.R. Dec. 1, 21 (2021) (holding that unanimous verdicts were required for both guilty and not guilty verdicts, in line with the Court's decision in *Ramos*), cert. denied, 143 S. Ct. 89 (2022) (mem.). The Supreme Court could have granted certiorari to clarify the effect of *Ramos* on Puerto Rico and territorial incorporation of the Sixth Amendment.

137. Despite this Note's disagreement with the Puerto Rican Supreme Court's approach, it is certainly not made up out of whole cloth. For example, in *Torres Rivera*, the court described the territorial incorporation doctrine as "polémica" ["controversial"], 204 P.R. Dec. at 302—a description that approaches understatement. The decision then goes on to cite Duncan v. Louisiana, 391 U.S. 145 (1968), for the proposition that, because the U.S. Supreme Court had deemed the criminal jury trial right to be fundamental, it impliedly overturned Balzac v. Porto Rico, 258 U.S. 298 (1922), and held that Sixth Amendment incorporation jurisprudence must also apply in Puerto Rico. *Torres Rivera*, 204 P.R. Dec. at 302–04. This is, without a doubt, a viable argument; it was made by the defendant on appeal in King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975), the case which, on remand, resulted in the incorporation of jury trial rights in American Samoa. King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977).

This Note, following existing scholarship, also points to *Duncan* as a change in the territorial incorporation doctrine but reads it more narrowly. Namely, this Note argues that *Duncan* altered the territorial incorporation doctrine from questioning whether a right is fundamental to all notions of ordered liberty to questioning whether the right in question is fundamental to the territory's specific legal system. See supra notes 81, 102; infra section III.A. Thus, while the Supreme Court of Puerto Rico has, perhaps nobly, rejected the influence of the *Insular Cases* to craft a reasonable vision for the U.S. Constitution's applicability in the territories, this Note takes the more somber view: that the *Insular Cases* remain current doctrine and must be deployed for constitutional equality while they remain good law.

138. See supra notes 70–72, 109, and accompanying text.

139. *Balzac*, 258 U.S. at 304–13.

140. P.R. Const. art. II, § 11.

141. See *Torres Rivera*, 204 P.R. Dec. at 300–01.

Sixth Amendment's criminal jury trial right is incorporated against Puerto Rico,[142] to the detriment of Puerto Rican residents.[143]

2. *Civil Jury Trials.* — The other constitutional jury trial protection—that of civil jury trials—is found in the Seventh Amendment's civil jury trial guarantee. As mentioned earlier, the Seventh Amendment does not currently contribute to the incorporation gap: The civil jury trial is not incorporated against either the states or any of the territories.[144] For Puerto Rico, this was confirmed in *Balzac*, in which the Court explained that neither the Sixth Amendment or, by analogy in dicta, the Seventh Amendment, was incorporated in Puerto Rico.[145] And importantly, while the civil jury trial right is guaranteed in every state either through their constitution or statutes,[146] there is no territorially created right to a civil jury trial in Puerto Rico.[147]

While *Balzac*'s Sixth Amendment holding was arguably disturbed by the criminal jury trial right's incorporation in *Duncan*,[148] the *Balzac* Court's Seventh Amendment dicta has never been altered by state incorporation of the civil jury trial right. But it is somewhat unclear why the Supreme Court has not yet incorporated the Seventh Amendment against the states. A leading explanation is that the Court simply has not yet found the appropriate vehicle.[149] As the Court noted in *McDonald*, federal courts have rarely been faced with the question directly, and the Court has not ruled on Seventh Amendment incorporation in over one hundred years[150]—well before selective incorporation began.[151]

An alternative argument hinted at by the *McDonald* Court is that stare decisis cautions against incorporating the Seventh Amendment against the states.[152] This explanation relies on the Supreme Court's 1916 *Minneapolis*

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142. One federal court, however, has incorporated the Sixth Amendment's jury trial right against an unincorporated territory: The District Court for the District of Columbia incorporated the right against American Samoa. See supra text accompanying note 17.

143. See infra Part II.

144. See supra note 16 and accompanying text.

145. *Balzac*, 258 U.S. at 304–06, 313; see also supra note 87.

146. See Eric J. Hamilton, Note, Federalism and State Civil Jury Rights, 65 Stan. L. Rev. 851, 855, 858–59 (2013).

147. The word "jury" is not used once in the Rules of Civil Procedure of Puerto Rico. See P.R. R. Civ. Proc.

148. See Ponsa-Kraus, supra note 3, at 2486–89 (arguing that the courts should have considered the relevance of *Duncan* in Sixth Amendment territorial incorporation jurisprudence).

149. See supra note 109.

150. See Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 219 (1916) ("[There is] no ground for the proposition that the [Seventh] Amendment is applicable and controlling in proceedings in state courts deriving their authority from state law . . . .").

151. McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010).

152. See id. at 784–85, 784 n.30 (plurality opinion) ("[I]f a Bill of Rights guarantee is fundamental from an American perspective, then, *unless stare decisis counsels otherwise*, that guarantee is fully binding on the States . . . ." (emphasis added) (footnote omitted)).

& St. Louis Railroad Co. v. Bombolis decision, which held that the Seventh Amendment does not apply in the states.[153] Operationalizing stare decisis to limit selective incorporation may have been more persuasive before *Ramos*, but the *Ramos* Court overturned precedent to incorporate the unanimity requirement of the Sixth Amendment.[154] Therefore, it is no longer sufficient to say that constitutional rights ought not be incorporated merely because stare decisis counsels otherwise. Given that the *McDonald* Court cited stare decisis and the lack of a presented issue as the only jurisprudential roadblocks to incorporating the Seventh Amendment,[155] it is reasonable to expect that the Court would not be so easily frustrated if a Seventh Amendment incorporation case came before it today.

Yet, practical roadblocks prevent federal courts from ruling on Seventh Amendment incorporation against the states. First, most states have already guaranteed the right to a jury trial in their state constitutions, and the remaining three states—Wyoming, Colorado, and Louisiana—have guaranteed some form of the civil jury trial right through statutes.[156] Therefore, appealing claimants would not be arguing that they were *denied* their jury trial right in the states; rather, they would most likely be arguing that there was some sort of irregularity inconsistent with the Seventh Amendment, such as a lack of unanimity.[157] Second, an exceedingly small percentage of cases are disposed of through a jury trial,[158] such that opportunities to argue for a claimant's Seventh Amendment jury trial right are rare.

Despite these hurdles, Justice Gorsuch recently signaled a potential path forward, implying a plaintiff could bring a claim against a state or local agency and assert their Seventh Amendment civil jury trial right in

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153. 241 U.S. at 217.

154. Ramos v. Louisiana, 140 S. Ct. 1390, 1425 (2020) (Alito, J., dissenting) (calling the Court's decision to overturn Apodaca v. Oregon, 406 U.S. 404 (1972), in which the Court chose not to incorporate the Sixth Amendment's unanimity requirement, a "rough treatment" of stare decisis).

155. *McDonald*, 561 U.S. at 765 n.13, 784–85, 784 n.30.

156. Hamilton, supra note 146, at 855, 858–59.

157. See Andres v. United States, 333 U.S. 740, 748 (1948) (explaining that the Sixth and Seventh Amendments both require unanimous jury verdicts). State practices regarding unanimity in civil juries vary widely, with many states historically and currently not requiring unanimity. See, e.g., N.Y. C.P.L.R. § 4113 (McKinney 2025); Hans Zeisel, The Verdict of Five Out of Six Civil Jurors: Constitutional Problems, 1982 Am. Bar Found. Rsch. J. 141, 141 nn.2–3 (compiling jurisdictions with nonunanimous juries).

158. See Paula Hannaford-Agor & Morgan Moffett, Nat'l Ctr. for State Cts., 2023 State-of-the-States Survey of Jury Improvement Efforts: Volume and Frequency of Jury Trials in State Courts 4 (2024), https://ncsc.contentdm.oclc.org/digital/collection/juries/id/365/ [https://perma.cc/9MSY-6DLT] (describing survey results showing that about 2% of felony criminal cases, about 1% of misdemeanor criminal cases, and about 1% of civil cases are disposed by jury trial).

line with the Court's recent decision in *SEC v. Jarkesy*.[159] If such an assertion is made and is successful, incorporation of the Seventh Amendment *only* against the states would further widen the incorporation gap. Thus, the prospect of state incorporation of the Seventh Amendment should worry those concerned about second-class constitutional treatment of territorial residents.

In sum, comparing the jury trial rights between Puerto Rico and the states provides a complex, if not confounding, view of the incorporation gap. The criminal jury trial right has not been incorporated in Puerto Rico through the U.S. Constitution, but the Puerto Rican Constitution guarantees that right. The Sixth Amendment's unanimity right is also not incorporated federally, but the Supreme Court of Puerto Rico has incorporated the *Ramos* decision, albeit without applying the territorial incorporation doctrine. And finally, the Seventh Amendment jury trial right has not been incorporated against the states or Puerto Rico. But while the Court has not taken the step, it has indicated interest in incorporating the civil jury trial right against the states—a move that would further widen the incorporation gap.

II. THE JURY DENIED—THE COSTS OF A LOST JURY

Given the extent to which the territorial incorporation gap is comprised of jury trial rights, it is worth measuring the existential, democratic, and outcome-determinative costs of denying these rights. While general constitutional inequality is damaging to Puerto Rico's relationship with the United States and its ability to determine its future, the unincorporation of jury trial rights is particularly pernicious: Unequal access to juries leads to unequal outcomes in civil contexts[160] and fewer jury trials results in less civic engagement. Thus, this Part will consider how juries affect trial outcomes and shape society's conception of the justice system, thereby showing the harm that is done when jury trials are denied.

A. *Unequal Outcomes*

Access to juries materially benefits defendants in both criminal and civil cases, and unanimity requirements benefit defendants while also incentivizing more thoughtful and deliberative juries. In a comprehensive twentieth-century study, Professors Harry Kalven, Jr., and Hans Zeisel found that juries and judges disagreed on verdicts in 19.1% of cases.[161] In 16.9% of those cases, the jury acquitted when the judge would have found

159. Thomas v. Humboldt County, 223 L. Ed. 2d 141, 142 (2025) (mem.) (statement of Gorsuch, J., respecting denial of certiorari); see also 144 S. Ct. 2117 (2024).

160. As noted above in section I.C and below in section II.A, there is practical uniformity in the criminal jury context, despite doctrinal disjunction.

161. Kalven & Zeisel, supra note 33, at 62. This study identified 3,576 cases where a jury rendered a verdict and asked the presiding judge whether they agreed with the jury. Id. at 55–56.

the defendant guilty.[162] Furthermore, considering guilt, lesser offenses, and criminal penalties, juries were more lenient than judges in 28.3% of cases.[163] This study was replicated fifty years later, when it was found that judges and juries disagree on guilt 25% of the time—a 6% increase from Kalven and Zeisel's numbers.[164] Thus, access to a jury trial can materially affect the likelihood that the defendant will not be convicted *and* will be more leniently punished.

The Sixth Amendment's unanimity requirement also serves as an important factor in determining trial outcomes. Unanimity is a tall hurdle that prosecutors must overcome: Rather than only convincing a supermajority of the jury, a prosecutor must convince *the entire* jury that a defendant is guilty beyond a reasonable doubt. With a unanimous jury, a defendant is always one holdout away from a hung jury and another opportunity at innocence. This is reflected in social science research, which has found that the hung-jury rate is higher when unanimity is required.[165] Furthermore, unanimity forces jurors to deliberate for longer periods of time, which often leads to more accurate judgments.[166] In one simulation, observers found that as fewer jurors were required to render a verdict, the jury deliberated for less time.[167]

Therefore, denying criminal jury trial rights, including constitutionally required unanimity, leads to worse outcomes for defendants and produces less deliberative jurors. While the criminal jury trial right is currently available in Puerto Rico, its unanimity requirement is both new and vulnerable. If the Puerto Rican Supreme Court's *Torres Rivera* decision is abrogated,[168] this would mark another area of inequality between Puerto Rican and state residents. Thus, until the unanimity requirement is incorporated by the Supreme Court against Puerto Rico, Sixth Amendment rights will remain vulnerable on the island.

The denial of civil jury trial rights produces similarly adverse effects and—even more clearly than the denial of criminal jury rights—shows the

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162. Id. at 62.

163. Id.

164. Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab & Martin T. Wells, Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's *The American Jury*, 2 J. Empirical Legal Stud. 171, 181 tbl. 1 (2005); see also Kalven & Zeisel, supra note 33, at 62.

165. Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 198 (1994).

166. See Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., in Support of Petitioner at 19, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807), 2020 WL 4450434 ("[N]on-unanimous juries 'discourage[] painstaking analyses of the evidence and steer[] jurors toward swift judgments that too often are erroneous or at least highly questionable.'" (second and third alterations in original) (quoting Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261, 1273 (2000))).

167. See Abramson, supra note 165, at 200 (finding that unanimous juries deliberated 84% longer than juries that only required eight of twelve jurors to render a verdict).

168. See supra notes 129–137 and accompanying text.

practical inequality between Puerto Rican and state residents. As noted above, while the Seventh Amendment is not incorporated against either the states or the territories, each state provides a domestic right to a civil jury trial—either through their state constitution or by statute.[169] No such right is provided by the Puerto Rican Constitution or territorial statutory scheme.[170]

Kalven and Zeisel found that judge–jury disagreement was mildly more prevalent in civil cases, with juries and judges disagreeing about 22% of the time.[171] Yet, judge–jury disagreement is particularly acute in civil trials at the damages stage. In one study, researchers found that in a hypothetical case dealing with corporate liability in the aftermath of an airplane accident, 84.1% of jurors believed punitive damages should be imposed.[172] When the same hypothetical was posed to ninety-four state judges, only 30.3% found that punitive damages should have been imposed.[173] This conclusion has been replicated numerous times and spans both punitive and compensatory civil damages.[174] So long as there is no right to a civil jury trial in Puerto Rico, claimants in Puerto Rico will be comparatively disadvantaged by lower awards in civil claims. Apart from the inherent inequality that comes from this denied right, barring Puerto Rican plaintiffs from civil jury trials and their associated benefits may encourage forum shopping away from the island, which would raise inevitable questions of fairness and efficiency.[175] Thus, while every state guarantees the right to a civil jury trial, the lack thereof in Puerto Rico leads to worse litigation outcomes and represents another gap in legal practices between the states and Puerto Rico.

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169. See supra note 156 and accompanying text.

170. See supra note 147 and accompanying text.

171. Kalven & Zeisel, supra note 33, at 63. Modern studies have been able to approximately replicate these findings, usually finding a slightly higher rate of disagreement. See Angela M. Jones, Shayne E. Jones & Aaron Duron, Perspective Differences in Trial Process: A Comparison of Judges, Juries and Litigants, 26 Psychiatry Psych. & L. 87, 88 (2019) (noting that modern studies generally find civil jury disagreement in approximately 20% to 35% of cases).

172. W. Kip Viscusi, Judging Risk and Recklessness, *in* Punitive Damages, supra note 33, at 171, 177.

173. Viscusi, Do Judges Do Better?, supra note 33, at 196.

174. See Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman & Martin T. Wells, Juries, Judges, and Punitive Damages: An Empirical Study, 87 Corn. L. Rev. 743, 778 (2002) (noting that there is a statistically greater range of punitive damages awarded by juries than by judges); Joni Hersch & W. Kip Viscusi, Punitive Damages: How Judges and Juries Perform, 33 J. Legal Stud. 1, 2–3 (2004) ("We find that . . . juries are more likely to make punitive awards and make larger awards. . . . We also find that juries award greater compensatory damages than do judges for any given case type.").

175. Scott Dodson, The Culture of Forum Shopping in the United States, ABA: Int'l Law. (June 5, 2024), https://www.americanbar.org/groups/international_law/resources/international-lawyer/57-2/culture-of-forum-shopping-united-states/ (on file with the *Columbia Law Review*) (noting that inefficiencies, delays, higher costs, and concerns of unfairness are natural consequences of forum shopping).

B. *Civic Engagement*

Trial by jury has been a central tenet of many countries' justice systems for centuries.[176] Yet, the American tradition of jury trials is unique in its concern about civic engagement and education. As Alexis de Tocqueville observed during his visit to America, juries represented "an eminently republican institution."[177] According to Tocqueville, jury duty was seen as both a judicial and political institution, an act of political and civic engagement equal to the American citizen's job as elector.[178] This duty and the right to jury trials generally were, as Justice Joseph Story remarked, "essential to political and civil liberty,"[179] a point on which, per Tocqueville, "[a]ll English and American lawyers are unanimous."[180] In addition to upholding these republican values, jury duty would "form the judgment and . . . augment the natural enlightenment of the people" by acting as "a school, free of charge and always open, where each juror comes to be instructed in his rights."[181]

These societal benefits observed by Justice Story and Tocqueville in the early nineteenth century are still visible today. Studies have shown that jury duty service leads to an increase in civic engagement, including a higher likelihood of voting and volunteering in political campaigns.[182] Furthermore, the entire judiciary benefits, as jurors are more likely to trust the judicial system after jury service.[183]

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176. See 3 William Blackstone, Commentaries *349 (noting that juries were a feature of British jurisprudence since the early Saxon colonies of the tenth century and traces of the practice could also be found in France, Germany, and Italy).

177. 1 Alexis de Tocqueville, Democracy in America 260 (Harvey C. Mansfield & Delba Winthrop eds. & trans., U. Chi. Press 2000) (1835).

178. Id. at 258, 261.

179. 2 Story, supra note 42, § 1768.

180. Tocqueville, supra note 177, at 259 n.3. But see Lizzie Dearden & Michael D. Shear, U.K. Plans to End Jury Trials for Crimes With Sentences Under 3 Years, N.Y. Times (Dec. 1, 2025), https://www.nytimes.com/2025/12/01/world/europe/uk-jury-trial-courts.html (on file with the *Columbia Law Review*).

181. Tocqueville, supra note 177, at 262. But see Andrew Guthrie Ferguson, Jury Instructions as Constitutional Education, 84 U. Colo. L. Rev. 233, 272–74 (2013) (arguing that modern jury instructions do not adequately educate jurors on constitutional principles).

182. See Valerie P. Hans, John Gastil & Traci Feller, Deliberative Democracy and the American Civil Jury, 11 J. Empirical Legal Stud. 697, 709–15 (2014) (finding that jurors who participate in a case where a unanimous decision is reached are much more likely to vote in future elections); Perks of Jury Duty: Research Says It Boosts Civic Engagement, Nat'l Civic League (Dec. 1, 2024), https://www.nationalcivicleague.org/perks-of-jury-duty-research-says-it-boosts-civic-engagement/ [https://perma.cc/A345-WVZV] (noting that jury duty increases the likelihood of voting in future elections and increases the jurors' belief in the judicial system).

183. See Liana Pennington & Matthew J. Dolliver, Understanding the Effects of Jury Service on Jurors' Trust in Courts, 56 Law & Soc'y Rev. 580, 596 (2022) ("[F]actors relating to positive deliberation experiences, satisfaction with the jury process, and juror attitudes

Perhaps most importantly, jury trials give citizens the opportunity to consider and execute the community's sense of justice. Jurors have the opportunity to protect defendants from an overly punitive government,[184] a principle that traces its origins to the Founding Era.[185] The jury's decision may come in the form of nullification[186] or compromise;[187] either way, the jury has the rare opportunity to develop and reinforce the societal and community values outside the ballot box—an opportunity that aligns with Tocqueville's understanding of the jury as "eminently republican."[188]

It naturally follows that fewer jury trials result in fewer opportunities for potential jurors and society at large to feel these benefits of increased civic engagement and judicial transparency. And for Puerto Rico, this is particularly acute in the civil context, where jury trials are not guaranteed.[189] Furthermore, to serve on a federal jury, prospective jurors are required "to adequately read, write, understand, and speak" English.[190] As a result, a large percentage of Puerto Rican residents[191] will only ever

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relating to law and justice all interact to bring about a rapid and meaningful increase in trust in courts for many jurors.").

184. See Why Jury Trials Are Important to a Democratic Society, Nat'l Jud. Coll., https://www.judges.org/wp-content/uploads/2020/03/Why-Jury-Trials-are-Important-to-a-Democratic-Society.pdf [https://perma.cc/RQM5-LH4S] (last visited Sep. 12, 2025) ("The founding fathers included jury trials in the constitution because jury trials prevent tyranny.").

185. See Kathleen M. O'Malley, Trial by Jury: Why It Works and Why It Matters, 68 Am. U. L. Rev. 1095, 1098 (2019) (noting that James Madison called the civil jury trial right "as essential to secur[ing] the liberty of the people as any one of the pre-existent rights of nature" (alteration in original) (internal quotation marks omitted) (quoting Mark W. Bennett, Judges' Views on Vanishing Civil Trials, 88 Judicature 306, 307 (2005))); History of Jury Duty, U.S. Cts.: W.D. Mo., https://www.mow.uscourts.gov/jury/history_of_jury_duty [https://perma.cc/BR8C-NGB6] (last visited Sep. 12, 2025) ("Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.").

186. See United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969) ("If the jury feels that the law . . . is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.").

187. For example, if a defendant is charged with multiple counts, the jury can choose to convict on certain counts and acquit on others, even if the compromise itself makes little legal sense. See McElrath v. Georgia, 144 S. Ct. 651, 659 (2024) ("We have long recognized that, while an acquittal might reflect a jury's determination that the defendant is innocent of the crime charged, such a verdict might also be 'the result of compromise, compassion, lenity, or misunderstanding of the governing law.'" (quoting Bravo-Fernandez v. United States, 580 U.S. 5, 10 (2016))).

188. Tocqueville, supra note 177, at 260.

189. See supra note 147 and accompanying text.

190. Juror Qualifications, Exemptions and Excuses, U.S. Cts., https://www.uscourts.gov/court-programs/jury-service/juror-qualifications-exemptions-and-excuses [https://perma.cc/9RRP-Q78K] (last visited Sep. 11, 2025).

191. One study found that in 2014, approximately 44% of Puerto Rican residents did not speak English. Rosa E. Guzzardo Tamargo, Verónica Loureiro-Rodríguez, Elif Fidan

participate in a civil suit if they are sued.[192] Thus, when jury trial rights are denied and curtailed, it is not only the defendant who is adversely affected. Rather, society's notion of justice is stunted, and the judiciary remains shrouded in mystery—both results being detrimental to the justice system.

III. BRIDGING THE TERRITORIAL INCORPORATION GAP

The solution is a Supreme Court decision incorporating jury trial rights in Puerto Rico. And the most likely way to convince the Court to do this is by recentering the oft-rejected logic of the *Insular Cases* and their progeny, soberly applying the legal standards expounded in those cases, and showing the Court that jury trial rights are neither impracticable nor anomalous but fundamental in Puerto Rico. While litigating parties have nobly attempted to overturn the *Insular Cases* in their entirety, this project has struggled throughout the twenty-first century,[193] with the Supreme Court reluctant and unwilling to overturn the *Insular Cases* outright.[194] To

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Acar & Jessica Vélez Avilés, Attitudes in Progress: Puerto Rican Youth's Opinions on Monolingual and Code-Switched Language Varieties, 40 J. Multilingual & Multicultural Dev. 304, 305 (2019).

192. Tocqueville noted that civil jury trials were particularly important for developing an empathetic notion of community justice: "[T]here is almost no one who fears being the object of a criminal prosecution one day; but everyone can have a lawsuit." Tocqueville, supra note 177, at 262.

193. See Willie Santana, The New *Insular Cases*, 29 Wm. & Mary J. Race Gender & Soc. Just. 435, 437–38 (2023) ("Despite the overwhelming academic and popular consensus against the Insular Cases, the Supreme Court has not only failed to overrule them but has instead unwittingly engaged in a project of establishing *new* Insular Cases." (footnotes omitted)).

194. It is worth briefly considering why the Court has been so sheepish about the *Insular Cases*. The natural question is this: If the *Insular Cases* are overturned, then what is territorial jurisprudence? The Constitution affords little mention of the territories other than Congress's plenary authority pursuant to the Territorial Clause to govern them. But see Veneno v. United States, 223 L. Ed. 2d 216, 218 (2025) (mem.) (Gorsuch, J., dissenting from denial of certiorari) ("Nor, for that matter, does the [Territories] Clause, rightly understood, endow the federal government with plenary power even within the Territories themselves." (citing United States v. Vaello Madero, 142 S. Ct. 1539, 1554–55 (2022) (Gorsuch, J., concurring))). In the absence of the *Insular Cases*, would the Constitution apply equally in full against the territories? Could the United States own indefinite territories without the *Insular Cases*, such that their overturning would require the government to reexamine the political statuses of the unincorporated territories? Would Puerto Rican independence be required? Immediate resolution of these questions would be welcomed, but the Court would likely hope to avoid reformulating American–Puerto Rican relations in a single judicial opinion. See James T. Campbell, *Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement With the *Insular Cases* and "the Law of the Territories", 131 Yale L.J. 2542, 2598 (2022) (arguing that "ill-considered judicial engagement" with the *Insular Cases* could harm territorial communities); Anthony M. Ciolli, Needful Rules and Regulations: Originalist Reflections on the Territorial Clause, 77 Vand. L. Rev. 1263, 1271–73 (2024) (explaining that these open questions have led to reluctance within the Court to definitively overturn the *Insular Cases*); see also U.S. Gov't Accountability Off., GAO-14-31, Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources 14–35 (2014). But see Ramsey, supra note

achieve a new result, prospective plaintiffs should instead dust off the territorial incorporation doctrine and apply its logic to jury trial rights.

While this Note has discussed both the absent civil jury trial right and the loosely rooted unanimous jury trial right, the latter is currently available under the Supreme Court of Puerto Rico's *Torres Rivera* decision.[195] As a result, there are no viable means for a Sixth Amendment incorporation claim to work its way to a federal appellate court.[196] Instead, civil claimants should assert their Seventh Amendment jury trial right and argue that it should be incorporated against Puerto Rico through the *Insular Cases*' territorial incorporation doctrine. Thus, Part III will evaluate the argument in favor of incorporating the Seventh Amendment against Puerto Rico. It will conclude by considering and ultimately dismissing other avenues for change, such as congressional or territorial legislative action.

A. *Applying the* Insular Cases *to the Jury Trial Right*

As was noted earlier, the territorial incorporation doctrine is a two-step inquiry: First, did Congress grant the right in question to the given territory through legislation? Second, if Congress did not, is the right fundamental, and is it neither impracticable nor anomalous?[197] Here, the first step is easy: Congress has never explicitly incorporated the Seventh Amendment's civil jury trial right against Puerto Rico.[198]

Having addressed that threshold question, we can turn to the harder questions, the first of which is whether the civil jury trial right is fundamental in Puerto Rico. At first glance, the answer appears to be no. Puerto Rico existed for hundreds of years under the Spanish civil law system, which does not generally provide jury trial rights (and certainly didn't in Puerto Rico).[199] Furthermore, since being annexed by the United States, Puerto Rico has never guaranteed a civil jury trial right in its statutes

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7, at 581–90 (arguing that overturning the *Insular Cases* "would likely not be substantially disruptive").

195. See Pueblo v. Torres Rivera, 204 P.R. Dec. 288, 300–01 (2020) (holding that, after the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment's unanimity requirement was incorporated against Puerto Rico).

196. There is one clause of the Sixth Amendment that is not yet incorporated in either the states or the territories that litigating parties could target in the unincorporated territories: The right to have "an impartial jury *of the State and district wherein the crime shall have been committed*." U.S. Const. amend. VI (emphasis added). This argument, however, poses two challenges. First, unlike the Seventh Amendment, the Court has never flagged that this clause is ripe for incorporation. Second, it is unclear if this aspect of the Sixth Amendment could be incorporated against the territories, given the language guarantees jurors of the "*state* . . . wherein the crime shall have been committed." Id. (emphasis added).

197. See supra section I.A.

198. Balzac v. Porto Rico, 258 U.S. 298, 305–13 (1922).

199. See, e.g., Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil [Royal Decree of July 24 1889 By Which the Civil Code Is Published] (B.O.E. 1889, 4763) (Spain).

or constitution.[200] How could a right that has never existed in Puerto Rico be considered fundamental?

To illustrate this, it is best to consider and dismiss these two critiques, beginning first with the argument that a right cannot be fundamental if it has never been practiced in the given territory. This argument appears intuitive, but if it is accurate, the territorial incorporation doctrine would swallow itself. The territorial incorporation doctrine is a judicial framework through which rights that are not currently guaranteed in a particular territory can be incorporated within that territory. If Puerto Rico *did* guarantee a civil jury trial right, then it would be unnecessary to sue for the guarantee of that right. Therefore, the mere fact that a civil jury trial right does not exist in Puerto Rico does not mean the civil jury trial right is not fundamental to Puerto Rico's legal system and within the realm of the territorial incorporation doctrine.

The second argument to consider is that, because Puerto Rico has a civil law tradition that did not include jury trial rights, a jury trial right cannot be fundamental to Puerto Rico's system of justice. This is a more potent criticism that strikes at the heart of what fundamentality requires. Nevertheless, the argument does not refute the conclusion that the civil jury trial right is fundamental in Puerto Rico under the territorial incorporation doctrine.

In *Duncan*, the Court held that the criminal jury trial right was incorporated against the states because the criminal jury trial right was fundamental to the Anglo-American (i.e., common law) system of justice.[201] Implicit in this ruling is the understanding that fundamentality is linked to the jurisdiction's legal system (e.g., common law or civil law).[202] Therefore, if the Court is evaluating a civil law system, which generally does not provide jury trial rights,[203] then it is unlikely to find that the right is fundamental. But if the Court is evaluating a common law system that has practiced some form of the right for an extended period of time, the Court should hold the right to be fundamental. Therefore, to determine whether the civil jury trial right is fundamental in Puerto Rico, one must consider the development of its legal system over time.

As discussed, Puerto Rico had a civil law system during its colonial occupation by Spain.[204] During this time, legal practices in colonial Puerto Rico were materially different than U.S. equivalents. Mayors and governors—generally untrained in the law—served as judges for centuries, and neither a Spanish Royal Court nor a court of appeals was established

200. See supra note 147 and accompanying text.

201. Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968).

202. See supra notes 81, 102, 137.

203. See infra note 221 and accompanying text.

204. See, e.g., Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil [Royal Decree of July 24 1889 By Which the Civil Code Is Published].

until 1832.[205] As to the broader profession, there were only three or four lawyers on the island in 1790.[206] The Puerto Rican legal bar was established in the nineteenth century and quickly became sophisticated, but it remained relatively small—twenty-two lawyers practiced on the island in 1840,[207] and only twelve were members of the bar.[208] Nonlawyers were allowed to advise during various segments of the legal process, and there was no law school in Puerto Rico pre–American annexation, such that all lawyers had to be educated abroad.[209]

This changed soon after American annexation of the island. American colonial authorities "embarked on ambitious campaigns to transform the legal systems and codes of Puerto Rico" and the other newly annexed territories, requiring "the systematic replacement of Spanish legal systems."[210] While cultural Americanization largely failed in Puerto Rico,[211] legal Americanization transformed the island's civil law tradition into "a hybrid of Civil and Common law,"[212] in which "Anglo-American common law . . . overlaid" the Spanish civil law system.[213] Common law features—such as the right to a criminal jury trial[214]—quickly began to materialize, with the first Puerto Rican Legislative Assembly codifying a

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205. Carmelo Delgado Cintrón, El Colegio De Abogados De Puerto Rico: Un Resumen Histórico [The Bar Association of Puerto Rico: A Historical Summary] (July 5, 1973), https://web.archive.org/web/20160303204735/http://capr.zaspy.com/index.cfm?page=10 (on file with the *Columbia Law Review*).

206. Rogelio Pérez-Perdomo, Latin American Lawyers: A Historical Introduction 32 (2006); Cintrón, supra note 205.

207. Cintrón, supra note 205.

208. Pérez-Perdomo, supra note 206, at 32.

209. Cintrón, supra note 205.

210. Pedro A. Cabán, The Colonizing Mission of the United States in Puerto Rico, 1898–1930, *in* Transnational Latina/o Communities: Politics, Processes, and Cultures 115, 119 (Carlos Vélez-Ibáñez & Anna Sampaio with Manolo González-Estay eds., 2002).

211. See Trías Monge, Oldest Colony, supra note 37, at 182 ("The people of Puerto Rico have also stubbornly clung to their national culture and traditions through decades of strenuous efforts to Americanize them."). For an account of the United States' attempt to impose the English language in Puerto Rican schools, as well as territorial inhabitants' subsequent resistance, see generally Aida Negrón De Montilla, Americanization in Puerto Rico and the Public School System: 1900–1930 (2d ed. 1975).

212. Pedro F. Silva-Ruiz, The Puerto Rican Legal System: A Hybrid of Civil and Common Law (Relationships Between Civil Law and Common Law in Puerto Rico), 8 Rev. Compar. L. 45, 56–57 (2003).

213. T.B. Smith, The Preservation of the Civilian Tradition in "Mixed Jurisdiction", 35 Revista Jurídica de la Universidad de Puerto Rico [Rev. Jur. U.P.R.] 263, 265 (1966). To be sure, the civil law tradition still plays a meaningful role in modern Puerto Rican jurisprudence. See, e.g., Urbain Pottier v. Hotel Plaza Las Delicias, Inc., 379 F. Supp. 3d 130, 136–37 (D.P.R. 2019) (acknowledging the lasting effect of Spanish civil traditions on Puerto Rican copyright law).

214. See Brianne J. Gorod & Lesley Kennedy, Why Americans Have a Right to Trial by Jury, Const. Accountability Ctr. (June 5, 2024), https://www.theusconstitution.org/news/why-americans-have-a-right-to-trial-by-jury/ [https://perma.cc/AU7H-T4ML] (noting that jury trial rights are deeply rooted in English common law).

criminal jury trial right.[215] This right was then enshrined in Puerto Rico's first self-founding document, the 1952 constitution.[216] And even during the early annexation, Puerto Ricans embraced their role as jurors and produced a "remarkable showing" toward their new civic duty.[217]

Thus, only fifty-four years after the American annexation, Puerto Rico had transitioned from a purely civil law system to a hybrid system that had adopted many common law institutions. This is particularly true of public and procedural law—which includes the here-relevant areas of constitutional law, civil procedure, and criminal procedure—which are "heavily influenced [by] and/or follow[]" American law.[218] In such a hybrid system, which features access to juries and other common law institutions, the civil jury trial right must be considered fundamental to Puerto Rico's legal system because, at least in the areas of law that most clearly implicate juries, Puerto Rico has adopted a primarily common law approach.

Bolstering this argument is the fact that Puerto Rico has already embraced the jury trial right, albeit incompletely. But this lack of completion speaks only to how anachronistic the lack of civil jury trials in Puerto Rico is. By embracing the criminal jury trial right in its territorial constitution,[219] Puerto Rico did not just embrace an individual right. Rather, this choice suggests that the Puerto Rican legal system adopted principles of community justice and civic participation manifest in a general jury trial right. In such a system, distinguishing between criminal and civil trials would be arbitrary and would not reflect how society conceptualizes the contours of its justice system.[220] Instead, by embracing a common law jury trial right,[221] the Puerto Rican legal system also

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215. An Act Concerning Procedure in Jury Trials, 1901 P.R. Laws 112.

216. P.R. Const. art. II, § 11.

217. Kent, supra note 8, at 448 (internal quotation marks omitted) (quoting Foster V. Brown, Report of the Attorney General of Porto Rico to the War Department 255 (1911)).

218. Silva-Ruiz, supra note 212, at 57.

219. P.R. Const. art. II, § 11.

220. Even though the *Balzac* Court was faced only with a Sixth Amendment incorporation claim, it felt the need to address the civil jury trial right as well—indicative of the notion that criminal and civil juries were seen as conceptually coupled. See Balzac v. Porto Rico, 258 U.S. 298, 304–05 (1922) ("It is well settled that these provisions for jury trial in criminal and civil cases apply to the Territories of the United States. But it is just as clearly settled that they do not apply to territory . . . which has not been incorporated into the Union." (citations omitted) (citing Gurvich v. United States, 198 U.S. 581 (1905) (per curiam); Rassmussen v. United States, 197 U.S. 516, 528 (1905); Dorr v. United States, 195 U.S. 138, 145 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Black v. Jackson, 177 U.S. 349 (1900); Cap. Traction Co. v. Hof, 174 U.S. 1 (1899); Thompson v. Utah, 170 U.S. 343, 347 (1898); Am. Publ'g Co. v. Fisher, 166 U.S. 464 (1897); Callan v. Wilson, 127 U.S. 540, 556 (1888); Reynolds vs. United States, 98 U.S. 145, 167 (1878); Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1851))).

221. See Thomas Weigend, The Impact of the Jury, Britannica, https://www.britannica.com/topic/procedural-law/The-impact-of-the-jury (on file with the *Columbia Law Review*) (last

embraced the underlying values of jury trials, the right to which is fundamental across both civil and criminal proceedings.[222]

Because of the influential role common law institutions play in Puerto Rico's hybrid legal system, the Seventh Amendment's right to a civil jury trial is fundamental in Puerto Rico. This satisfies the first prong of the territorial incorporation doctrine's noncongressional path.

The second and final question is whether the right is impracticable or anomalous—the answer to which is unequivocally no.

Regarding the question of anomaly, it would be more accurate to say that the *lack* of civil jury trials is anomalous. As was noted in the fundamentality discussion, common law systems that feature jury trial rights do not generally distinguish between civil claims and criminal prosecutions. Justice Story noted this when he said that civil jury trials were "scarcely inferior" to the equivalent criminal jury right,[223] and the English and American common law systems include both civil and criminal jury trial rights. Thus, the only anomaly in the Puerto Rican legal system is that it provides one category of jury trial rights without the other.

Turning then to impracticability, civil jury trials would surely be practical, in part because criminal jury trials have long been an available right in Puerto Rico. In *King*, the Court interpreted impracticability to be a question of whether a criminal jury trial right would interfere with a cultural institution in American Samoa, ultimately concluding that the Sixth Amendment did not undermine Samoan culture.[224] Here, there is no equivalent cultural concern: Again, Puerto Rico already has a criminal jury trial right; if jury trial rights undercut a Puerto Rican cultural institution, then the criminal jury trial right would not have been established by the legislature in its first legislative session, and the same right would not have been enshrined in the 1952 constitution.[225]

Furthermore, the extension of the Seventh Amendment in Puerto Rico would not impose difficulties regarding implementation. Puerto Rico already has the infrastructure to procure capable jurors as a result of the guaranteed criminal jury trial.[226] And as noted earlier, a large portion of

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visited Jan. 8, 2026) ("Probably the single most dramatic difference between civil- and common-law procedure is the institution of the civil jury trial . . . .").

222. While the Seventh Amendment is not incorporated against the states, this is mostly a jurisprudential anomaly for the reasons discussed in this Note. See supra section I.C.2.

223. 3 Joseph Story, Commentaries on the Constitution of the United States § 1762 (Bos., Hilliard, Gray & Co., 1833).

224. King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977).

225. See supra note 216 and accompanying text.

226. See Jury Duty Administration Bureau, Jud. Branch P.R., https://poderjudicial.pr/eng/community-education/legal-topics/criminal-cases/jury-duty-administration-bureau/ [https://perma.cc/WBD5-NCUY] (last visited Sep. 12, 2025) (detailing the jury selection process and noting that purpose of the system is "to guarantee the constitutional right of every person charged with a felony to be tried by an impartial jury of their peers").

the Puerto Rican population cannot participate in federal jury trials, given the federal courts' English-language requirement.[227] As a result, there are plenty of potential jurors who are, at the moment, only eligible for territorial criminal jury trials. The territorial government would have to further develop the jury selection infrastructure to fill civil jury panels. But the need to expand an already-existing jury system cannot rise to impracticability if it was not impracticable for the American Samoan government to build a jury selection operation after *King*. Therefore, under the *Reid* formulation of the impracticable-and-anomalous test, application of the Seventh Amendment's civil jury trial right is neither impracticable nor anomalous in Puerto Rico.

Given that the Seventh Amendment's civil jury trial right is fundamental to Puerto Rico's legal system—which today includes American and British common law features, particularly in the areas of procedure and criminal law—and given that the civil jury trial is neither impracticable nor anomalous in Puerto Rico, the Court should incorporate the Seventh Amendment through the territorial incorporation doctrine. Such a ruling would grant Puerto Ricans a substantive right enjoyed by residents in every state, thereby bridging the legal inequality that separates Puerto Ricans from Americans living in the states. Rather than rejecting the *Insular Cases* as cementing constitutional inequality, litigating parties can and should use the *Insular Cases* to assert their rights so long as the Court allows these horrific cases to retain their precedential value.

B. *The Pitfalls of Legislative Solutions*

While a judicial solution would bring needed clarity to the territorial incorporation doctrine, courts operate slowly, such that legislative solutions may bring about constitutional equality more quickly. As discussed, step one of the territorial incorporation doctrine asks whether Congress has explicitly incorporated the given right.[228] Therefore, wouldn't it be to simply ask Congress to incorporate the Sixth and Seventh Amendments—or perhaps the entire Constitution—against Puerto Rico and the other territories?

While Congress and the Puerto Rican Legislative Assembly could both act on this issue by either granting the Sixth and Seventh Amendment protections (in the case of Congress) or establishing a civil jury trial system (in the case of the Puerto Rican legislature), both proposals would incompletely solve the dual issues of constitutional inequality[229] and denial

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227. See supra notes 190–191 and accompanying text.

228. See supra text accompanying note 84.

229. This Note has assumed without arguing that constitutional equality is itself a desirable end. But it is worth acknowledging that the cost of such equality is decreased territorial autonomy. In *Fitisemanu v. United States*, for example, the American Samoan government intervened to argue that the Citizenship Clause should not apply in the

of substantive rights. The rest of Part III will consider both legislative avenues in turn.

1. *U.S. Congressional Action.* — Congress could solve the territorial incorporation gap by simply passing a law fully granting the Bill of Rights's protections in Puerto Rico and the other unincorporated territories. This would promote state–territorial equality under the law and guarantee useful, substantive rights for territorial residents. But this solution underestimates the difficulty of congressional action and forgets the lack of voice that Puerto Rico has in Congress. Passing any law is an arduous affair: A legislator or group thereof must persuade a majority of elected representatives—each with their own concerns and constituents—to consider and agree to a legislative proposal. Generally, members of Congress may negotiate with other members, trading votes, making future campaign promises, and showing how their proposed law will benefit constituents across the country.

However difficult this process is for a voting congressperson, Puerto Rico's Resident Commissioner—the island's nonvoting delegate in Congress—faces a taller task given that they have none of these legislative tools. The Resident Commissioner cannot vote[230] and therefore lacks relative bargaining power. And Puerto Rican residents can't vote in national elections,[231] so politicians with national ambitions do not need to consider how Puerto Ricans may feel about their voting history. Thus, because the current constitutional regime disarms Puerto Rican politicians in Congress, they face a treacherously uphill battle when trying to propose legislation.[232] As a result, it is unlikely that Congress would enact legislation as impactful as full constitutional incorporation in Puerto Rico—especially when the Constitution is not fully incorporated in the states either.[233]

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territory. 1 F.4th 862, 864 (10th Cir. 2021). Therefore, had the court incorporated the Citizenship Clause against American Samoa, it would have done so over the express wishes of the territorial government. Should there be individuals subject to the laws of the United States who do not benefit from all of its protections? Certainly not. But is judicially imposed, autonomy-limiting constitutional equality the perfect solution? See generally Alvin Padilla-Babilonia, The Imposition of Constitutional Rights, 123 Mich. L. Rev. 1289 (2025) ("The debate about how the Constitution applies to the territories overshadows how the imposition of rights can also impair democratic self-governance, pluralism, and decolonization.").

230. See Jane A. Hudiburg, Cong. Rsch. Serv., R40170, Parliamentary Rights of the Delegates and Resident Commissioner From Puerto Rico 1 (2022).

231. Ashleigh Jackson, Here's Why Millions of Americans in Puerto Rico, Other Territories Can't Vote for President, The Hill (Oct. 30, 2024), https://thehill.com/homenews/4960708-heres-why-millions-of-americans-in-puerto-rico-other-territories-cant-vote-for-president/ (on file with the *Columbia Law Review*).

232. See, e.g., Trías Monge, Oldest Colony, supra note 37, at 108–09 (explaining the swift legislative death of the Tydings–Piñero Bill, which would have allowed Puerto Rico to conduct a political status referendum that would be binding on the United States).

233. See supra note 112.

2. *Puerto Rican Legislative Solution.* — A legislative solution from within Puerto Rico would be more feasible, but it would fall flat in terms of constitutional equality. The territorial incorporation gap is more than just a list of rights denied in Puerto Rico; it represents the second-class status that the United States has imposed on the unincorporated territories. Judicial bridging of the incorporation gap would be a powerful first step in reconciling the legal relationship between the United States and its territories. Yet, if territorial legislatures and courts establish various federal constitutional rights within the territories, this expansion will only serve to preempt future litigation.

The Puerto Rican Supreme Court's *Pueblo v. Torres Rivera*[234] and *Pueblo v. Rodriguez Lopez*[235] rulings illustrate this point: Because the Puerto Rican Supreme Court incorporated the Second Amendment and certain rights protected by the Sixth Amendment into Puerto Rican jurisprudence, there is no realistic avenue to challenge their lack of federal unincorporation through the territorial incorporation doctrine. As a result, the incorporation gap remains, with fewer options to meaningfully challenge it. All the while, the federal courts are absolved from facing the "rotten foundation[s]"[236] of the *Insular Cases*, as the cases slowly fade, unseen, into the tapestry of federal jurisprudence.[237]

While legislative action could resolve the issue of constitutional incorporation in the territories, the likelihood of a federal solution is bleak, while a territorial solution would remain incomplete. Therefore, a judicial remedy—applying the *Insular Cases* and the territorial incorporation doctrine—remains the best path to feasibly and completely resolve the territorial incorporation gap.

CONCLUSION

The *Insular Cases* represented a sharp and appalling departure from American territorial jurisprudence. Before the *Insular Cases*, territorial residents in the American West enjoyed most, if not all, constitutional protections and looked forward to eventual statehood.[238] The *Insular Cases* disrupted this reality, creating an artificial, two-tier system in which incorporated territories enjoyed the opportunities and protections of the

234. 204 P.R. Dec. 288, 300–01 (2020) (incorporating the Sixth Amendment's jury unanimity right in Puerto Rico).

235. 210 P.R. Dec. 752, 770–71 (2022) (incorporating the Second Amendment in Puerto Rico).

236. United States v. Vaello Madero, 142 S. Ct. 1539, 1557 (2022) (Gorsuch, J., concurring).

237. See Christina Duffy Ponsa, When Statehood Was Autonomy, *in* Reconsidering the *Insular Cases*: The Past and Future of the American Empire 1, 1 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) (describing the *Insular Cases* as "[n]early invisible for a century after they were handed down").

238. See supra notes 45–47 and accompanying text.

American legal system and unincorporated territories received only what the courts and Congress were willing to give them.

These cases have been the subject of well-founded criticism by academics, litigants, judges, and Justices.[239] To many, the *Insular Cases* represent the roadblock to constitutional equality in the territories, and these advocates have long called for their complete dismantling. Nevertheless, over the last 125 years, the Court has never been able to escape these cases, which retain full precedential force.

Despite the nobility of this legal movement, challenging the *Insular Cases* head-on has only yielded marginal doctrinal improvement. So long as the *Insular Cases* remain good law, litigating parties must explore new strategies to successfully procure and protect constitutional rights in the territories. A reluctant embrace of the *Insular Cases* could prove to be one such strategy—providing a solution to the incorporation gap and territorial legal inequality that could be used as a springboard to dismantle the larger political and structural inequalities in the unincorporated territories. In pursuit of constitutional equality, this Note proposes a reluctant embrace of the *Insular Cases* to bridge the territorial incorporation gap.

239. See supra notes 9–11 and accompanying text.

AI-GENERATED DENIALS: MEDICAL NECESSITY IN MEDICARE ADVANTAGE TODAY

*Emma Ziegler**

Medicare Advantage insurers hold vast power over access to care for Medicare beneficiaries enrolled in their plans. Among other things, these insurers make the all-important determination as to whether care is "medically necessary" and thus warrants coverage under Medicare. Recently, these insurers have turned to artificial intelligence to help with these determinations. This trend has yielded concerning results, exacerbating both inaccuracy and opacity in the coverage determination process. This Note describes the current state of determinations. Taking an outcomes-focused approach, it argues that the government must demand greater information sharing from Medicare Advantage insurers and enhance beneficiaries' access to the appeals process. Such reforms are an important first step in ensuring beneficiaries have access to the care they are entitled to.

* J.D. Candidate 2026, Columbia Law School. Thank you to Professor John Jacobi for his invaluable support throughout this process; Peter Travitsky, Rebecca Wallach, and the team at New York Legal Assistance Group for their commitment to protecting and expanding access to necessary care; and the entire staff of the *Columbia Law Review* for their great editorial work and friendship.

INTRODUCTION

On December 28, 2023, Carol Clemens received an alarming notice: Only ten days after she had entered a skilled nursing facility following a life-threatening collapse, her health insurance company was refusing to pay for her continued stay.[1] Given that Clemens was unable to eat solid foods, speak more than a few words at a time, or walk without assistance, she immediately appealed the decision, asking the insurer to reconsider letting her finish the rehabilitation program.[2] Clemens's doctor had prescribed a stay until at least January 18, 2024.[3] The insurer, however, was not convinced. Just one day after Clemens submitted her appeal, the company denied the request, stating that a continued stay was "not medically necessary."[4] With no one to pay for her stay, Clemens returned home on January 3.[5] Just three days later, no longer having access to the supervision of the skilled nursing facility staff, Clemens fell again, this time resulting in a "traumatic subarachnoid hemorrhage . . . [and] severe brain bleed."[6] She needed to be readmitted to the hospital, where she spent over two weeks recovering before returning to the skilled nursing facility to restart her rehabilitation, this time with a traumatic head injury.[7]

Clemens is not alone in her experience. Clemens serves as one of multiple plaintiffs in a class action suit filed in Minnesota against insurance giant UnitedHealth Group that makes multiple claims related to Medicare Advantage plans incorrectly denying coverage to aging adults.[8] How did

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1. First Amended Class Action Complaint at 24–25, Estate of Lokken v. UnitedHealth Grp., Inc., No. 0:23-cv-03514-JRT-DTS (D. Minn. filed Apr. 5, 2024), 2024 WL 2853368 [hereinafter Lokken Amended Complaint].

2. Id. at 25.

3. Id.

4. Id.

5. Id.

6. Id. at 26.

7. Id. The devastating health consequences that Clemens has faced due to this denial are further compounded by financial consequences. At the time of filing, Clemens owed over sixteen thousand dollars in out-of-pocket expenses for care that her insurer would not cover. See id. at 27.

8. The lawsuit names UnitedHealth Group and two of its subsidiaries—UnitedHealthcare and naviHealth—as defendants. Id. at 8–9. There is a similar lawsuit in Kentucky against Humana. See Class Action Complaint at 1, Barrows v. Humana, Inc., No. 3:23-cv-00654-RGJ (W.D. Ky. filed Apr. 22, 2024), 2024 WL 4132639 [hereinafter Barrows Complaint] ("Humana employs [AI] to summarily deny elderly patients care owed to them under Medicare Advantage Plans on false pretenses."). Another lawsuit in California makes similar claims against Cigna, although it involves Cigna's employer-sponsored plans rather

anyone seeing the facts of Clemens's case—her inability to eat, talk, and walk—determine that continued rehabilitation was "not medically necessary?" Well, Clemens claims, no one did. As the plaintiffs allege, UnitedHealth Group is not relying on human expertise to make these determinations but is instead deploying "artificial intelligence (AI) in place of real medical professionals[,] . . . overriding . . . physicians' determinations as to medically necessary care."[9]

The Minnesota lawsuit is not the first time that Medicare Advantage insurers have been accused of inappropriately deploying AI to make medical necessity determinations. In 2023, journalists Casey Ross and Bob Herman released a four-part investigative series about Medicare Advantage insurers' widespread use of algorithms to deny care to vulnerable seniors.[10] After the series, over fifty members of Congress wrote to the Centers for Medicare and Medicaid Services (CMS), urging increased oversight of Medicare Advantage plans and stating that the insurers "continue to use AI tools to erroneously deny care and contradict provider assessment findings."[11] The Senate Permanent Subcommittee on Investigations investigated the nation's three largest Medicare Advantage insurers—UnitedHealthcare, Humana, and CVS—and concluded that more intervention was necessary.[12] While CMS promulgated a new rule in

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than its Medicare Advantage plans. See Third Amended Class Action Complaint at 1, Kisting-Leung v. Cigna Corp., No. 2:23-cv-01477-DAD-CSK (E.D. Cal. filed June 14, 2024) [hereinafter Kisting-Leung Third Amended Complaint] ("This action arises from Cigna's illegal scheme to systematically, wrongfully, and automatically deny its insureds the thorough, individualized physician review of claims guaranteed to them and, ultimately, the payments for necessary medical procedures owed to them under Cigna's health insurance policies."). 29% of all Medicare Advantage beneficiaries are enrolled in a UnitedHealthcare plan, 18% are enrolled in a Humana plan, and 2% are enrolled in a Cigna plan. Meredith Freed, Jeannie Fuglesten Biniek, Anthony Damico & Tricia Neuman, Medicare Advantage in 2024: Enrollment Update and Key Trends, KFF (Aug. 8, 2024), https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2024-enrollment-update-and-key-trends/ [https://perma.cc/8XMS-8URP].

9. Lokken Amended Complaint, supra note 1, at 2.

10. Casey Ross & Bob Herman, Denied by AI: How Medicare Advantage Plans Use Algorithms to Cut Off Care for Seniors in Need, STAT (Mar. 13, 2023), https://www.statnews.com/2023/03/13/medicare-advantage-plans-denial-artificial-intelligence/ (on file with the *Columbia Law Review*) [hereinafter Ross & Herman, Denied by AI].

11. Letter from Rep. Judy Chu et al. to Chiquita Brooks-LaSure, Adm'r, Ctrs. for Medicare & Medicaid Servs. 1 (June 25, 2024), https://chu.house.gov/sites/evo-subsites/chu.house.gov/files/evo-media-document/Final%20Chu-Nadler-Warren%20Letter%20to%20CMS%20to%20Increase%20Oversight%20of%20AI%20in%20Medicare%20Advantage%20Coverage%20Decisions%2006.25.2024.pdf [https://perma.cc/WTX8-BEEW].

12. See Majority Staff of S. Permanent Subcomm. on Investigations, 118th Cong., Refusal of Recovery: How Medicare Advantage Insurers Have Denied Patients Access to Post-Acute Care 4, 47–52 (2024), https://www.hsgac.senate.gov/wp-content/uploads/2024.10.17-PSI-Majority-Staff-Report-on-Medicare-Advantage.pdf (on file with the *Columbia Law Review*).

2023 to address some of the concerns about AI-produced medical necessity determinations,[13] some claim the rule is not enough.[14]

This Note explores the current state of coverage determinations in Medicare Advantage. It views insurers' use of AI—and the harmful effects that accompany such use—as the latest development in a Medicare Advantage program that has been plagued for decades with inaccuracy and opacity. To combat this problem, CMS should enhance information sharing about denials while also increasing meaningful access to the appeals process for individual beneficiaries. Not only will such mechanisms improve access to care, but they will also reflect an important return of power and autonomy to beneficiaries, enabling the individuals most affected by determinations to take control of their own coverage and care.

The Note proceeds in three Parts. Part I explores the concept of medical necessity in Medicare, asking what it is and who decides it. Part II outlines the problems present in the coverage determination process today, noting the high rates of inaccuracy and opacity in determinations. It also summarizes CMS's most recent attempt to combat these problems, concluding that more is needed. Part III charts a path forward, presenting two important accountability mechanisms that CMS can enact to enhance insurer accountability.

I. MEDICAL NECESSITY: WHAT IS IT AND WHO DECIDES?

Since its inception, Medicare has only covered services that are "*reasonable and necessary* for the diagnosis or treatment of illness or injury."[15] This provision remains today as a broad standard under which involved actors—most notably third-party insurers—make coverage determinations in individual beneficiaries' cases. Often referred to as "medical necessity"—a term this Note will adopt—this requirement can, and often does, serve as the sole reason to deny coverage to a Medicare beneficiary, as demonstrated by Clemens's case.[16] This Part outlines the medical necessity provision. Section I.A asks *what* medical necessity is, demonstrating how this statutory provision operates as a flexible standard applied to individual cases, rather than a rigid, uniform rule. Section I.B

13. See infra section II.B.

14. See, e.g., Majority Staff of S. Permanent Subcomm. on Investigations, supra note 12, at 51–52 ("CMS has not provided sufficiently specific guidance on separating the use of predictive technologies from patient determinations regarding post-acute care."); Jennifer D. Oliva, Regulating Healthcare Coverage Algorithms, 100 Ind. L.J. 1861, 1878 (2025) ("While CMS was well-intentioned in issuing this rule, the agency left numerous unanswered questions on the table insofar as insurer implementation and use of [utilization management] algorithms are concerned.").

15. Social Security Amendments of 1965, Pub. L. No. 89-97, § 1862(a)(1), 79 Stat. 286, 325 (codified as amended at 42 U.S.C. § 1395y(a)(1)(A) (2018)) (emphasis added).

16. See Lokken Amended Complaint, supra note 1, at 25 (noting that the reason provided for the denial of care was that "rehab care was not medically necessary").

explores *who* makes determinations of medical necessity in Medicare today, discussing the integral role of Medicare Advantage insurers. Section I.C outlines the regulatory tools the government retains over determinations.

A. *An Intentionally Broad Standard*

Created by the Social Security Amendments of 1965,[17] Medicare has long served a foundational role in this country's healthcare system, providing coverage to tens of millions of Americans every year.[18] While the program's benefits are extensive, it has always excluded—by statute—services that are not medically necessary.[19] The statute currently reads: "[N]o payment may be made under [Medicare] for any expenses incurred for items or services . . . not reasonable and necessary for the diagnosis or treatment of illness or injury . . . ."[20] The inclusion of a medical necessity requirement in the statute is largely uncontroversial,[21] merely assuring beneficiaries do not receive unnecessary or harmful care.[22] Similar provisions appear across various health insurance plans both domestically and abroad.[23]

Medicare's medical necessity provision operates as a broad and ambiguous standard rather than a precise rule. Outside the original governing language, neither Congress nor HHS and its subsidiary agencies

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17. Social Security Amendments §§ 100–411, 1801–1875.

18. See Freed et al., supra note 8 (noting that in 2024, over sixty million individuals were enrolled in Medicare).

19. Social Security Amendments § 1862(a)(1).

20. 42 U.S.C. § 1395y(a)(1)(A); see also id. § 1395y(a)(1)(B)–(E) (repeating the "reasonable and necessary" requirement for various types of services).

21. See Janet L. Dolgin, Unhealthy Determinations: Controlling "Medical Necessity", 22 Va. J. Soc. Pol'y & L. 435, 483 (2015) ("The notion of medical necessity, in the abstract, is unproblematic.").

22. See T. Christian Miller, Patrick Rucker & David Armstrong, "Not Medically Necessary": Inside the Company Helping America's Biggest Health Insurers Deny Coverage for Care, ProPublica (Oct. 23, 2024), https://www.propublica.org/article/evicore-health-insurance-denials-cigna-unitedhealthcare-aetna-prior-authorizations [https://perma.cc/5W4Q-Y8CX] (noting that utilization management processes "serve to guard against doctors who recommend unnecessary and even potentially harmful treatments"); see also Dolgin, supra note 21, at 438 ("Validation of the notion of medical necessity and development of methods for implementing the notion would seem basic to any healthcare system that is anxious both to provide adequate care and contain costs." (citing Edward B. Hirshfeld & Gail H. Thomason, Medical Necessity Determinations: The Need for a New Legal Structure, 6 Health Matrix 3, 19–20 (1996))).

23. See, e.g., Cathy Charles, Jonathan Lomas, Mita Giacomini, Vandna Bhatia & Victoria A. Vincent, Medical Necessity in Canadian Health Policy: Four Meanings and . . . a Funeral?, 75 Milbank Q. 365, 365 (1997) ("[T]he concept of medical necessity has been a cornerstone of Canadian federal legislation regarding publicly funded health service coverage."); Mark A. Hall & Gerard F. Anderson, Health Insurers' Assessment of Medical Necessity, 140 U. Pa. L. Rev. 1637, 1645–47 (1992) (discussing the contractual provisions that govern medical necessity in private domestic insurance plans); id. at 1647 n.30 ("The Medicaid statute has been construed similarly to require states to cover all 'medically necessary services.'").

have passed or promulgated any legally binding definitions or interpretations of this provision.[24] Medical necessity has thus taken on a "multiplicity of meanings," with different interest groups promoting "varying views of the term's meaning" over time.[25] Even in its consumer-facing handbook, CMS largely parrots the statute, defining as medically necessary any service "needed to diagnose or treat an illness, injury, condition, disease, or its symptoms and that meet[s] accepted standards of medicine."[26] Such a definition leads to "heterogeneous interpretations."[27]

While many criticize this amorphous definition as contributing to a Medicare program that is "inconsistent" and "unprincipled" in what it covers,[28] some caution against further defining medical necessity.[29] The practice of medicine itself produces caution: Medicine is neither one-size-fits-all nor stagnant. The medical field today widely recognizes that quality care consists not of a standardized list of approved treatments but instead "must be tailored or 'personalized' to [an] individual's unique biochemical, physiological, environmental exposure, and behavioral profile."[30] This required individualization on the patient side is coupled with "rapidly evolving medical knowledge" and a changing technological landscape on the provider side.[31] With so many changing variables from person to person and day to day, no singular definition can cover with precision what it means for a service or treatment to be medically necessary for each and every beneficiary.[32] It is in such situations that broad

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24. See Timothy P. Blanchard, "Medical Necessity" Denials as a Medicare Part B Cost-Containment Strategy: Two Wrongs Don't Make It Right or Rational, 34 St. Louis U. L.J. 939, 975 (1990) ("[T]he statute gives no guidance regarding the interpretation of this broad criterion."); John V. Jacobi, Tara Adams Ragone & Kate Greenwood, Health Insurer Market Behavior After the Affordable Care Act: Assessing the Need for Monitoring, Targeted Enforcement, and Regulatory Reform, 120 Penn. St. L. Rev. 109, 129 (2015) ("There is no straight-forward, generally accepted definition of medical necessity.").

25. William M. Sage, Managed Care's Crimea: Medical Necessity, Therapeutic Benefit, and the Goals of Administrative Process in Health Insurance, 53 Duke L.J. 597, 601, 603 (2003).

26. See Ctrs. for Medicare & Medicaid Servs., HHS, Medicare & You 2026: The Official U.S. Government Medicare Handbook 120 (2025), https://www.medicare.gov/publications/10050-medicare-and-you.pdf [https://perma.cc/VP39-3DUX].

27. See Dolgin, supra note 21, at 438.

28. See, e.g., Sage, supra note 25, at 601 ("[D]ecisions involving medical necessity are frequently characterized by inconsistent administration, poor communication, distrust and . . . relatively unprincipled, results-oriented judicial resolution.").

29. See id. at 604 ("This counsels against mandating intricate, but supposedly less ambiguous, definitions of medical necessity, as some commentators have suggested.").

30. Laura H. Goetz & Nicholas J. Schork, Personalized Medicine: Motivation, Challenges, and Progress, 109 Fertility & Sterility 952, 952 (2018).

31. Amy B. Monahan & Daniel Schwarcz, Rules of Medical Necessity, 107 Iowa L. Rev. 423, 427 (2022); see also id. at 432 ("Standards of treatment for medical care are constantly advancing, technology is changing, clinical evidence is expanding, and individual patients often have unique presentations.").

32. See id. at 432 ("The range of possible medical treatments and clinical presentations was thought to be too vast and likely to evolve to specify in the terms of a contract.");

standards—which can adjust and account for changing circumstances—typically dominate over hard-and-fast rules.[33] Indeed, scholars have found that in the private insurance sphere, where more precise definitions of medical necessity have started to emerge,[34] there have been detrimental effects on access to care, particularly due to the rules' lack of individualization and inflexibility.[35] Given that good medicine requires providing "the right care for the right patient for the right problem at the right time,"[36] medical necessity must allow for the same type of person-, situation-, and time-specific determinations rather than rigidly following objective criteria.

Medical necessity—as it exists in Medicare—therefore remains a broad and somewhat ambiguous standard that all services must meet to be covered. This ambiguity is often thought inevitable[37] and even helpful. It enables decisionmakers to account for both an individual's particular circumstances and evolving industry knowledge to ensure the program covers services that are necessary for a particular beneficiary at a particular time.[38]

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see also Dolgin, supra note 21, at 448 ("[T]here could be no hard and fast rules within medicine about how best to care for patients."); Sage, supra note 25, at 649 ("Too many different actors with varying perspectives and incentives are involved in creating, implementing, and policing medical necessity for the term to develop a unitary meaning that can be applied consistently when insurance arrangements are entered into, when treatment is proposed, and when disputes are resolved.").

33. See Monahan & Schwarcz, supra note 31, at 437 ("Rules typically prevent individualized determinations, and they may become outdated . . . . [This] means that some medically beneficial care will be denied to individuals who do not conform to broader trends." (footnote omitted)); see also id. at 430 ("[T]he specificity of rules often leaves them inflexible, both to unique circumstances and to technological or other societal changes." (footnote omitted) (citing Derek E. Bambauer, Rules, Standards, and Geeks, 5 Brook. J. Corp. Fin. & Com. L. 49, 52 (2010))).

34. See id. at 427 (noting that over the past two decades, private insurers have "increased their reliance on rules rather than standards").

35. See id. at 482 ("The rulification of medical necessity raises the real possibility that individuals with health insurance will have no effective legal recourse when they are denied coverage for critical care . . . on the basis of an insurer-drafted rule that . . . does not account for the individual's unique presentation.").

36. Ian Coulter, Patricia Herman, Gery Ryan, Lara Hilton, Ron D. Hays & Members of the CERC Team, The Challenge of Determining Appropriate Care in the Era of Patient-Centered Care and Rising Health Care Costs, 24 J. Health Servs. Rsch. & Pol'y 201, 201 (2019).

37. See, e.g., Sage, supra note 25, at 604 ("[A]mbiguity in the interpretation of medical necessity is inevitable . . . .").

38. Medicare also has certain bright-line rules, mainly in the form of national and local coverage determinations. These determinations *categorically* prohibit or require coverage for certain medical services. See Susan Bartlett Foote & Robert J. Town, Implementing Evidence-Based Medicine Through Medicare Coverage Decisions, 26 Health Affs. 1634, 1636 (2007) ("The resulting LCDs and NCDs . . . can grant, limit, or exclude items or services from Medicare."). These rules are binding on all parties making coverage determinations. Ctrs. for Medicare & Medicaid Servs., HHS, Report to Congress Fiscal Year 2023: Medicare National Coverage Determinations 2 (2024), https://www.cms.gov/files/

B. *The Origins and Expansion of Insurer Power*

Because medical necessity operates as a broad standard, it is important to know *who* is applying this standard.[39] Over fifty years ago, a New York court tasked with resolving a medical necessity dispute asked this very question, stating: "The words 'necessary for proper treatment' call into play the exercise of judgment. 'Proper' in whose eyes? The patient's, the treating physician's, the hospital's, an [insurance] administrator's, or a court's looking back on the events sometime afterwards?"[40] As Clemens's story illuminates, Medicare Advantage insurers hold great power over these determinations in Medicare today.

Medicare has always relied on third-party insurers to administer coverage determinations and manage payments to doctors.[41] The original

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document/2023-report-congress.pdf [https://perma.cc/SZ57-BME9]. These categorical rules, however, are then always followed by a second, individualized determination to see if the service is necessary for the specific beneficiary at the particular time they are requesting it. See Eleanor D. Kinney, The Medicare Appeals System for Coverage and Payment Disputes: Achieving Fairness in a Time of Constraint, 1 Admin. L.J. 1, 13–14 (1987) (explaining that coverage determinations require two steps, the second of which asks "whether the benefit was either necessary and reasonable *in a specific instance*" (emphasis added)). It is this second, individualized determination that this Note is primarily concerned with.

It is not always easy, however, to parse out whether an insurer's denial is based on medical necessity or a separate requirement. For example, an insurer may state that it is denying coverage because it is missing information. But that may mean that it does not have the information to determine if the service is medically necessary, and thus, the denial really is related to the medical necessity provision. The reasons can bleed into one another, and the medical necessity provision often plays a role.

39. See Dolgin, supra note 21, at 438 ("Individual determinations about healthcare coverage reflect the particular decision-maker . . . .").

40. Mount Sinai Hosp. v. Zorek, 271 N.Y.S.2d 1012, 1016 (Civ. Ct. 1966). Given that the events of this case happened before the creation of Medicare, the case involves a private insurer's medical necessity provision. Id. at 1014. Nevertheless, the question remains relevant.

41. See Dolgin, supra note 21, at 453 ("[T]he legislation authorized insurance companies to render coverage determinations and to administer Medicare payments." (citing Sylvia A. Law & Barry Ensminger, Negotiating Physicians' Fees: Individual Patients or Society? (A Case Study in Federalism), 61 N.Y.U. L. Rev. 1, 12–13, 12 n.67 (1986))). While repeating the long history of how third-party insurers came to be integral to Medicare is beyond the scope of this Note, a few points merit mention. For years, many doctors and hospitals opposed government-funded national health insurance. See Kinney, supra note 38, at 6 (noting the "formidable ideological opposition [to Medicare], particularly from the medical profession, because of the fear of government control of medical practices"); David Orentlicher, Rights to Healthcare in the United States: Inherently Unstable, 38 Am. J.L. & Med. 326, 328 (2012) (noting that during the Cold War, the AMA "waved the flag of socialism to mobilize public opposition" to Medicare). As early as 1920, the AMA passed a resolution "declar[ing] its opposition to . . . any scheme embodying a system of compulsory contributory insurance against illness . . . provided, controlled or regulated by any State or the Federal Government." House of Delegates, AMA, Proceedings of the New Orleans Session: Minutes of the Seventy-First Annual Session of the American Medical Association, Held at New Orleans, April 26–30, 1920, at 37 (1920).

In the 1960s, the government and medical profession finally struck a compromise: Instead of the government managing every aspect of the program, third-party insurers

statute instructed the Secretary to enter into contracts with insurers, delegating to them a number of tasks, including making payments to treating physicians, ensuring physician and hospital compliance with various sections of the program, and protecting "against unnecessary utilization of services."[42] The delegation was expansive.[43] As Wilbur Cohen, one of the chief architects of Medicare, told President Lyndon B. Johnson at the time, the insurers "would have to do all the policing" of the program,[44] which inevitably included determining whether services met the statutory medical necessity requirement.[45]

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would perform day-to-day functions like processing claims. See Dolgin, supra note 21, at 453 (noting that Congress added insurance companies as part of an effort "to placate physicians and hospital groups"); Hall & Anderson, supra note 23, at 1663 n.93 ("[T]he federal government was forced to adopt the same insurance system provided in the private sector in order to avoid a boycott by the hospital industry and the medical profession."). Doctors and hospitals believed these intermediaries would "serve as a buffer" between themselves and the federal government and "make Medicare more palatable to the medical profession." Sylvia A. Law, Blue Cross: What Went Wrong? 38 (2d ed. 1976); see also Kinney, supra note 38, at 9 ("[T]he hospital industry lobbied for the arrangement as it allowed the hospitals to deal with familiar Blue Cross plans and insurance companies rather than with the federal government."). Indeed, by the time of passage, there had been a "long-standing alliance between the insurance industry and organized medicine." Herman Miles Somers & Anne Ramsay Somers, Doctors, Patients, and Health Insurance: The Organization and Financing of Medical Care 415 (1961).

Despite this historical alliance between the medical profession and insurers, a change in payment models left the parties in opposition. See infra notes 59–63 and accompanying text. Noting this history, one scholar bluntly stated his opinion on the role doctors and hospitals played in creating the system that exists today:

> However one may view the use of private insurance companies to process Medicare claims, the medical profession has no ground to complain about it now. Certainly neither the law nor the policymakers can have sympathy for the medical profession, which fought to put [insurers] in power at the inception of the Medicare program, now that their accomplice appears to have turned . . . against them. . . . Be that as it may, physicians . . . nevertheless have valid complaints regarding carrier claims processing and review activities.

Blanchard, supra note 24, at 942 n.13. For a more detailed account of the politics surrounding this scheme and the passage of Medicare, see generally Judith M. Feder, Medicare: The Politics of Federal Hospital Insurance (1977); Law, supra; Ronald L. Numbers, Almost Persuaded: American Physicians and Compulsory Health Insurance, 1912–1920 (1978).

42. See Social Security Amendments of 1965, Pub. L. No. 89-97, §§ 1816, 1842, 79 Stat. 286, 297–99, 309–12 (codified as amended at 42 U.S.C. §§ 1395h, 1395u (2018)).

43. See Kinney, supra note 38, at 9 ("Congress delegated extraordinary adjudicative powers to these private organizations with respect to resolving appeals over coverage and payment issues arising under Part A and Part B of the Medicare program.").

44. Nicholas Bagley, Bedside Bureaucrats: Why Medicare Reform Hasn't Worked, 101 Geo. L.J. 519, 527–28 (2013) (internal quotation marks omitted) (quoting Larry DeWitt, The Medicare Program as a Capstone to the Great Society—Recent Revelations in the LBJ White House Tapes (May 2003) (unpublished manuscript)).

45. See Blanchard, supra note 24, at 957–58 (noting the third parties used screens "to identify claims that may not be medically necessary").

At the time, however, the insurers largely deferred to treating physicians regarding medical necessity determinations.[46] The insurers did not have financial motives of their own—unlike insurers today, which operate on a risk-based model[47]—so they served as mere fiscal intermediaries.[48] The insurers themselves identified as solely "fiduciary institutions" that would have "no interference in the provision of care."[49] Additionally, the statutory framework retained important roles for both treating physicians and the government. Treating physicians served their role on the front end of the process. For Medicare to reimburse any claim, a physician certification had to accompany the claim, stating that the services "were medically required."[50] Thus, kickstarting the entire process, physicians made their own judgment about medical necessity and certified it in writing. Without a certification, no reimbursement would be made.[51] The government, on the other hand, served as a back-end check on the entire process, providing a robust appeals process for beneficiaries who disagreed with the insurer's ultimate determination.[52]

This original statutory framework remains largely untouched. Today, treating physicians attest that care is medically necessary when they seek payment; third-party insurers then "police" claims to ensure full compliance with the statute, including making their own judgment as to medical necessity; and the government provides an appeals process if there are major disagreements. What has changed, however, are the internal motives and processes driving third-party insurers as they go about determinations. This has come with the rise of the risk-based, capitated payment system and Medicare Advantage.

In the years following Medicare's enactment, healthcare costs skyrocketed[53] while societal confidence in physicians plummeted.[54] Studies

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46. See Law, supra note 41, at 121 ("In the early years of the Medicare program there was no effort to overrule the determinations of physicians and utilization review committees that care was medically necessary."); Hall & Anderson, supra note 23, at 1644 ("[P]rivate insurers were initially very deferential to both hospitals and physicians.").

47. See infra notes 60–63 and accompanying text.

48. See Somers & Somers, supra note 41, at 414–15 (describing how insurers at the time were "highly reluctant . . . to assume any such responsibility" over costs and care).

49. Id. at 415 (internal quotation marks omitted) (quoting Joseph F. Follman, Jr., Commercial Insurance Views Financing of Hospital and Medical Care, 58 J. Mich. St. Med. Soc'y 971, 973 (1959)).

50. Social Security Amendments of 1965, Pub. L. No. 89-97, §§ 1814(a)(2), 1835(a)(2), 79 Stat. 286, 294–95, 303–04 (codified as amended at 42 U.S.C. §§ 1395f(a)(2), 1395n(a)(2) (2018)).

51. See id.

52. See id. § 1869 (noting that "[a]ny individual dissatisfied with any determination" was entitled to a hearing). More detail about the appeals process is in section I.C.

53. See Dolgin, supra note 21, at 452 (noting that national spending on healthcare rose from $39 billion to $119 billion in the decade following Medicare's enactment).

54. See Hui Zheng, Losing Confidence in Medicine in an Era of Medical Expansion?, 52 Soc. Sci. Rsch. 701, 701 (2015) ("[T]he percentage of Americans reporting little confidence in medicine has doubled from 4.5% in 1974 to 9.8% in 1994 . . . ."). For a more

led to a "growing awareness of errors in medical judgement and of the widespread variation in the prevalence of procedures" performed by different physicians.[55] Particularly notable was the public realization that physicians had—and were acting on—financial incentives to order more services than were necessary.[56] Because Medicare reimbursed physicians for each service provided, physicians earned more income the more services they ordered.[57] This new data and subsequent realization led to backlash across the country in the 1970s, eventually resulting in congressional hearings in which individuals testified to their experiences of feeling like doctors were treating them as "raw material for the production of profits."[58]

The findings and resulting public sentiment led insurance companies—as the police of the Medicare program—to more greatly scrutinize coverage.[59] To encourage Medicare insurers to internalize the role of ensuring treatments were medically necessary, Congress changed the way such insurers were paid, creating a risk-based payment model that made insurers' financial motives diametrically opposed to those of physicians.[60] This consisted of implementing a capitated payment system, which sets a prospective payment to an insurer per beneficiary it serves, regardless of how many services the insurer covers for that beneficiary.[61] If the insurer

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detailed account of this trend, see generally Mark Schlesinger, A Loss of Faith: The Sources of Reduced Political Legitimacy for the American Medical Profession, 80 Milbank Q. 185 (2002) (outlining the public's loss of faith and confidence in the medical profession during this time).

55. Schlesinger, supra note 54, at 193.

56. See Hall & Anderson, supra note 23, at 1667 ("[A]mple data suggests that physician financial incentives are . . . a significant determinant of treatment behavior."); see also Adnan Varol, M.D., P.C., v. Blue Cross & Blue Shield of Mich., 708 F. Supp. 826, 833 (E.D. Mich. 1989) (noting that doctors were admitting that pay, not medical judgment, drove some of their medical decisions).

57. See Pamela H. Bucy, Health Care Reform and Fraud by Health Care Providers, 38 Vill. L. Rev. 1003, 1012 (1993) ("Because the fee for service system rewards for volume of services rendered, there is strong incentive for the fraudulent provider to perform and bill for unnecessary services."); Kinney, supra note 38, at 19 ("[S]ince hospitals could be assured of payment for all the reasonable costs of covered services, they were rewarded for providing more services at higher cost. Physicians also had comparable incentives . . . .").

58. See Medicare and Medicaid Frauds: Hearing Before the Subcomm. on Long-Term Care of the S. Spec. Comm. on Aging: Part 5, 94th Cong. 544 (1976) (statement of Patricia G. Oriol, Chief Clerk, Senate Comm. on Aging); see also id. at 542 (statement of Patricia G. Oriol, Chief Clerk, Senate Comm. on Aging) ("[D]octors . . . were completely frank about their determination to make as many dollars as possible for as little care as possible.").

59. See Hall & Anderson, supra note 23, at 1652 ("These studies encouraged insurers to begin reviewing the appropriateness of medical procedures more closely . . . .").

60. See id. at 1682 (noting that the system created a situation in which there is "a treating physician with an incentive for ordering too much treatment, and a reviewing physician [from the insurance company] with an incentive to pay for too little").

61. Yash M. Patel & Stuart Guterman, Commonwealth Fund, The Evolution of Private Plans in Medicare 2 (2017), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_issue_brief_2017_dec_patel_evolution_private_p

approves no services in any given month, the entire month's payment is profit. If, on the other hand, the insurer covers a great number of expensive services in a month, it loses money (as again, the insurer receives the same rate regardless). The capitated system—a reflection of a classic risk-based model used frequently in insurance and elsewhere—left third-party Medicare insurers with an inherent financial motive to closely monitor the care doctors were ordering.[62] And, just as Congress had hoped, the insurers started to police coverage and medical necessity with more rigor.[63]

Alongside the implementation of the capitated payment system came the rapid expansion of Medicare Advantage.[64] Medicare Advantage serves as an "alternative to 'traditional' or 'original' Medicare" in which purely private insurers contract with the government to provide a host of services to enrollees for a capitated payment.[65] These services extend far beyond claims processing, instead coordinating many aspects of a beneficiary's care. For example, Medicare Advantage insurers can create their own utilization management policies, limit coverage to certain networks, charge additional premiums, offer supplemental and bundled services, and exercise a host of other controls.[66] These plans also often use prior authorization—a process that requires beneficiaries to obtain a determination of medical necessity before receiving the service rather

lans_medicare_managed_care_ib.pdf [https://perma.cc/S2QP-WWVY] ("The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) established a capitated payment system with prospectively set payment rates per enrollee . . . .").

62. See Off. of Inspector Gen., HHS, OEI-09-16-00410, Medicare Advantage Appeal Outcomes and Audit Findings Raise Concerns About Service and Payment Denials 1 (2018) [hereinafter Off. of Inspector Gen., Medicare Advantage Appeal Outcomes], https://oig.hhs.gov/documents/evaluation/3140/OEI-09-16-00410-Complete%20Report.pdf [https://perma.cc/6VC7-4QLN] ("A central concern about the capitated payment model . . . is the potential incentive for insurers to inappropriately deny access to services and payment in an attempt to increase their profits."); Dolgin, supra note 21, at 445 ("The fewer claims that an insurance company pays, the greater the company's profits." (citing Hall & Anderson, supra note 23, at 1668)); see also Law, supra note 41, at 108 ("There is no economic incentive for [an insurer under a capitated system] to provide a prolonged and intensive course of life-saving treatment. Incentives for economy can also be incentives for no care or inferior care.").

63. See Hall & Anderson, supra note 23, at 1653 ("Suddenly, from all directions, physicians experienced much greater scrutiny of their treatment decisions than ever before.").

64. Medicare Advantage has gone by different names throughout the years, including Medicare+Choice and Medicare Part C. Christina Ramsay, Gretchen Jacobson, Steven Findlay & Aimee Cicchiello, Medicare Advantage: A Policy Primer, Commonwealth Fund (Jan. 31, 2024), https://www.commonwealthfund.org/publications/explainer/2024/jan/medicare-advantage-policy-primer (on file with the *Columbia Law Review*). For purposes of consistency and clarity, this Note will exclusively use the term Medicare Advantage.

65. See id.

66. See id; see also Hannah Ruth Leibson, Hidden in Plain Sight: Two Models of Medicare Privatization, 33 U. Fla. J.L. & Pub. Pol'y 81, 110 (2022) ("Medicare Advantage providers become responsible for the entire administration of the plan." (citing Travis Broome & Farzad Mostashari, Spurring Provider Entry Into Medicare Advantage, Health Affs. Forefront (July 6, 2017), https://www.healthaffairs.org/content/forefront/spurring-provider-entry-into-medicare-advantage (on file with the *Columbia Law Review*))).

than seeking approval after the fact—which is generally not allowed in traditional Medicare.[67]

Essentially, Medicare Advantage results in a "greater delegation" of powers to third-party, private insurers.[68] Indeed, Medicare Advantage is often referred to as the "privatization" of Medicare,[69] and accordingly, it has drawn participation from the nation's most prominent private insurers, which now operate Medicare Advantage plans alongside their private plans.[70] While these insurers are still subject to the Medicare statute, and therefore, under law, their enrollees still "have the same rights and protections [they] would have under Original Medicare,"[71] Medicare Advantage insurers exercise powers far greater than insurers did at the inception of Medicare. This is what proponents of Medicare Advantage intended. They claimed that delegating powers en masse to private insurers could lead to better coordination and increased efficiency.[72] These Medicare Advantage plans are now the norm in Medicare,[73] and any inquiry into coverage determinations in Medicare inevitably requires consideration of these plans' unique blend of expanded powers and inherent financial interests.[74]

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67. See Off. of Inspector Gen., HHS, OEI-09-18-00260, Some Medicare Advantage Organization Denials of Prior Authorization Requests Raise Concerns About Beneficiary Access to Medically Necessary Care 4 (2022), https://oig.hhs.gov/documents/evaluation/3150/OEI-09-18-00260-Complete%20Report.pdf [https://perma.cc/EBH3-ZQSF] [hereinafter Off. of Inspector Gen., Medicare Advantage Denials Raise Concerns].

68. See Leibson, supra note 66, at 108 (stating that in Medicare Advantage, "the private contractor moves from passenger to driver" and has "greater delegation" and "amassed power").

69. See, e.g., id. at 107.

70. Six of the seven top Medicare Advantage insurers by enrollment currently also offer commercial plans. Freed et al., supra note 8. The seventh insurer, Humana, also offered commercial plans until 2023, when it decided to shift its focus to solely government-funded insurance programs. Press Release, Humana, Humana to Exit Employer Group Commercial Medical Products Business (Feb. 23, 2023), https://news.humana.com/press-room/press-releases/2023/humana-to-exit-employer-group-commercial-medical-products [https://perma.cc/VA4N-K6CB].

71. Ctrs. for Medicare & Medicaid Servs., HHS, Understanding Medicare Advantage Plans 5 (2024), https://www.medicare.gov/publications/12026-understanding-medicare-advantage-plans.pdf [https://perma.cc/63C2-LECJ].

72. See Patel & Guterman, supra note 61, at 2 ("Proponents argued that the efficiencies of HMOs could reduce government expenditures, improve quality, and provide additional benefits beyond those offered by traditional Medicare."). Unfortunately, these claims appear to have been incorrect. It is widely accepted that Medicare Advantage costs the government more money while delivering poorer health outcomes. See, e.g., Leibson, supra note 66, at 110 ("This hands-off, highly-privatized model has given rise to several negative externalities over the past years."); Ramsay et al., supra note 64 ("Medicare Advantage costs the government more than traditional Medicare for covering the same beneficiary.").

73. See Freed et al., supra note 8 ("In 2024, 32.8 million people are enrolled in a Medicare Advantage plan, accounting for more than half, or 54 percent, of the eligible Medicare population . . . .").

74. Due to the prominence of Medicare Advantage and its insurers' unique financial incentives, this Note focuses its remaining inquiry on medical necessity determinations in Medicare Advantage. It bears noting, however, that the Trump Administration has

C. *The Government's Regulatory Tools*

While Medicare Advantage insurers hold vast power over determinations today, the government retains multiple mechanisms of control. The federal Medicare statute still governs, and it entrusts the HHS Secretary with the power to create rules and regulations as necessary.[75] Currently, federal law sets certain requirements for how Medicare Advantage insurers must make medical necessity and coverage determinations. Among other things, it demands insurers have a standardized procedure for making determinations, provides specific time frames in which insurers must make determinations, and requires that insurers share certain information with beneficiaries.[76] Most recently, CMS promulgated a rule mandating Medicare Advantage insurers rely on their internal physicians, rather than any automated system, when making adverse medical necessity determinations. The rule also limits the types of data and criteria that insurers can use when making determinations.[77] These "modest rules" direct Medicare Advantage insurers on how they must approach determinations.[78]

Additionally, federal law mandates an appeals process that enables beneficiaries to appeal an insurer's determination when the beneficiary believes the insurer to be incorrect. This appeals process has five stages. A beneficiary's first step is to ask the Medicare Advantage insurer for a

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announced plans to start rewarding contractors that cut costs and use AI in traditional Medicare. See Press Release, Ctrs. for Medicare & Medicaid Servs., HHS, CMS Launches New Model to Target Wasteful, Inappropriate Services in Original Medicare (June 27, 2025), https://www.cms.gov/newsroom/press-releases/cms-launches-new-model-target-wasteful-inappropriate-services-original-medicare [https://perma.cc/XC25-ML7D] (announcing a model that will utilize "enhanced technologies, including artificial intelligence" and pay contractors "based on their ability to reduce unnecessary or non-covered services"); see also Suzanne Blake, Medicare Will Start Using AI to Help Make Coverage Decisions Next Year, Newsweek (Aug. 8, 2025), https://www.newsweek.com/medicare-will-start-using-ai-help-make-coverage-decisions-next-year-2111093 [https://perma.cc/R5T7-GLPF] (reporting on an "AI test pilot" in traditional Medicare that will result in contractors having "incentive[s] to deny coverage"). This proposal—which makes traditional Medicare operate more like Medicare Advantage—is concerning, given the poor outcomes Medicare Advantage delivers to beneficiaries. See Blake, supra ("For many Americans, the term 'Medicare Advantage' has left them asking what the real advantage was, as plans haven't worked out in some parts of the country as efficiently as originally promised." (internal quotation marks omitted) (quoting Alex Beene, Fin. Literacy Instructor, Univ. of Tenn. at Martin)); see also infra section II.A. While this Note focuses on Medicare Advantage, the same concerns noted here may arise in traditional Medicare, should the Trump Administration go through with this proposal.

75. See 42 U.S.C. §§ 1395–1395lll (2018) (including various delegations to HHS and its subsidiary agencies to effectively manage the Medicare program).

76. See id. § 1395w-22(g); 42 C.F.R. §§ 422.101, 422.560–422.634 (2024).

77. This rule is outlined in detail in section II.B.

78. Letter from Sen. Ron Wyden, Rep. Frank Pallone, Jr. & Rep. Richard E. Neal to Chiquita Brooks-LaSure, Adm'r, Ctrs. for Medicare & Medicaid Servs. 1–2 (Oct. 29, 2024), https://www.finance.senate.gov/imo/media/doc/102924_wyden_neal_pallone_letter_to_cms_about_ma.pdf [https://perma.cc/7D86-2ZZE].

reconsideration.[79] While such a process is completely internal to the insurance plan, federal law demands that any reconsideration involve a physician at the insurance company "*other than [the] physician involved in the initial determination*."[80]

If the insurer stands by its original determination, still refusing to cover the service, the decision is automatically forwarded to an Independent Review Entity (IRE) to start the second step of the appeals process.[81] The insurer must send the determination—along with all information that led to the determination, including the patient's case file and the insurer's utilization management tools—to the IRE for an external review.[82] The IRE, which has its own doctors and healthcare professionals, is retained by CMS and "independently review[s] and assess[es] the medical necessity of the items and services pertaining to [the beneficiary's] case."[83] The IRE then makes its own determination, which is binding on both the insurer and the beneficiary.[84]

If the IRE upholds the insurer's denial, the beneficiary can once again appeal the decision.[85] The final three steps of the appeals process involve various government actors, and a beneficiary must follow them in sequential order. The beneficiary can first appeal to an administrative law judge (ALJ) from the Office of Medicare Hearings and Appeals (OMHA) for a hearing.[86] After the ALJ renders a decision, that decision can be appealed to the Medicare Appeals Council,[87] which is made up of multiple

79. 42 U.S.C. § 1395w-22(g)(2); Appeals in Medicare Health Plans, Medicare.gov, https://www.medicare.gov/providers-services/claims-appeals-complaints/appeals/medicare-health-plans [https://perma.cc/K4JJ-RBWH] (last visited Sep. 12, 2025) ("If you disagree with the initial decision from your plan, you or your representative can ask for a reconsideration.").

80. 42 U.S.C. § 1395w-22(g)(2)(B) (emphasis added).

81. Id. § 1395w-22(g)(4).

82. See Ctrs. for Medicare & Medicaid Servs., HHS, Parts C & D Enrollee Grievances, Organization/Coverage Determinations, and Appeals Guidance ¶¶ 50.12.1–50.12.4, 60.1–60.7 (2024), https://www.cms.gov/medicare/appeals-and-grievances/mmcag/downloads/parts-c-and-d-enrollee-grievances-organization-coverage-determinations-and-appeals-guidance.pdf [https://perma.cc/4B6L-KYHF] [hereinafter Ctrs. for Medicare & Medicaid Servs., Parts C & D] (outlining plan responsibilities regarding case files to be sent to the IRE).

83. Level 2 Appeals: Medicare Advantage (Part C), HHS, https://www.hhs.gov/about/agencies/omha/the-appeals-process/level-2/part-c/index.html [https://perma.cc/4L69-VR4K] (last updated Jan. 9, 2020).

84. Ctrs. for Medicare & Medicaid Servs., Parts C & D, supra note 82, ¶ 60.7.

85. 42 U.S.C. § 1395w-22(g)(5).

86. See Ctrs. for Medicare & Medicaid Servs., Parts C & D, supra note 82, ¶ 70.1 ("Any party to the reconsideration, except the [Medicare Advantage] plan, has a right to a hearing." (emphasis omitted)). These appeals, however, are only available for denials of services that cost $180 or more. Appeals in Medicare Health Plans, supra note 79.

87. 42 C.F.R. § 422.608 (2024).

ALJs.[88] If that decision still is not accepted, the final step is an appeal to a federal district court, invoking classic judicial review.[89]

Federal law thus creates a robust appeals process for beneficiaries denied coverage that involves various actors: multiple doctors from the insurance plan, independent doctor reviewers from the IRE, a host of ALJs in OMHA and the Medicare Appeals Council, and Article III judges. This appeals process combines with laws that set out general procedures as to how Medicare Advantage insurers must make determinations to comprise the government's main regulatory tools regarding medical necessity determinations. Therefore, while Medicare Advantage insurers hold vast power in applying this necessarily broad statutory standard to an individual beneficiary's case—a power that has been enhanced over time—the government retains the power to check these insurers should they stray away from their statutory duties.

II. THE CURRENT STATE OF DETERMINATIONS IN MEDICARE ADVANTAGE

Unfortunately, Medicare Advantage insurers have seemingly strayed from their duties. This Part outlines the current state of coverage determinations. Section II.A demonstrates that Medicare Advantage insurers are using AI to incorrectly and opaquely deny coverage, often based on a lack of medical necessity, and sometimes obstructing access to the appeals system in the process. Section II.B outlines recent reforms that the government has enacted to curb improper denials. Section II.C then notes the shortfalls of the reforms.

A. *Automated Denials on the Rise*

While the precise ways that Medicare Advantage insurers use AI today remain varied and unclear,[90] the technology is playing an increasing role in medical necessity and coverage determinations, as demonstrated by

88. See Who Are the Board Members & Judges?, HHS, https://www.hhs.gov/about/agencies/dab/about-dab/who-are-the-board-members-and-judges/index.html [https://perma.cc/DJ9H-JBPE] (last updated Dec. 5, 2025) (listing out the members of the Medicare Appeals Council and their qualifications).

89. 42 C.F.R. § 422.612. Appeals to a federal court, however, are only available for services that meet a certain amount in controversy. Appeals in Medicare Health Plans, supra note 79. In 2024, that amount was $1,840. Id.

90. See Nat'l Ass'n of Ins. Comm'rs, Artificial Intelligence in Health Insurance: The Use and Regulation of AI in Utilization Management 7–10 (2024), https://healthlaw.org/wp-content/uploads/2024/11/20241111_Role-of-AI-in-UM_508_FINAL-v2.pdf [https://perma.cc/9ZHZ-VYU8] (exploring three separate ways health insurers may use AI in determinations); Ross & Herman, Denied by AI, supra note 10 ("[T]he precise role the algorithms play in these decisions has remained opaque."); Letter from Rep. Judy Chu et al. to Chiquita Brooks-LaSure, supra note 11, at 2 ("[W]e do not know what inputs are used for the algorithms and AI tools currently being used . . . .").

multiple investigations.[91] While the use of AI in decisionmaking is not always inherently harmful,[92] it is concerning in this context, as evidence shows that AI usage may be correlated with increasing denials, inaccuracy, and discrimination.[93] In recent years, Medicare Advantage insurers have seen a slight uptick in denials, from 5.7% in 2019 to 6.4% in 2023.[94] The trend is more stark for costly services, such as post-acute rehabilitation services, an area in which UnitedHealthcare's denial rate increased from 10.9% in 2020 to 16.3% in 2021 to 22.7% in 2022.[95] Humana's denial rate for similar services saw a comparable increase, growing by 54% between

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91. See, e.g., Kevin De Liban, TechTonic Just., Inescapable AI: The Ways AI Decides How Low-Income People Work, Live, Learn, and Survive 10 (2024), https://static1.squarespace.com/static/65a1d3be4690143890f61cec/t/673c7170a0d09777066c6e50/1732014450563/ttj-inescapable-ai.pdf [https://perma.cc/WE65-RB39] ("About 16.5 million low-income people are exposed to AI-related decision-making through the prior authorization processes used in Medicare Advantage programs. As a result, people are denied medically necessary treatments and medicines." (emphasis omitted)); Nat'l Ass'n of Ins. Comm'rs, supra note 90, at 11 ("[T]here is evidence that AI is already widely used today [in medical necessity determinations] . . . ."); id. ("Today, one of the most common uses of AI in health insurance is for utilization management." (emphasis omitted)); Ross & Herman, Denied by AI, supra note 10 ("Elevance, Cigna, and CVS Health, which owns insurance giant Aetna, have all purchased [AI tools] in recent years. One of the biggest and most controversial companies behind these models, NaviHealth, is now owned by UnitedHealth Group."); id. ("STAT's investigation revealed these tools are becoming increasingly influential in decisions about patient care and coverage.").

92. The entire point of the medical necessity determination process is to ensure access to necessary care and prevent unnecessary care. To the extent AI can do that, many agree it should be welcomed. As one consumer advocate says: "In an ideal world, AI would increase efficiency without posing any additional harms to patients or their access to care." Nat'l Ass'n of Ins. Comm'rs, supra note 90, at 12 (emphasis omitted) (internal quotation marks omitted) (quoting a consumer advocate). Whether AI will ever be able to do this, given the personalization and complexity required for medical decisions, has not yet been determined. See supra notes 31–36 and accompanying text. While this Note does not take an opinion on the future capabilities of AI, current models do not seem to have the ability to make these decisions accurately. See infra notes 93, 110–123 and accompanying text.

93. See Brandon Novick, Denying Coverage With AI: CMS's New Medicare Model, Ctr. for Econ. & Pol'y Rsch. (July 8, 2025), https://cepr.net/publications/denying-coverage-with-ai-cmss-new-medicare-model/ (on file with the *Columbia Law Review*) (reporting that use of AI in coverage determinations has "not proven to be reliable" and "has difficulty getting facts correct"); see also infra notes 110–123.

94. Jeannie Fuglesten Biniek, Nolan Sroczynski, Meredith Freed & Tricia Neuman, Medicare Advantage Insurers Made Nearly 50 Million Prior Authorization Determinations in 2023, KFF (Jan. 28, 2025), https://www.kff.org/medicare/issue-brief/nearly-50-million-prior-authorization-requests-were-sent-to-medicare-advantage-insurers-in-2023/ [https://perma.cc/EVW2-AA2L] [hereinafter Fuglesten Biniek et al., Medicare Advantage Insurers]. A separate study found a similar trend, finding that denials had increased by 15% between 2015 and 2022. Suhas Gondi, Kushal T. Kadakia & Thomas C. Tsai, Coverage Denials in Medicare Advantage—Balancing Access and Efficiency, JAMA Health F., Mar. 1, 2024, at 1, 1, https://jamanetwork.com/journals/jama-health-forum/fullarticle/2815743 (on file with the *Columbia Law Review*).

95. Majority Staff of S. Permanent Subcomm. on Investigations, supra note 12, at 4.

2020 and 2022.[96] Physicians across practice areas report this trend: In a 2024 survey, 75% reported that denials have "[i]ncreased somewhat or significantly" over the last five years.[97]

This increasing rate of denials has tracked with the increasing usage of AI in the determination process. In its October 2024 report, the Senate Permanent Subcommittee on Investigations noted that UnitedHealthcare's denial rate was increasing at the very same time the prominent insurer "was implementing multiple initiatives to automate the process."[98] A more direct correlation was found in UnitedHealthcare's internal meeting minutes, in which the company approved a new automated model after noting it produced "an increase in adverse determination rate."[99] The producers of the models and processes market them explicitly as tools that can increase denial rates: Salespeople for Cigna's EviCore, for example, "have boasted of a 15% increase in denials."[100] Denials, many of them lacking accuracy and transparency, are on the rise.

1. *Determinations Are Frequently Inaccurate.* — Medicare Advantage insurers regularly invoke Medicare's medical necessity provision to incorrectly deny necessary services.[101] HHS started investigating the accuracy of denials after CMS's audits of plans found "widespread and persistent

96. Id. at 6. The correlation with costly services is not shocking given the financial incentives Medicare Advantage insurers have under the capitated payment model. The Senate Permanent Subcommittee on Investigations concluded that Medicare Advantage insurers "target" such costly services for medical necessity denials, knowing the impact it has on their bottom line. Id. at 19. In such circumstances, the Senate Permanent Subcommittee on Investigations concluded, Medicare Advantage insurers were "substituting judgment about medical necessity with a calculation about financial gain." Id. at 7.

97. AMA, 2024 AMA Prior Authorization Physician Survey (2025), https://www.ama-assn.org/system/files/prior-authorization-survey.pdf [https://perma.cc/6FDP-VQAG].

98. Majority Staff of S. Permanent Subcomm. on Investigations, supra note 12, at 4.

99. See id. at 5 (internal quotation marks omitted) (quoting UnitedHealthcare's internal meeting minutes).

100. See Miller et al., supra note 22.

101. One caveat to the figures presented in this Note is that not all denials are based on a lack of medical necessity. Other reasons appear on denial notices: the service is experimental, the service does not meet coverage criteria, the provider is out of network, the request has missing information, and so on. These reasons, however, are often overlapping. In many ways, a denial based on a lack of information might be saying: "We do not have the data to determine whether this is medically necessary." A denial based on coverage criteria might be saying: "Our coverage criteria, which were created to determine if something is medically necessary, have not been met." So, the reasons often bleed into one another, with medical necessity frequently playing a role, albeit sometimes a step removed. Further, data categorizing these denials is not readily accessible or digestible—yet another demonstration of the opacity that exists in this system. See infra section II.A.2. The numbers that appear in this Note encompass more than outright medical necessity denials. But this does not affect this Note's conclusions about inaccuracy and opacity.

problems related to inappropriate denials of services."[102] HHS's investigation confirmed as much to be true, reporting that in a study of over twelve thousand denials, "an estimated 13 percent met Medicare coverage rules" meaning "these services likely would have been approved . . . under original Medicare."[103] Among post-service payment denials, the error rate was even higher, with 18% of denials being incorrect.[104] The report explicitly noted that Medicare Advantage insurers were denying services that neutral physician reviewers determined were medically necessary.[105]

Medicare Advantage insurers admit to the high rate of inaccuracy, albeit indirectly. As mandated by law, plans must reconsider their original determinations as the first step of a beneficiary's appeal.[106] In doing so, Medicare Advantage plans overturned their own decisions at a staggering rate of 80% or higher in every year between 2019 and 2023, deciding upon review that a service should indeed be covered despite their first determination that it should not be.[107] Government reviewers went on to overturn even more determinations at later stages in the appeals process.[108] When plans are forced to defend their original determinations, they find them to be inaccurate in the majority of cases.[109]

Medicare Advantage insurers' use of AI in the determination process has only exacerbated inaccuracy.[110] Beneficiary advocates express this concern, stating that they believe AI is "simply lead[ing] to a faster cadence of incorrect . . . decisions that could result in delayed or denied care."[111] The Center for Medicare Advocacy (CMA), a national nonprofit

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102. Off. of Inspector Gen., Medicare Advantage Denials Raise Concerns, supra note 67, at 2 (citing Off. of Inspector Gen., Medicare Advantage Appeal Outcomes, supra note 62).

103. Id. at 9.

104. Id. at 12.

105. See id. at 10, 32, 36–38, 40–41 (noting various cases in which physician reviewers found care medically necessary despite a denial from the Medicare Advantage plan).

106. See supra notes 79–80 and accompanying text.

107. Fuglesten Biniek et al., Medicare Advantage Insurers, supra note 94.

108. See Off. of Inspector Gen., Medicare Advantage Appeal Outcomes, supra note 62, at 9 ("Independent reviewers overturned additional denials in favor of beneficiaries and providers at four levels of appeal[.]").

109. Two things are worth noting about this data. First, the appeals likely suffer from a self-selection bias as to which determinations get appealed. One can imagine that claims with more merit are more likely to be appealed, thus skewing this data as appeals disproportionately reflect more meritorious claims. Second, it is also possible that the insurer was not provided all the relevant information upon the first consideration and, therefore, the changed determination does not reflect an insurer's changed position but rather new or changed information. Both factors would tend to inflate the rates of reversal. Nevertheless, such reversal rates are so high that it remains concerning.

110. Because Medicare Advantage insurers remain opaque about the precise role AI is playing in determinations, it is not possible to find direct causation. This is part of the opacity that exists. See infra section II.A.2. This Note, therefore, primarily relies on correlations that have been documented.

111. Nat'l Ass'n of Ins. Comm'rs, supra note 90, at 13.

that closely follows Medicare trends, agrees this is happening, stating that it sees cases in which AI tools appear overly restrictive and deny beneficiaries access to necessary care.[112] Multiple lawsuits allege the same, claiming that certain AI models have inaccuracy rates as high as 90%, yet remain in use.[113] Some of this may be due to the algorithms' inability to account for individual characteristics or special circumstances, which is necessary for medical necessity determinations.[114] As CMA Codirector David Lipschutz has reported, the algorithms in Medicare Advantage often operate as "a hard-and-fast rule . . . . There's no deviation from [their outputs], no accounting for changes in condition, no accounting for situations in which a person could use more care."[115]

The distributional effects of this inaccuracy are also concerning, as AI has been found to exacerbate discrimination, particularly against individuals from protected classes.[116] This bias has been documented across AI tools in various domains,[117] including in the healthcare industry. For example, one algorithm that relied on insurance data "fail[ed] to account for a collective nearly 50,000 chronic conditions experienced by black patients" and thus did not recommend those patients for extra health services, often instead recommending white patients who were not as sick.[118] Additionally, "physicians overestimate pain tolerance of patients

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112. Ctr. for Medicare Advoc., The Role of AI-Powered Decision-Making Technology in Medicare Coverage Determinations 9 (2022), https://medicareadvocacy.org/wp-content/uploads/2022/01/AI-Tools-In-Medicare.pdf [https://perma.cc/QA3D-5DU8].

113. Lokken Amended Complaint, supra note 1, at 2; see also Barrows Complaint, supra note 8, at 13 ("Upon information and belief, over 90 percent of patient claim denials are reversed . . . [which] demonstrates the blatant inaccuracy of the nH Predict AI Model . . . ."). Again, this number is likely inflated due to the concerns addressed above in note 109.

114. See supra notes 32–36 and accompanying text.

115. Ross & Herman, Denied by AI, supra note 10 (internal quotation marks omitted) (quoting David Lipschutz, Codirector, CMA). Given that individualized decisionmaking is a key basis for the broad medical necessity standard, a tool that is unable to deviate from hardline rules will inevitably fail to correctly employ the standard.

116. See Nat'l Ass'n of Ins. Comm'rs, supra note 90, at 13–14 (noting that when AI is used in coverage determinations, there are "potential risks for discrimination against consumers, particularly patients from protected classes"). The potential for increased discrimination when AI is involved is well documented, prompting former President Joe Biden to issue an executive order to combat such discrimination. See Exec. Order No. 14,110, 3 C.F.R. 657, 658 (2024) ("From hiring to housing to healthcare, we have seen what happens when AI use deepens discrimination and bias, rather than improving quality of life."). President Donald Trump, however, revoked this order when he took office. See Exec. Order No. 14,148, 90 Fed. Reg. 8237, 8240 (Jan. 20, 2025).

117. See, e.g., Talia B. Gillis, The Input Fallacy, 106 Minn. L. Rev. 1175, 1176 n.5 (2022) (listing various sources that discuss the bias in algorithmic decisionmaking); Margot E. Kaminski & Jennifer M. Urban, The Right to Contest AI, 121 Colum. L. Rev. 1957, 1969–71 (2021) (discussing instances of biased AI in healthcare, employment, and lending).

118. See Shraddha Chakradhar, Widely Used Algorithm for Follow-Up Care in Hospitals Is Racially Biased, Study Finds, STAT (Oct. 24, 2019), https://www.statnews.com/2019/10/24/widely-used-algorithm-hospitals-racial-bias/ (on file with the *Columbia Law*

of color, leading to systemic undertreatment";[119] low-income individuals can be excluded from receiving necessary treatments due to a lack of insurance coverage;[120] and "women and minorities are frequently excluded from medical research."[121] Given that inequities pervade the United States healthcare system and available datasets, there is serious concern that "[t]he introduction of AI-informed decision making . . . will continue to exacerbate many of these inequities."[122] As Medicare Advantage insurers increasingly use AI, more beneficiaries—particularly the most vulnerable—may receive denials stating care is "not medically necessary," when in fact their situation requires care. These inaccurate denials have devastating health and financial consequences for beneficiaries and their families.[123]

2. *Determinations Are Opaque.* — Compounding the inaccuracy of determinations is the opacity that accompanies them, both in what led to the determinations and in how a beneficiary can challenge them. A CMS audit found that nearly half of all Medicare Advantage insurers are "sending incorrect or incomplete denial letters, which may inhibit beneficiaries' and providers' ability to appeal."[124] Treating physicians report a similar phenomenon, stating that often "their attempts to get explanations [about denials] are met with blank stares and refusals to share more information."[125] An internal memorandum provided to employees of naviHealth—a subsidiary of UnitedHealth Group that created and uses an algorithm to make coverage decisions[126]—makes clear

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Review); see also Sharon Begley, Discovery of Racial Bias in Health Care AI Wins *STAT* Madness 'Editors' Pick', STAT (Apr. 6, 2020), https://www.statnews.com/2020/04/06/stat-madness-editors-pick-racial-bias-in-health-care-ai/ (on file with the *Columbia Law Review*) ("The artificial intelligence software . . . routinely let healthier white patients into the programs ahead of black patients who were sicker and needed them more.").

119. Sahar Takshi, Unexpected Inequality: Disparate-Impact From Artificial Intelligence in Healthcare Decisions, 34 J.L. & Health 215, 242 (2021).

120. Id. at 218 n.7.

121. Id. at 222.

122. Id. at 218, 222.

123. See, e.g., Lokken Amended Complaint, supra note 1, at 18–35 (outlining claims about the drastic consequences the plaintiffs faced due to care denials); see also Casey Ross & Bob Herman, UnitedHealth Pushed Employees to Follow an Algorithm to Cut Off Medicare Patients' Rehab Care, STAT (Nov. 14, 2023), https://www.statnews.com/2023/11/14/unitedhealth-algorithm-medicare-advantage-investigation/ (on file with the *Columbia Law Review*) [hereinafter Ross & Herman, UnitedHealth] (sharing how, after a denial for a continued stay in a nursing home, a family was forced to pay out of pocket for a private caregiver to care for their mother).

124. Off. of Inspector Gen., Medicare Advantage Appeal Outcomes, supra note 62, at 12.

125. Ross & Herman, Denied by AI, supra note 10.

126. After receiving significant backlash due to reports on its use in care denials, naviHealth has since rebranded. Bob Herman & Casey Ross, UnitedHealth Discontinues a Controversial Brand Amid Scrutiny of Algorithmic Care Denials, STAT (Oct. 23, 2023), https://www.statnews.com/2023/10/23/unitedhealth-optum-navihealth-rebranding-

that this lack of information is intentional in some cases, stating, "IMPORTANT: Do NOT guide providers or give providers answers to the questions" about their requests for care.[127]

Once again, AI has exacerbated this concern, further preventing beneficiaries from understanding or challenging decisions. Beneficiaries are "neither aware of the algorithms, nor able to question their calculations."[128] There remains a lack of disclosure as to how plans are using AI in determination processes and applications of the medical necessity provision.[129] This opacity carries over into how AI is deployed in beneficiaries' individual cases. One legal aid attorney reports that "[the algorithm's report] is never communicated with clients,"[130] and, even if requested, plans often refuse to disclose such information on the basis that the AI relies on "proprietary datasets."[131] This makes it "even more difficult for consumers and providers to get detailed information about why a request was denied and what criteria and data were used,"[132] information that is often necessary to mount a successful appeal.[133]

Such opacity has limited beneficiaries' ability to access the appeals process, which is how they can get incorrect determinations reversed.[134] While Medicare Advantage insurers denied 3.2 million prior authorization requests in 2023, beneficiaries appealed only 11.7% of these denials.[135] Over 2.5 million denials, therefore, never received a second look and never had a chance for reversal. A 2023 survey conducted by KFF—a leading healthcare policy nonprofit—reports that a lack of information and transparency may be contributing to this low rate, finding that 35% of Medicare beneficiaries were uncertain whether they had appeals rights and an additional 7% believed that they had no appeals rights.[136] Even

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algorithm/ (on file with the *Columbia Law Review*). It still, however, exists under the UnitedHealth Group umbrella. Id.

127. Majority Staff of S. Permanent Subcomm. on Investigations, supra note 12, at 28 (internal quotation marks omitted) (quoting instructions from naviHealth to its employees).

128. Ross & Herman, Denied by AI, supra note 10; see also Nat'l Ass'n of Ins. Comm'rs, supra note 90, at 18 ("AI is an impenetrable 'black box,' obscuring the chain of command and making it nearly impossible for consumers to push back on decisions regarding their own care.").

129. See supra note 90 and accompanying text.

130. Ross & Herman, Denied by AI, supra note 10 (alteration in original) (internal quotation marks omitted) (quoting Christine Huberty, Att'y).

131. See Nat'l Ass'n of Ins. Comm'rs, supra note 90, at 14.

132. Id.

133. This outcome has been documented across appeals systems for various public benefits. One report concludes that "AI makes it harder for individuals harmed to contest decisions," specifically in the realm of "administrative hearings." De Liban, supra note 91, at 16 (emphasis omitted).

134. See supra notes 107–109 and accompanying text.

135. Fuglesten Biniek et al., Medicare Advantage Insurers, supra note 94.

136. Karen Pollitz, Kaye Pestaina, Alex Montero, Lunna Lopes, Isabelle Valdes, Ashley Kirzinger & Mollyann Brodie, KFF Survey of Consumer Experiences With Health Insurance,

when enrollees knew of their rights, they did not know how to invoke them, with 61% reporting that they did not know which government agency, if any, they could contact for help regarding their health insurance coverage.[137] Even treating physicians, who should be experts in the field, reported appealing a very small number of adverse decisions, citing mistrust in the appeals system and a lack of time or resources.[138]

The current state of coverage determinations in Medicare Advantage is not one of applying a broad statutory standard through robust inquiry into beneficiaries' individual circumstances. Instead, determinations look more like what Clemens alleges in her complaint: the rapid issuance of an automated, opaque, and inaccurate denial that is difficult to appeal.[139] Armed with AI technologies that enable an "increased volume and speed" of denials,[140] Medicare Advantage insurers are leaving many beneficiaries without access to the care their doctors certified was medically necessary. This not only results in "[c]ostly implications for patients" but also strains the country's healthcare system overall.[141]

B. *CMS Increases Procedural Requirements*

The state of incorrect, opaque determinations prompted CMS to take action.[142] On April 5, 2023, CMS promulgated a final rule that, among other things, aimed to "help ensure [Medicare Advantage] enrollees have consistent access to medically necessary care, without unreasonable

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KFF (June 15, 2023), https://www.kff.org/private-insurance/poll-finding/kff-survey-of-consumer-experiences-with-health-insurance/ [https://perma.cc/LA6W-D8DS].

137. Id.

138. See AMA, supra note 97; see also Gondi et al., supra note 94, at 1 ("[A]ppealing denials contributes to clinician workload and burnout.").

139. See Lokken Amended Complaint, supra note 1, at 24–25.

140. Nat'l Ass'n of Ins. Comm'rs, supra note 90, at 13 (emphasis omitted).

141. See Michael J. Alkire, Unnecessary Insurance Claim Denials Compromise Patient Care and Provider Bottom Lines, STAT (May 1, 2024), https://www.statnews.com/2024/05/01/insurance-claim-denials-compromise-patient-care-provider-bottom-lines/ (on file with the *Columbia Law Review*) ("Refusing or delaying legitimate medical claims has a significant impact on providers and patients. Problematic payer practices strain hospital resources, deplete cash reserves and hinder medically necessary care.").

142. This section will focus on the rule CMS promulgated in 2023, which directly addresses both medical necessity and AI and remains in legal effect. CMS promulgated another rule in April 2025. Medicare and Medicaid Programs 2026 Policy and Technical Changes, 90 Fed. Reg. 15,792 (Apr. 15, 2025) (to be codified at 42 C.F.R. pts. 417, 422, 423, 460). But the 2025 rule does not have direct relevance to this Note's inquiry. Interestingly, the proposed rule predating the 2025 final rule addressed AI, including a section titled "Ensuring Equitable Access to Medicare Advantage (MA) Services—Guardrails for Artificial Intelligence." Proposed Medicare and Medicaid Programs 2026 Policy and Technical Changes, 89 Fed. Reg. 99,340, 99,396–98 (proposed Dec. 10, 2024). The final rule—adopted after the change in administration—dropped this section. Medicare and Medicaid Programs 2026 Policy and Technical Changes, 90 Fed. Reg. at 15,795. The most relevant AI and medical necessity provisions, therefore, are in the 2023 rule.

barriers or interruptions."[143] The rule codified two relevant provisions relating to how Medicare Advantage insurers must make such decisions.

First, the rule clarified the factors that insurers can use when making "medical necessity determinations."[144] The rule both prohibits insurers from using any internal coverage criteria that are not supported by clinical guidelines or not "publicly accessible"[145] and mandates that every decision account for "[t]he enrollee's medical history (for example, diagnoses, conditions, functional status), physician recommendations, and clinical notes."[146] In describing the latter half of this provision, the rule's accompanying explanation emphasizes the individualized nature of a decision, noting plans "must ensure that they are making medical necessity determinations based on the circumstances of the specific individual . . . *as opposed to using an algorithm or software* that doesn't account for an individual's circumstances."[147]

After receiving questions about this new provision, particularly whether it "mean[s] that [Medicare Advantage] organizations cannot use algorithms or artificial intelligence to make coverage decisions," CMS released further guidance in February 2024.[148] The guidance explicitly addressed how both the "publicly accessible" criteria requirement and the individualization requirement applied to the use of AI. As to the public accessibility requirement, CMS stated: "[P]redictive algorithms or software tools cannot apply other internal coverage criteria that have not been explicitly made public and adopted in compliance with the evidentiary standard in § 422.101(b)(6)."[149] This was a further elaboration on the rule, which stated that such tools' "proprietary nature does not absolve [Medicare Advantage] plans from their responsibilities under this final rule."[150] To the contrary, "[t]he [Medicare Advantage] plan must make the evidence that supports the internal criteria used by (or used in developing) these tools publicly available, along with the internal coverage policies themselves."[151] As to the individualization requirement, CMS responded:

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143. Medicare Program 2024 Policy and Technical Changes, 88 Fed. Reg. 22,120, 22,122 (Apr. 12, 2023) (codified at 42 C.F.R. pt. 422).

144. 42 C.F.R. § 422.101(c)(1) (2024).

145. Id. § 422.101(b)(6).

146. Id. § 422.101(c)(1)(i)(C).

147. Medicare Program 2024 Policy and Technical Changes, 88 Fed. Reg. at 22,195 (emphasis added).

148. See Memorandum from Ctrs. for Medicare & Medicaid Servs. to All Medicare Advantage Orgs. & Medicare-Medicaid Plans (Feb. 6, 2024), https://calhospital.org/wp-content/uploads/2024/02/HPMS-Memo-FAQ-on-CC-and-UM-020624.pdf [https://perma.cc/4F74-GEWX] [hereinafter Ctrs. for Medicare & Medicaid Servs., Feb. 6 Memo].

149. Id. at 3.

150. Medicare Program 2024 Policy and Technical Changes, 88 Fed. Reg. at 22,195.

151. Id.

> An algorithm or software tool can be used to assist [Medicare Advantage] plans in making coverage determinations, but it is the responsibility of the [Medicare Advantage] organization to ensure that the algorithm or artificial intelligence complies with all applicable rules for how coverage determinations by [Medicare Advantage] organizations are made. For example, compliance is required with all of the rules at § 422.101(c) for making a determination of medical necessity, including that the [Medicare Advantage] organization base the decision on the individual patient's circumstances, so an algorithm that determines coverage based on a larger data set instead of the individual patient's medical history, the physician's recommendations, or clinical notes would not be compliant with § 422.101(c).[152]

Both requirements have had implications for how insurers make medical necessity determinations, including the role AI is allowed to play.

The second relevant provision in the rule addresses *who* must make determinations of medical necessity. The rule requires that any "partially or fully adverse medical necessity . . . decision . . . be reviewed by a physician or other appropriate health care professional" before the insurer finalizes it.[153] CMS copied this provision from the requirement already present for medical necessity determinations at the reconsideration stage[154] and now requires the same expert input for the first determination. The provision, therefore, prohibits a plan from using only AI to issue any denial based on medical necessity. CMS stated that it would utilize a "combination of routine and focused audits in 2024" to monitor compliance with these new requirements to "make sure that [Medicare Advantage] beneficiaries get the care they need."[155]

These CMS regulations are a welcome first step to combatting Medicare Advantage insurers' current misuse of AI and the medical necessity provision to deny beneficiaries access to care. The regulations require more transparency through disclosure of criteria and data; demand individualization, which is a key underpinning of any quality medical necessity determination; and provide a human check prior to any denial that could impede a beneficiary's access to care. Each of these changes, if enforced well, could alleviate some of the concerns that surround improper denials today.

C. *Accountability Remains Missing*

Although the CMS regulations are helpful, they fall short in fully protecting beneficiaries from inaccurate AI-generated denials. This is

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152. Ctrs. for Medicare & Medicaid Servs., Feb. 6 Memo, supra note 148, at 2.

153. 42 C.F.R § 422.566(d) (2024).

154. See Medicare Program 2024 Policy and Technical Changes, 88 Fed. Reg. at 22,217 ("This is the same standard of review with respect to expertise that applies to physician review of reconsiderations at § 422.590(h)(2).").

155. Ctrs. for Medicare & Medicaid Servs., Feb. 6 Memo, supra note 148, at 14.

largely because the regulations fail to enact a sufficient accountability method for incorrect determinations, both individually and at large. Of course, by implementing the new requirements, CMS hopes to prevent these inaccurate determinations before they happen. But this strategy rests on two questionable assumptions.

1. *An Overemphasis on Front-End Procedure.* — First, in focusing solely on front-end[156] rules, CMS conflates improved internal procedures with improved outcomes. These two items are related and often go hand in hand. They are not, however, the same. In the context of medical necessity, the goal is an outcome: Beneficiaries obtain coverage for medically necessary services but do not receive coverage for unnecessary or harmful services. The statutory language focuses solely on an outcome, stating covered services must be "reasonable and necessary," without establishing any mandated procedure to determine this.[157] Similarly, in practice, beneficiaries care about the outcome—whether they receive coverage for necessary services—rather than whatever procedure led to that outcome. Both in law and fact, the outcome is what is important, and any procedural requirements are likely only as good as their ability to produce correct outcomes.[158]

Unfortunately, CMS has not provided ample evidence that its new procedural requirements will lead to better outcomes. And preliminary evidence indicates otherwise. Take, for example, CMS's new requirement that a human healthcare professional must review any adverse medical necessity determination before issuance.[159] Nearly all plans claim to already comply with this requirement. For example, UnitedHealthcare claims that its AI decisionmaking model already requires human review for any case that results in a denial.[160] Cigna and Humana both claim to follow similar models.[161] Yet these are the very Medicare Advantage plans

156. This Note uses the term *front-end* to describe anything that happens before the insurer issues a determination. The procedural requirements that an insurer must meet before issuing any determination, including items like what information can be used and who can be involved, fall into this category. The term *back-end* refers to anything that happens after an insurer makes a determination, including the recourse beneficiaries have to challenge such determinations. This includes items like notice requirements and the appeals process.

157. See 42 U.S.C. § 1395y(a)(1)(A) (2018).

158. This may seem like an obvious point. But there are many situations in which a procedure is itself an ultimate good. In elections, for example, the fair and democratic process is in and of itself a good, often more important than any specific outcome. This is not the case for medical necessity determinations. But see infra note 189 and accompanying text.

159. 42 C.F.R. § 422.566(d) (2024).

160. See Majority Staff of S. Permanent Subcomm. on Investigations, supra note 12, at 23 ("[T]hese documents and public statements from UnitedHealthcare indicate that final denials of prior authorization requests could come only from human reviewers . . . .").

161. See id. at 46 (describing Humana's "preference to 'put humans in the loop for purposes of decision-making'" (quoting Humana, Ethical Usage of Augmented Intelligence Standard (2022))); Miller et al., supra note 22 (discussing a Cigna model that the company

facing class action suits that allege their models are producing inaccurate denials.[162] The lawsuits allege that the human review may be happening, but the plans essentially demand that human reviewers adhere to the algorithm's result, threatening "possible termination" if reviewers deviate in their recommendations.[163] Medicare Advantage insurers have thus checked the box on the procedural requirement, but there is no evidence that determinations have gotten more accurate, which is the true goal.

The same goes for the other enacted requirements. CMS itself wrote, "[M]any [Medicare Advantage] organizations may already be interpreting our current rules in a way that aligns with what we proposed."[164] Yet CMS promulgated this rule because beneficiaries are not receiving the necessary care to which they are entitled.[165] If Medicare Advantage insurers are already following these requirements but outcomes remain poor, the newly codified procedural requirements alone will not suffice. Again, in medical necessity determinations, the procedure is often only as important as its ability to lead to proper outcomes. CMS has provided no evidence that the new requirements can do as much.[166]

2. *A Lack of Enforcement Mechanisms.* — Even if the new requirements could lead to better outcomes, CMS fails to create mechanisms that will enable either CMS or beneficiaries to hold Medicare Advantage insurers accountable for these requirements, both on an individual and plan-wide basis. On the individual level, the rule does not provide an enhanced remedy or recourse for individuals improperly denied medically necessary care. Instead, the only enforcement methods it mentions are in the aggregate, noting CMS continues to conduct plan-wide audits, issue warning letters, require corrective action plans, and pursue civil penalties and sanctions when it finds insurers are failing to comply with the new

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says "never automate[s] medical necessity denials" (internal quotation marks omitted) (quoting an Aetna spokesperson)).

162. See, e.g., Kisting-Leung Third Amended Complaint, supra note 8, at 1; Barrows Complaint, supra note 8, at 1; Lokken Amended Complaint, supra note 1, at 2.

163. E.g., Ross & Herman, UnitedHealth, supra note 123; see also Barrows Complaint, supra note 8, at 3–4 (noting that "Humana intentionally limits its employees' discretion to deviate from the nH Predict AI Model").

164. Medicare Program 2024 Policy and Technical Changes, 88 Fed. Reg. 22,120, 22,190 (Apr. 12, 2023) (codified at 42 C.F.R. pt. 422).

165. See Proposed Medicare Program 2024 Policy and Technical Changes, 87 Fed. Reg. 79,452, 79,498 (proposed Dec. 27, 2022) (noting that "CMS has received feedback from various stakeholders" that Medicare Advantage plans' current techniques "create a barrier to patients accessing medically necessary care").

166. This is true for a more zoomed-out historical look as well. Over the years, CMS has "exercised greater control over contractors, as evidenced by increasing procedural requirements." Susan Bartlett Foote, The Impact of the Medicare Modernization Act's Contractor Reform on Fee-for-Service Medicare, 1 St. Louis U. J. Health L. & Pol'y 67, 70 (2007). Yet outcomes today are as poor as ever. See supra section II.A. It thus does not appear that proceduralizing medical necessity determinations on the front end alone suffices to obtain better outcomes. It certainly may help, but it has not proven enough to solve the issue at hand.

rule.[167] But audits do little to provide a remedy for individuals suffering without the care they need. One can wonder how much comfort someone like Clemens would find in the idea that, while nothing will change in her individual case, CMS may issue a warning letter or fine her insurer at the end of the year. Individual beneficiaries and their families are the parties most harmed by inaccurate denials. A proper rule would place beneficiaries at the center of any remedy.[168]

Of course, CMS may point to the existing appeals process[169] as the proper mechanism for individual remedies. CMS, however, has noted that Medicare Advantage plans often withhold appropriate data or appeals directions from beneficiaries, hampering beneficiaries' ability to appeal.[170] Physicians have reported the same.[171] While the appeals process is an important tool for beneficiaries,[172] it only works if beneficiaries have the data and information needed to properly access it. They currently do not, and the rule does little to change this.[173] And, even if beneficiaries appeal their determinations, they must first exhaust the internal reconsideration stage, which can result in serious delays in care.[174] The new rule thus continues to leave beneficiaries without a proper remedy in their individual cases.

Even on a plan-wide basis, CMS has not introduced a mechanism that will lead to true accountability for improper decisions or procedure. As noted, the mechanism CMS uses is the same one it has used for years:

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167. See Ctrs. for Medicare & Medicaid Servs., Feb. 6 Memo, supra note 148, at 14.

168. See infra note 189 and accompanying text.

169. See section I.C for a discussion of what this process entails.

170. See supra section II.A.2.

171. See supra notes 125, 127 and accompanying text; see also AMA, supra note 97 (noting that 67% of physicians do not appeal because they "do not believe the appeal will be successful," while 55% report having "insufficient . . . resources/time").

172. As discussed above, data show that when beneficiaries do invoke this right, they are highly successful, with Medicare Advantage plans reversing their determinations at rates above 80%. See Fuglesten Biniek et al., Medicare Advantage Insurers, supra note 94.

173. The new rule requires Medicare Advantage insurers to make public the criteria on which they base their decisions. 42 C.F.R § 422.101(b)(6)(ii) (2024). This, however, only requires that plans disclose their general coverage criteria or formulas at large. See id. § 422.101(b)(6)(ii)(A). It does not require plans to disclose how exactly criteria interacted with a specific beneficiary's situation. See id. Beneficiaries will likely still lack the information they need to challenge these determinations. Additionally, while CMS has for years required Medicare Advantage insurers to "[s]tate the specific reasons for the denial" in adverse determinations, id. § 422.568(e), broad language with references to regulatory codes has generally sufficed to meet this "specific reasons" standard. See Letter from Rep. Judy Chu et al. to Chiquita Brooks-LaSure, supra note 11, at 2 (asking for more specific language on denial letters). Given how broad and ambiguous medical necessity is, see supra section I.A, this does not give beneficiaries or their doctors enough information. Insurers are failing to meet even these basic requirements. See supra note 124 and accompanying text.

174. See supra notes 79–80 and accompanying text; see also Fuglesten Biniek et al., Medicare Advantage Insurers, supra note 94 (reporting that despite high reversal rates at the reconsideration stage, "patients potentially faced delays in obtaining services").

conducting audits to detect violations and then issuing sanctions when violations are discovered.[175] By all means, audits and sanctions are necessary. But they do not suffice to produce proper outcomes when it comes to Medicare Advantage insurers. In HHS's 2018 report, the Department noted that CMS was conducting audits and pursuing civil penalties against insurers in violation of the rules, particularly against those Medicare Advantage insurers issuing incorrect denials.[176] Nevertheless, HHS concluded that CMS "continue[d] to see the same types of violations in its audits of different [plans] every year."[177] Seven years later, the same problem persists, despite CMS engaging in audits and enforcement actions the entire time.[178] CMS provides no explanation for why or how its traditional means will result in better outcomes this time around.

To the contrary, early data show that insurer behavior is the same. In June 2024—six months after the new rule went into effect—a group of federal legislators wrote to CMS, reporting: "Plans continue to use AI tools to erroneously deny care and contradict provider assessment findings."[179] In October 2024, separate legislators wrote to CMS, stating that "plans are not following even the modest rules CMS has put into place."[180] Reports are not only coming out of Congress but from journalists and experts as well.[181] Casey Ross, a cowriter on the *STAT* exposé, reported in December 2024 that he had not "seen any evidence . . . that [insurers are] planning to pull back on the use of the algorithms or change the way they do it or welcome any additional oversight."[182] It seems Medicare Advantage insurers continue to see little, if any, threat in CMS's current enforcement methods.[183]

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175. See Ctrs. for Medicare & Medicaid Servs., Feb. 6 Memo, supra note 148, at 14 (outlining CMS's plan to conduct audits and issue "enforcement actions" for non-compliance).

176. See Off. of Inspector Gen., Medicare Advantage Appeal Outcomes, supra note 62, at 1.

177. Id.

178. See, e.g., Medicare Parts C & D Oversight & Enf't Grp., Ctrs. for Medicare & Medicaid Servs., 2023 Part C and Part D Program Audit and Enforcement Report 3–4, 8 (2024), https://www.cms.gov/files/document/2023-program-audit-enforcement-report.pdf [https://perma.cc/B2A8-XURR].

179. Letter from Rep. Judy Chu et al. to Chiquita Brooks-LaSure, supra note 11, at 1.

180. Letter from Sen. Ron Wyden et al. to Chiquita Brooks-LaSure, supra note 78, at 1–2.

181. See, e.g., Outlook 2024: AI Risks Start to Come Into Focus; Eyes Are on MA Rule, Telehealth Audits, Rep. on Medicare Compliance, Jan. 15, 2024, at 1, 5 https://www.pyapc.com/wp-content/uploads/2024/01/rmc-jan-15.pdf [https://perma.cc/AQ5A-LL63] ("Experts are skeptical [Medicare Advantage] plans will abide by the new rule . . . .").

182. Willis Ryder Arnold & Meghna Chakrabarti, How Insurance Companies Use AI to Deny Claims, WBUR (Dec. 18, 2024), https://www.wbur.org/onpoint/2024/12/18/unitedhealth-ai-insurance-claims-healthcare [https://perma.cc/27MJ-JCS5] (quoting Casey Ross, Reporter, STAT).

183. Unfortunately, when it comes to Medicare Advantage, this sentiment extends beyond coverage denials, with insurers seeming to thwart a wide array of laws and regulations.

Scholars and policymakers alike share skepticism that traditional enforcement methods can bring about the change in Medicare Advantage that is necessary. One scholar wrote: "[A]udits should not be confused with oversight. . . . [B]ecause of their random nature, audits are likely to only identify some instances of fraud and abuse."[184] Additionally, individuals have noted that CMS's small budget has at times made it "ill-equipped in the matchup with moneyed insurers."[185] Such comments—combined with data that reveal outcomes remain subpar despite enforcement efforts—demonstrate that while CMS audits and subsequent sanctions are important, they alone will not suffice to bring about the change needed.

The new rule, therefore, fails to create a system in which access to necessary care will significantly improve, despite that being the rule's stated goal.[186] Its focus on front-end procedure, rather than improved outcomes, and its failure to create new enforcement mechanisms, both at the individual and plan level, inhibit its effectiveness. The rule is a welcome first step to combatting Medicare Advantage insurers' improper coverage determinations, but more is needed to ensure beneficiaries can access the medically necessary care to which they are entitled.[187]

See, e.g., Christopher Weaver & Anna Wilde Mathews, UnitedHealth Group Is Under Criminal Investigation for Possible Medicare Fraud, Wall St. J., https://www.wsj.com/us-news/unitedhealth-medicare-fraud-investigation-df80667f (on file with the *Columbia Law Review*) (last updated May 15, 2025) (discussing a criminal investigation into "the company's Medicare Advantage business practices"); Press Release, DOJ, Cigna Group to Pay $172 Million to Resolve False Claims Act Allegations (Sep. 30, 2023), https://www.justice.gov/archives/opa/pr/cigna-group-pay-172-million-resolve-false-claims-act-allegations [https://perma.cc/38SR-J8MV] (discussing a settlement secured after the government alleged Cigna submitted "inaccurate and untruthful diagnosis codes for its Medicare Advantage Plan enrollees in order to increase its payments from Medicare"). Given just how persistent and widespread the problems with Medicare Advantage are, even some Republicans have supported greater regulation, calling for "bipartisan support for a crackdown." See Anna Wilde Mathews & Christopher Weaver, Dr. Oz Criticizes Some Medicare Advantage Business Practices, Wall St. J., https://www.wsj.com/politics/policy/dr-oz-criticizes-some-medicare-advantage-business-practices-45c98a2a?mod=article_inline (on file with the *Columbia Law Review*) (last updated Mar. 14, 2025).

184. Leibson, supra note 66, at 113–14.

185. Brendan Williams, United We Fall? The Change Healthcare Cyberattack and the Danger of a Too-Big-to-Fail Health Insurer, 101 Denv. L. Rev. Forum 1, 12 (2024), https://www.denverlawrev.org/_files/ugd/9d4c2a_8d0706ff6fd44fdc81d276f972c571e7.pdf [https://perma.cc/5CHW-5X35].

186. See supra note 143 and accompanying text.

187. It merits acknowledging that Medicare beneficiaries have "earned their eligibility" to participate in the program by paying into Social Security during their working years. Orentlicher, supra note 41, at 329; see also Oliva, supra note 14, at 1876 (noting that Medicare Advantage beneficiaries "spent their entire working lives paying taxes to earn Medicare benefits in retirement"). When Medicare Advantage insurers illegally deny coverage of medically necessary care, they are typically denying care to individuals who have spent years paying into the system.

III. OBTAINING BETTER OUTCOMES THROUGH BENEFICIARY EMPOWERMENT

This Part explores how CMS can improve its current regime to better combat Medicare Advantage insurers' issuance of inaccurate and opaque coverage denials.[188] CMS should do two things. First, CMS should diligently track, disclose, and create penalties for inaccurate denials arising from each individual Medicare Advantage plan. Such efforts will hold insurers accountable for whether they cover necessary care, shifting the focus from front-end procedure to outcomes. Second, CMS should strengthen the current appeals process through increased education and transparency. These two efforts—and the strategies set forth in this Part to implement them—will not only reduce the frequency of inaccurate denials but also serve as an important shift in how Medicare Advantage is administered more generally, returning power to the beneficiaries who are most affected. Medical necessity determinations intimately affect beneficiaries' lives, and beneficiaries—rather than their insurers, their doctors, or a government agency—should have more say in determinations.[189]

Notably, these efforts are not directed only at insurers' use of AI in determinations, which, as described above, appears to play an increasing role in the inaccuracy and opacity in the process. These efforts will combat improper use of AI, but they take aim at all coverage determinations. This broadened scope is important for two reasons. First, problems with the medical necessity determination process have existed in Medicare Advantage for years.[190] Even before insurers integrated AI into their processes, these insurers made inaccurate and opaque determinations.[191]

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188. This Note's proposals do not mean CMS should cease its current audits or enforcement methods—which remain important—but they merely urge CMS to fill the gaps that remain.

189. This is not a new sentiment. In 1976, Professor Sylvia A. Law, writing on national health insurance and the lack of consumer input, stated the following:

> A structure that gives people, individually and collectively, an opportunity to participate in making decisions about the health services they receive is [a] better structure even if the same substantive result can be achieved more cheaply and efficiently through professional, technical, or bureaucratic decision making. In fact, of course, a system in which decisions about the allocation and manner of delivery of health services was democratized would not produce the same substantive results as professional, technical, or bureaucratic decision making. The results of the decisions now being made by professional and bureaucratic processes are, by any standard, unsatisfactory.

Law, supra note 41, at 149.

190. See id. at 116–17 (describing insurers' use of medical necessity denials in the 1970s as "an administrative and human disaster"); Blanchard, supra note 24, at 944 (writing in 1990 on "claims processing delays and inappropriate claims denials").

191. See Off. of Inspector Gen., Medicare Advantage Appeal Outcomes, supra note 62, at 10–11 (noting that, in every year between 2012 and 2016, violations for "insufficient denial letters" and "inappropriate denials" were common).

While the insurers' use of AI is a concerning new development exacerbating these issues,[192] the issues speak to a deeper concern of Medicare Advantage insurers and their medical necessity determinations going unchecked more generally. This Note thus presents a solution that encompasses AI usage but does not limit its remedies to the latest technology or strategy insurers are using.

Second, when it comes to medical necessity determinations, outcomes—in the form of grants or denials of coverage—are likely more important to beneficiaries than the internal procedures used to arrive at those outcomes.[193] Focusing efforts solely on regulating the AI used in the determinations process risks overemphasizing procedural requirements that may not lead to better outcomes.[194] Recognizing this, this Note presents solutions that combat the underlying issues in Medicare Advantage's coverage determination process that AI is currently exacerbating. Section III.A proposes new data collection and disclosure requirements focused on determination outcomes. Then, section III.B focuses on important enhancements to the current appeals process, a proven method that enables beneficiaries to obtain better outcomes in individual cases. While these two mechanisms admittedly will not prevent every inaccurate determination, they will lead to positive changes for beneficiaries.

A. *Increased Data Collection and Disclosure*

Collecting and disclosing information about each Medicare Advantage plan's denial rates and practices is an important first step toward accountability.[195] The entire concept of Medicare Advantage is built on the idea that beneficiaries get "to choose from among a broad[]

192. See supra section II.A.

193. See Julie Carter & Rachel Gershon, Clearer Choices: Why Medicare Advantage Enrollees Need Better Information on Supplemental Benefits, Health Affs. Forefront (June 13, 2025), https://www.healthaffairs.org/content/forefront/clearer-choices-why-medicare-advantage-enrollees-need-better-information-supplemental (on file with the *Columbia Law Review*) (noting that beneficiaries choose or change plans based on what coverage they believe they will receive); see also Nat'l Ass'n of Ins. Comm'rs, supra note 90, at 12 (reporting a consumer advocate's statement that, in an ideal world, AI could play a role in coverage determinations if it did not have any harmful effects on access to care). But see supra note 189 and accompanying text.

194. See supra sections II.B–.C.

195. This is not a novel suggestion, but it remains important. For years, advocates and policymakers have asked for increased transparency in Medicare Advantage. See, e.g., Gondi et al., supra note 94, at 2 ("Given the lack of available data to describe [Medicare Advantage] claim denials, increasing transparency is a critical first step."); Letter from Rep. Judy Chu et al. to Chiquita Brooks-LaSure, supra note 11, at 1–2 (noting that "more detailed information about denials is warranted" to "protect access to care" and "improve clarity"); Letter from Just. in Aging to Chiquita Brooks-LaSure, Adm'r, Ctrs. for Medicare & Medicaid Servs. 5 (May 29, 2024), https://justiceinaging.org/wp-content/uploads/2024/05/JIA-Medicare-Advantage-Data-RFI-response.pdf [https://perma.cc/XKZ6-UNJ6] ("We ask that CMS release data that gives a fuller picture of service requests that are delayed or denied.").

array of private health plans" to determine which plan can best serve them and their care needs.[196] Currently, however, neither the government nor insurers provide beneficiaries with the information necessary to determine which plan will reliably cover the services that they need.[197] As medical necessity determinations are a key component controlling which care beneficiaries have access to, it only makes sense for beneficiaries to have access to information about how each plan invokes and applies the medical necessity provision.[198]

A successful transparency regime will involve two parts: collection and presentation. First, CMS should increase its collection and analysis of data on coverage denials from Medicare Advantage plans. CMS currently collects data on denials, including the number of requests for services, the number of those requests resulting in denials, and the number of denials overturned at the internal reconsideration stage.[199] Significant gaps, however, remain in the data. CMS does not require Medicare Advantage insurers to report why they deny certain services,[200] which types of services

196. See Majority Staff of S. Permanent Subcomm. on Investigations, supra note 12, at 8; see also Thomas G. McGuire, Joseph P. Newhouse & Anna D. Sinaiko, An Economic History of Medicare Part C, 89 Milbank Q. 289, 290 (2011) ("[T]he [Medicare Advantage] program has pursued two stated goals. The first is to expand Medicare beneficiaries' choices to include private plans with coordinated care and more comprehensive benefits . . . .").

197. See Medicare Payment Advisory Comm'n, Report to the Congress: Medicare Payment Policy 359 (2024), https://www.medpac.gov/wp-content/uploads/2024/03/Mar24_MedPAC_Report_To_Congress_SEC-3.pdf [https://perma.cc/XPN7-MZE9] ("[B]eneficiaries lack meaningful quality information when choosing among [Medicare Advantage] plans."); Lindsey Copeland, Medicare Advantage Plan Data Remains Inadequate, Medicare Rts. Ctr.: Medicare Watch (May 18, 2023), https://www.medicarerights.org/medicare-watch/2023/05/18/medicare-advantage-plan-data-remains-inadequate [https://perma.cc/P5FB-YBD4] ("Significant gaps in data about Medicare Advantage (MA) plan processes and enrollee experiences make it impossible for . . . beneficiaries to make informed coverage choices."); cf. Carter & Gershon, supra note 193 (advocating for better information sharing about plans' supplemental benefits with Medicare Advantage beneficiaries).

198. See Gondi et al., supra note 94, at 2 ("CMS should go farther by requiring that plans disclose both how often services are denied and why they were denied. Denial rates provide a more helpful signal of health care access across plans than do dense coverage criteria, and disclosure would help beneficiaries choose from among [Medicare Advantage] plans . . . ."); see also Medicare Payment Advisory Comm'n, supra note 197, at 362 ("To make informed choices about enrolling in [a Medicare Advantage] plan, beneficiaries need good information about the quality and access to care provided by [Medicare Advantage] plans in their local market.").

199. Ctrs. for Medicare & Medicaid Servs. & Ctr. for Medicare Drug Benefit & C&D Data Grp., Medicare Part C Reporting Requirements 6–8 (2025), https://www.cms.gov/files/document/cy-2025-part-c-reporting-requirements.pdf [https://perma.cc/6TMN-4K9U].

200. See Jeannie Fuglesten Biniek, Meredith Freed & Tricia Neuman, Gaps in Medicare Advantage Data Remain Despite CMS Actions to Increase Transparency, KFF (Apr. 10, 2024), https://www.kff.org/medicare/issue-brief/gaps-in-medicare-advantage-data-remain-despite-cms-actions-to-increase-transparency/ [https://perma.cc/8WRF-NNKM] [hereinafter Fuglesten Biniek et al., Gaps in Medicare Advantage Data] ("Medicare Advantage insurers do not report the reasons for prior authorization denials to CMS." (emphasis omitted)).

they are denying,[201] or how or why an appeal resulted in a reversal.[202] CMS also does not require that insurers break this data down by plan but instead only requires that they do so at the contract level.[203] As a single insurer can have many plans under one contract—plans that serve different populations—this data does not enable CMS or beneficiaries to understand what is happening within each plan.[204] These data gaps make it "substantially more difficult [for CMS] to assess whether Medicare Advantage insurers are complying with" laws[205] and for beneficiaries to know if a plan is best for them.[206]

The increased collection of data, of course, should be coupled with thoughtful presentation. In fact, CMS's main objection to requiring Medicare Advantage plans to increase their reporting is due to "data overload, patient understanding, and usability of the data," including that a "patient might not be able to relate to the data and would not refer to the reports as intended."[207] CMS, however, can choose how to best present the data to beneficiaries. CMS already distills and presents significant amounts of information about different plans and their benefits with its Plan Finder tool, a tool that enables patients to compare plans' costs and supplemental benefits.[208] CMS could present basic information about denial rates, denial reasoning, and reversals for the most prominent

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201. See Majority Staff of S. Permanent Subcomm. on Investigations, supra note 12, at 47 ("Notably, these requirements do not require Medicare Advantage insurers to break down their prior authorization data by service category."); Fuglesten Biniek et al., Gaps in Medicare Advantage Data, supra note 200 ("Medicare Advantage insurers are not required to report prior authorization requests, denials, and appeals by type of service . . . .").

202. See Janet P. Sutton, More Medicare Advantage Beneficiaries Are Filing Appeals for Denied Services or Treatments, Commonwealth Fund: Blog (Oct. 8, 2024), https://www.commonwealthfund.org/blog/2024/more-medicare-advantage-beneficiaries-are-filing-appeals-denied-services-or-treatments (on file with the *Columbia Law Review*) ("There are limited publicly available data on trends in beneficiary appeals to [Medicare Advantage] plans . . . .").

203. See Fuglesten Biniek et al., Gaps in Medicare Advantage Data, supra note 200 ("[T]he aggregate-level data that CMS is requiring Medicare Advantage plans to post on their websites will only be available at the contract, rather than plan level.").

204. See id. ("Contracts can include multiple types of Medicare Advantage plans . . . . [B]y aggregating data in this way, it is not possible to assess variations in prior authorization practices across plans within a contract, including across plans that serve different populations.").

205. Majority Staff of S. Permanent Subcomm. on Investigations, supra note 12, at 48.

206. See Robert A. Bitonte & Michelle Gutierrez Harris, Transparency in Payors' Medical Necessity Denials, 40 J. Legal Med. 2, 2 (Supp. 2020) (arguing that, without data, beneficiaries are forced to enroll in a plan "blindly").

207. See Advancing Interoperability and Improving Prior Authorization Processes, 89 Fed. Reg. 8758, 8890 (Feb. 8, 2024) (to be codified at 42 C.F.R. pt. 156).

208. See Press Release, Ctrs. for Medicare & Medicaid Servs., Medicare Plan Finder Gets an Upgrade for the First Time in a Decade (Aug. 27, 2019), https://www.cms.gov/newsroom/press-releases/medicare-plan-finder-gets-upgrade-first-time-decade [https://perma.cc/27KZ-JJUL] ("The new Plan Finder walks users through the Medicare Advantage and Part D enrollment process from start to finish and allows people to view and compare many of the supplemental benefits that Medicare Advantage plans offer.").

service categories in a similar, digestible fashion. Or CMS could outsource this work. There are many nonprofits and other stakeholders that have the technical expertise necessary to distill data and the intimate knowledge of beneficiaries' capabilities to access and understand data. For example, New York Legal Assistance Group (NYLAG)—a nonprofit legal services organization in New York—has distilled and published similar information regarding Medicaid Managed Long-Term Care through its Data Transparency Project.[209] The project gathered selected data from government reports and turned it into interactive visuals for consumers and advocates to use when thinking about choosing a plan.[210] KFF also regularly tracks, distills, and publishes such data for the public.[211] Working with organizations like these—or at the very least making the data available to these organizations for their use—could also assuage CMS's concerns.

Data sharing can lead to better outcomes in three ways. First, data can alert CMS to potential violations and drive enforcement efforts. The data may reveal oddities or inconsistencies for certain plans or even alert CMS to contracts it should not renew.[212] Second, consumers can use the data when choosing which plan to enroll in, avoiding plans that have high denial rates in service categories important to them.[213] Current data show that plans vary significantly in how often and for which services they deny

209. NYLAG, New York State Managed Long-Term Care Data Transparency Project (2022), https://nylag.org/wp-content/uploads/2022/09/MMCOR-Report-FINAL.3.pdf [https://perma.cc/79Z6-YTAF].

210. Id. at 1. The interactive visuals live on NYLAG's website and enable users to isolate data for certain plans, on certain issues, or from certain regions of the state. MLTC Data Transparency Project, NYLAG, https://nylag.org/mltcdatatransparency/ [https://perma.cc/Y4DZ-HTHH] (last visited Sep. 11, 2025).

211. See, e.g., Nancy Ochieng, Meredith Freed, Jeannie Fuglesten Biniek, Anthony Damico & Tricia Neuman, Medicare Advantage in 2025: Enrollment Update and Key Trends, KFF (July 28, 2025), https://www.kff.org/medicare/medicare-advantage-enrollment-update-and-key-trends/ [https://perma.cc/7AK6-8PNG]; Nancy Ochieng, Meredith Freed, Jeannie Fuglesten Biniek, Anthony Damico & Tricia Neuman, Medicare Advantage in 2025: Premiums, Out-of-Pocket Limits, Supplemental Benefits, and Prior Authorization, KFF (July 28, 2025), https://www.kff.org/medicare/medicare-advantage-premiums-out-of-pocket-limits-supplemental-benefits-and-prior-authorization/ [https://perma.cc/QSR4-CF8L].

212. See Letter from the Am. Hosp. Ass'n to Chiquita Brooks-LaSure, Adm'r, Ctrs. for Medicare & Medicaid Servs. 2 (May 29, 2024), https://www.aha.org/system/files/media/file/2024/05/AHA-RFI-Response-to-CMS-on-Medicare-Advantage-Data-and-Oversight.pdf [https://perma.cc/EU84-EBCE] ("We believe data collection and reporting on plan performance metrics that are meaningful indicators of patient access are a critical component of an effective enforcement strategy and strongly support CMS efforts to require [Medicare Advantage] plans to submit additional information necessary to conduct appropriate oversight." (emphasis omitted)).

213. See Majority Staff of S. Permanent Subcomm. on Investigations, supra note 12, at 47 (noting that data transparency would enable "the seniors weighing various plans, or deciding between Medicare Advantage and traditional Medicare[] to see whether certain kinds of care are being singled out for denials").

coverage.[214] Data also show denial and appeal trends in Medicare Advantage differ from those in traditional Medicare.[215] Providing beneficiaries with this data—in a comprehensible way—will enable them to have a meaningful choice of whether to enroll in a Medicare Advantage plan or remain in traditional Medicare.[216] When some beneficiaries learn of a certain insurer's policies around denials, they change their enrollment decisions.[217] As plans are paid per enrollee, insurers will suffer the consequences if they continue to erroneously deny care compared to other plans or traditional Medicare.

Finally, even before CMS and beneficiaries start using this data to make decisions, Medicare Advantage insurers may start to change their behavior. According to a phenomenon known across various fields as the sentinel effect, "perceived oversight" often leads to "improved behavior."[218] Research has shown this to be true in the healthcare industry, with perceived oversight leading to increased compliance, reduced fraud, and lower financial reporting aggressiveness.[219] Medicare Advantage insurers do not appear immune from this effect. Internal documents reveal that if insurers know their decisions are likely to be appealed and reviewed by other entities, they change their behavior. One internal UnitedHealthcare email noted that the insurer had formed a working group to "identify cases which may result in an appeal" and find ways to correct the determination before it got to that stage.[220] If Medicare Advantage insurers know that both CMS and millions of beneficiaries have access to data on their medical necessity denials, the sentinel effect will hopefully drive them to self-correct even outside of beneficiaries and CMS holding them accountable. While information sharing may not solve all the woes in Medicare Advantage, it can start to combat erroneous coverage denials by revealing which plans may be misapplying the medical necessity

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214. See id. at 19 ("The data provided by the companies show that . . . the rate of denial was substantially higher for some companies."); see also Fuglesten Biniek et al., Medicare Advantage Insurers, supra note 94 (noting denial rates for different insurers).

215. See Fuglesten Biniek et al., Medicare Advantage Insurers, supra note 94; see also Alkire, supra note 141 (reporting that Medicare Advantage insurers denied 20.1% of post-acute care requests, while original Medicare denied only 3.0%). But see supra note 74 (noting that a recent Trump Administration proposal could result in similar concerns about inaccuracy and lack of transparency in traditional Medicare).

216. See Letter from Sen. Ron Wyden et al. to Chiquita Brooks-LaSure, supra note 78, at 1 ("People with Medicare should be able to benefit from an array of plan choices that they can easily comprehend . . . .").

217. See Ross & Herman, Denied by AI, supra note 10 (telling the story of an individual who refused to enroll with a UnitedHealth Medicare Advantage plan after experiencing the insurer's medical necessity denials).

218. Jared Koreff, Sean W.G. Robb & Gregory M. Trompeter, The Sentinel Effect and Financial Reporting Aggressiveness in the Healthcare Industry, 34 Acct. Horizons 131, 132 (2020).

219. See id. at 131–32.

220. Majority Staff of S. Permanent Subcomm. on Investigations, supra note 12, at 28 (internal quotation marks omitted) (quoting Dir. of Clinical Value, UnitedHealthcare).

standard at high rates, enabling beneficiaries to avoid those plans and CMS to engage in enforcement efforts.

B. *Enhanced Disclosure and Education for Appeals*

While the increased transparency efforts described in this Part serve an important role in combatting erroneous denials at the plan-wide level—and hopefully create a program with fewer incorrect denials—such efforts are unlikely to help an individual beneficiary who is actively facing a denial that they believe is wrong. Alongside transparency efforts aimed at increasing choice for beneficiaries, therefore, it is important for CMS to ensure individual beneficiaries have adequate access to the appeals process,[221] a process that Congress mandates by statute.[222] There is significant evidence that when beneficiaries access the appeals process, it works. As discussed above, "[f]rom 2019 through 2023, more than eight in ten (81.7%) denied prior authorization requests that were appealed were overturned."[223] These high rates have been steady throughout the years, with the rate between 2014 and 2016 being only slightly lower at 75%.[224] Most of these reversals happen at the first two stages, after which the number of appeals greatly diminishes.[225] Many beneficiaries, however, never access this process, with appeal rates, particularly for denied prior authorization requests, sitting at just 11.7%.[226] Ensuring beneficiaries can access this process, particularly the first two steps, is important for combatting erroneous denials. This Note puts forth two efforts that CMS can make to maintain and improve access.

1. *Partner for Outreach and Education Efforts.* — CMS should partner with organizations to improve beneficiaries' knowledge of the appeals process. Beneficiaries currently are not invoking their appeals rights, appealing less than 12% of adverse determinations.[227] Many beneficiaries report that they did not know they had the right to appeal.[228] When someone does not know their rights, they cannot successfully invoke them.[229] Because

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221. See supra section I.C.

222. 42 U.S.C. § 1395w-22(g)(4)–(5) (2018).

223. Fuglesten Biniek et al., Medicare Advantage Insurers, supra note 94.

224. Off. of Inspector Gen., Medicare Advantage Appeal Outcomes, supra note 62, at 7.

225. See id. at 7–9, 27 (reporting that of the 863,000 appeals in Medicare Advantage between 2014 and 2016, less than five thousand moved beyond the IRE stage). Throughout this Part, this Note intends to focus on increasing access to the first two steps of this appeals process. They alone are typically quite successful. See id. (showing that over 99.8% of reversals were made in either the first or second stage). They also both have decently tight time frames, enabling care to be delivered in a timely manner. See Appeals in Medicare Health Plans, supra note 79.

226. See supra notes 134–138 and accompanying text.

227. See supra note 135 and accompanying text.

228. See supra notes 136–137 and accompanying text.

229. See Catrina Denvir, Nigel J. Balmer & Pascoe Pleasence, When Legal Rights Are Not a Reality: Do Individuals Know Their Rights and How Can We Tell?, 35 J. Soc. Welfare & Fam. L. 139, 140 (2013) (noting that "without such knowledge, individuals will more often

of this, Know Your Rights campaigns have proliferated among the nation's top legal services and civil rights organizations over the years.[230] Beyond the practical aspects, some also argue that knowing one's rights is an important meta-right, based in multiple theories of morality.[231]

Such knowledge, however, has little effect if not accompanied by direction in how to properly invoke the rights in practice.[232] Reports show Medicare beneficiaries also struggle in this aspect, with 61% reporting not knowing how to invoke their rights.[233] News reports also note how difficult this is for experts in the field, calling the appeals process "an impossible labyrinth" at times.[234] Outreach by CMS must not only focus on rights in the abstract[235] but must provide practical guidance on how beneficiaries can invoke their rights with their particular plans in the context of improper medical necessity determinations.

To successfully do this—and thus improve access to the appeals process and independent review—CMS should prioritize the involvement of community-based groups that regularly engage in the appeals process.[236] Grantmaking to such groups for both beneficiary education and

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fail to vindicate their rights . . . [and] fail to take steps to protect themselves"); Olivia Newman, The Right to Know Your Rights, 49 Polity 464, 464 (2017) ("[M]any individuals fail to declare their rights because they do not know or fully understand what their rights entail.").

230. See, e.g., Know Your Rights, ACLU, https://www.aclu.org/know-your-rights [https://perma.cc/U5BL-GA5U] (last visited Sep. 12, 2025); Know Your Rights, NAACP, https://naacp.org/find-resources/know-your-rights [https://perma.cc/ZE7J-D5FS] (last visited Sep. 12, 2025); Know Your Rights, NYCLU, https://www.nyclu.org/resources/know-your-rights?types=right&issues=&dates=&searchTerm=&pageNumber=1 [https://perma.cc/KLD9-7ENJ] (last visited Sep. 12, 2025).

231. See Newman, supra note 229, at 470–79 (exploring the basis for the right to know one's rights in deontological, consequentialist, and social contract theories).

232. See Charles Elsesser, Community Lawyering—The Role of Lawyers in the Social Justice Movement, 14 Loy. J. Pub. Int. L. 375, 393 (2013) ("The 'know your rights' events by lawyers are often dry recitations of the law. Many lawyers, in giving these presentations, fail to mention the practical difficulties in implementing these rights, leaving the individuals with a false sense of individual power.").

233. See Pollitz et al., supra note 136 (noting that 61% of Medicare beneficiaries do not know who to call when they face coverage issues).

234. See Cheryl Clark, I Set Out to Create a Simple Map for How to Appeal Your Insurance Denial. Instead, I Found a Mind-Boggling Labyrinth., ProPublica (Aug. 31, 2023), https://www.propublica.org/article/how-to-appeal-insurance-denials-too-complicated (on file with the *Columbia Law Review*).

235. See Brandi M. Lupo, Legal Rights, Real-World Consequences: The Ethics of Know Your Rights Efforts and Towards Improved Community Legal Education, 17 Nw. J. Hum. Rts. 1, 19 (2019) ("[W]hen rights are discussed in universal, general terms, they can easily 'operate in and as an ahistorical, acultural, acontextual idiom . . . .'" (quoting Wendy Brown, States of Injury: Power and Freedom in Late Modernity 97 (1995))).

236. There are multiple groups that do this important work. The Medicare Rights Center runs a national hotline, providing assistance with appeals. Counseling & Advocacy, Medicare Rts. Ctr., https://www.medicarerights.org/counseling-and-advocacy [https://perma.cc/2C58-9JHN] (last visited Sep. 12, 2025). NYLAG, discussed above, does similar work in New York City. Healthcare Access, NYLAG, https://nylag.org/healthcare-access/ [https://perma.cc/2XBF-6NTN] (last visited Sep. 12, 2025).

consultation with CMS about improved notices prioritizes the sharing of practical, real-world knowledge by leveraging the experience and expertise these groups have in engaging with the process.[237] Also, given that Medicare inherently serves a vulnerable population,[238] outsourcing to community groups helps ensure those in charge of these efforts have the cultural competency and built trust to adequately engage and communicate with beneficiaries.[239] By utilizing these groups' expertise on the appeals process and their long-time relationships with beneficiaries and other vulnerable communities, CMS can empower beneficiaries and their advocates to access this all-important process.

2. *Require Specificity in Denial Letters.* — Along with generally improving access to the appeals process, CMS should ensure such access is meaningful. Beneficiaries are facing increasingly opaque denials, exacerbated by the use of AI technologies.[240] Even under the 2023 rule, there is no requirement for denials to include person-specific data or reference the particular criteria used in the case at hand in a thorough manner.[241] This lack of information prevents individuals from knowing whether an appeal is warranted or not.[242] As two scholars have queried: "[W]ithout knowing the basis for the denial, how can one show it was flawed?"[243]

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237. See Peter Frumkin, Service Contracting With Nonprofit and For-Profit Providers: On Preserving a Mixed Organizational Ecology, *in* Market-Based Governance: Supply Side, Demand Side, Upside, and Downside 66, 79 (John D. Donahue & Joseph S. Nye Jr. eds., 2002) (noting that, when outsourcing, "looking at an organization's track record in achieving meaningful client outcomes" enables the government to "focus resources on organizations that have proved they can deliver quality results in their chosen field").

238. The only individuals eligible for Medicare are people aged sixty-five or older, people with disabilities, people with end-stage renal disease, and people with ALS. Who's Eligible for Medicare?, HHS, https://www.hhs.gov/answers/medicare-and-medicaid/who-is-eligible-for-medicare/index.html [https://perma.cc/BL7T-94RY] (last updated Dec. 8, 2022). This vulnerability is compounded in Medicare Advantage, where a disproportionate number of beneficiaries are people of color and an increasing number are low income. Freed et al., supra note 8.

239. See Michael G. Wilson, John N. Lavis & Adrian Guta, Community-Based Organizations in the Health Sector: A Scoping Review, Health Rsch. Pol'y & Sys., Nov. 2012, at 1, 1 ("[C]ommunity-based organizations are well positioned to deliver such services 'because they understand their local communities and are connected to the groups they serve.'" (quoting Kata Chillag, Kelly Bartholow, Janna Cordeiro, Sue Swanson, Jocelyn Patterson, Selby Stebbins, Carol Woodside & Francisco Sy, Factors Affecting the Delivery of HIV/AIDS Prevention Programs by Community-Based Organizations, 14 AIDS Educ. & Prevention (Supplement) 27, 27 (2002))).

240. See supra section II.A.2.

241. See supra note 173 and accompanying text.

242. See Nat'l Ass'n of Ins. Comm'rs, supra note 90, at 30 ("Patients and providers need to be given a rationale for every denial, so that they can determine whether or not to appeal the decision . . . .").

243. Michelle M. Mello & Sherri Rose, Denial—Artificial Intelligence Tools and Health Insurance Coverage Decisions, JAMA Health F., Mar. 7, 2024, at 1, 1, https://jamanetwork.com/journals/jama-health-forum/fullarticle/2816204 [https://perma.cc/7EBZ-SW83].

CMS should require Medicare Advantage insurers to provide reasoning that is person- and situation-specific in denial letters. This is merely a reflection of what determinations under the medical necessity standard are: individualized determinations that ask whether care is necessary for a given beneficiary at a given time.[244] Further, CMS already requires Medicare Advantage insurers to engage in individualized decisionmaking when applying the medical necessity provision,[245] and it is not clear why these individualized results cannot be shared with the party most affected. This disclosure will give beneficiaries the information they need to know exactly why the insurer found the care unnecessary in their specific case, providing them with critical information needed to launch an appeal should they believe the reasoning is incorrect.[246]

CONCLUSION

Medicare's medical necessity standard has been around since the program's inception and is an important provision to protect both beneficiaries and taxpayers. Today, however, Medicare Advantage insurers are commonly misusing this provision and their statutory privileges to deny care that is necessary. The introduction of AI into determinations has only exacerbated such misuse, resulting in a process that is increasingly inaccurate and opaque. To combat this, CMS should stay focused on outcomes rather than getting bogged down in the precise internal procedures of individual insurers and their AI programs. The goal remains the same: ensuring beneficiaries have access to necessary care while preventing coverage of unnecessary care, regardless of the means used to determine these outcomes. CMS can do this by collecting better data, improving disclosure to beneficiaries, and ensuring proper access to the appeals process. Doing so will not only lead to better outcomes, but it will also provide information and power to the party most affected by determinations: beneficiaries in need of care.[247]

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244. See supra section I.A.

245. See supra notes 146–147 and accompanying text.

246. Others have noted the importance of adding these details to denial letters. See, e.g., Letter from Rep. Judy Chu et al. to Chiquita Brooks-LaSure, supra note 11, at 2 ("We also recommend that denial notices should include person-specific details for why a service is denied . . . .").

247. This Note regrettably did not have the space to share more stories from individual beneficiaries that would show how devastating the effects of incorrect coverage denials can be. Medicare serves some of the country's most vulnerable residents in their greatest times of need, and every incorrect denial can lead to a beneficiary going without the medical care they desperately need. From crippling debt to the progression of a debilitating illness to death, the effects are severe and intimate. As policymakers, scholars, and lawyers look for solutions, stories and real-world effects must remain a key part of the inquiry. To read some of these stories and hear directly from beneficiaries and their families about their experiences, see Miller et al., supra note 22 (sharing the story of Little John Cupp); Ross & Herman, Denied by AI, supra note 10 (sharing the story of Dolores Millam); see also Lokken Amended Complaint, supra note 1, at 18–35 (outlining the experiences of various plaintiffs who have been denied coverage).

BOOK REVIEW

ADMINISTRATION, DISTRUST, AND THE ENERGY TRANSITION

Climate of Contempt: How to Rescue the U.S. Energy Transition From Voter Partisanship
By David B. Spence. New York: Columbia University Press, 2024.
Pp. 400. $28.00.

*Sharon Jacobs**

Climate change is one of the greatest threats facing the United States. The majority of Americans believe that the federal government should be doing more to confront the climate challenge and prioritize the buildout of infrastructure supporting the energy transition. In spite of this, U.S. climate policy is moving in the opposite direction. In his new book, Climate of Contempt: How to Rescue the U.S. Energy Transition From Voter Partisanship, *Professor David B. Spence blames increasing polarization and partisanship, fueled by social media, for our inability to act as a nation in the face of an existential threat like climate change. He argues that genuine dialogue about climate policy—that leaves all net-zero options on the table, discusses trade-offs frankly, and engages critical questions rather than dismissing them—is vital to building a durable climate coalition that supports meaningful regulation.*

This Book Review suggests that Spence's approach is necessary, but not sufficient, to ensure sound climate policy. Highlighting the knowledge-producing functions of federal agencies, it emphasizes the critical role that government research on climate science, climate impacts, and new technologies play in the policy conversations Spence seeks. The Book Review outlines recent actions by the executive branch to undercut knowledge production and dissemination at the National Oceanic and Atmospheric Administration, the Department of Energy, and other federal agencies. Concluding that substitutes are unlikely to be sufficient, it suggests approaches that Congress and other actors might take to defend agency knowledge production, promote transparency, and strengthen the integrity of federal-agency-produced data.

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* Professor, UC Berkeley School of Law. The author would like to thank William Boyd, Sarah Krakoff, Jim Salzman, Leehi Yona, and all of the participants in the 2025 Colorado/UCLA Climate Workshop for helpful comments and conversations. She would also like to acknowledge Kylie Ford's valuable editorial contributions.

INTRODUCTION

The World Meteorological Organization's 2024 *State of the Climate* report is bleak. Greenhouse gas emissions reached record levels in 2023 and are still increasing.[1] Polar sea ice continues to decline, and ocean temperatures continue to rise.[2] Extreme weather events linked to climate change affected millions of people globally and exacerbated problems of food insecurity and human displacement.[3] The year 2024 surpassed 2023 to become the warmest year on record.[4]

While society is already experiencing some effects of planetary warming, urgent action can still avert the worst outcomes. The most recent report from the UN's Intergovernmental Panel on Climate Change (IPCC) warns that the world must achieve "rapid, deep, and in most cases immediate [greenhouse gas] emission reductions in all sectors" to avoid levels of warming beyond two degrees Celsius and the irreversible impacts that would accompany them.[5]

The United States, however, seems to be moving in the opposite direction. Congress has been unable to coalesce around a regulatory

1. World Meteorol. Org., State of the Climate in 2024: Update for COP29, at ii (2024), https://library.wmo.int/viewer/69075/download?file=State-Climate-2024-Update-COP29_en.pdf&type=pdf&navigator=1 (on file with the *Columbia Law Review*).

2. Id.

3. Id. at 6.

4. Press Release, Nat'l Oceanic & Atmospheric Admin., 2024 Was the World's Warmest Year on Record (Jan. 10, 2025), https://www.noaa.gov/news/2024-was-worlds-warmest-year-on-record [https://perma.cc/J54U-G4Y6].

5. Intergovernmental Panel on Climate Change, Climate Change 2023: Synthesis Report, Contribution of Working Groups I, II, and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 82 (H. Lee & J. Romero eds., 2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf [https://perma.cc/3FTC-5FJC].

strategy to mitigate greenhouse gas emissions. The signature piece of legislation on climate change and the energy transition—the Inflation Reduction Act—was passed in 2022 through a special process known as reconciliation, which allowed it to be enacted over the votes of every single congressional Republican.[6] The Act imposed no direct restrictions on greenhouse gas emissions, instead providing government dollars to support clean energy industries (alongside some dirtier ones).[7] Now even this approach has been gutted by another reconciliation bill.[8]

Professor David B. Spence's new book, *Climate of Contempt*,[9] helps make sense of the current state of climate and energy policy in America. Spence draws on law as well as economics, sociology, psychology, and ethics to conclude that increasing polarization and partisanship, exacerbated by social media, are to blame for the lack of progress.[10] Spence argues that the only way to work through our current impasse is to engage in face-to-face dialogue with opponents of climate policy. By treating them with respect and taking their concerns seriously, Spence argues, we can build the climate coalition.[11]

Part I of this Book Review describes *Climate of Contempt*'s approach and summarizes its main arguments. Part II argues that Spence's account is important but incomplete. This is because the partisanship and polarization that Spence blames for our lack of progress on the energy transition are also eroding faith in government institutions. This Part describes efforts to undermine federal climate and clean energy policy

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6. Kristina M. Moore, Can Republicans Repeal the Inflation Reduction Act (IRA)?, Nat'l L. Rev. (Oct. 22, 2024), https://natlawreview.com/article/can-republicans-repeal-inflation-reduction-act-ira [https://perma.cc/ZLU3-CE4K].

7. See Bipartisan Pol'y Ctr., Inflation Reduction Act Summary: Energy and Climate Provisions 1–2 (2022), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2022/08/Energy-IRA-Brief_R04.pdf (on file with the *Columbia Law Review*) ("Clean energy provisions in the bill would accelerate the deployment of clean energy technologies, reduce global emissions, lower energy prices, help export American innovation, strengthen our economy and build a reliable and affordable energy sector.").

8. See, e.g., Amy Turner, The One Big Beautiful Bill Act: Considerations for Cities and Community Partners, Sabin Ctr.: Climate L. Blog (July 7, 2025), https://blogs.law.columbia.edu/climatechange/2025/07/07/the-one-big-beautiful-bill-act-considerations-for-cities-and-community-partners/ [https://perma.cc/Z5NF-ERBJ] (noting that the One Big Beautiful Bill Act "guts many of the IRA's grant and loan programs"). Meanwhile, the Trump Administration has frozen and clawed back funds already awarded under the Act. Simmone Shah, How Trump Is Trying to Undo the Inflation Reduction Act, Time (Feb. 27, 2025), https://time.com/7262600/how-trump-is-trying-to-undo-the-inflation-reduction-act/ (on file with the *Columbia Law Review*); see also, e.g., Claire Brown, Waiting, Often in the Dark, for Frozen E.P.A. Funds, N.Y. Times (May 17, 2025), https://www.nytimes.com/2025/05/17/climate/puerto-rico-ira-funds-frozen.html (on file with the *Columbia Law Review*) (documenting how the frozen funds are impacting infrastructure projects in Puerto Rico).

9. David B. Spence, Climate of Contempt: How to Rescue the U.S. Energy Transition From Voter Partisanship (2024) [hereinafter Spence, Climate of Contempt].

10. E.g., id. at 2, 5.

11. Id. at 30.

that Professor Jody Freeman and I have described as "structural deregulation": the dismantling of federal agencies and, with it, their capacity to govern.[12] This erosion can create a pernicious feedback loop in which the dearth of government expertise makes it even more difficult to agree on basic facts, thus further fueling the propaganda machine and partisan entrenchment that Spence describes.

Part III turns to solutions. Given the unprecedented destruction of government capacity and knowledge production since January 20, 2025, Spence's call to focus on interpersonal dialogue is sound but insufficient. If climate policy is to stand a chance against the structural deregulation of agencies, Spence's approach must be paired with legal and structural responses that protect administrative knowledge production. Supreme Court rulings and presidential actions have made traditional efforts to shield agencies and their heads from presidential influence increasingly ineffective.[13] But there are still opportunities for Congress to defend agency knowledge production, require greater agency transparency, and strengthen data and scientific integrity policies. To enhance their legitimacy, agencies should also consider partnering with more trusted societal actors, including the military and professional organizations. These are longer-term solutions, however, and in the short term, it may be necessary to rely on substitute sources of climate and energy data and research outside of the federal government.

I. *CLIMATE OF CONTEMPT*

Early in the book's first chapter, Spence recounts a story from his own life. As a young man in 1979, Spence was living near the Three Mile Island nuclear power plant in Pennsylvania when one of its reactors experienced a partial meltdown.[14] That event, and the antinuclear messaging from copartisans and pop culture that followed, led Spence to become involved in antinuclear activism.[15] Over time, however, Spence's position changed. As he studied energy policy and the power sector, as he puts it, his "moral clarity . . . became muddied by a more complicated reality."[16]

This is the kind of experience Spence hopes that more people will have more frequently. The experience need not be related to the desirability of nuclear power or any other particular policy area. But the book encourages readers to *complicate* their own beliefs and understandings through investigation and reflection as an antidote to the

12. See Jody Freeman & Sharon Jacobs, Structural Deregulation, 135 Harv. L. Rev. 585, 588, 591–92 (2021) [hereinafter Freeman & Jacobs, Structural Deregulation].

13. See infra notes 179–181 and accompanying text.

14. Spence, Climate of Contempt, supra note 9, at 4.

15. Id.

16. Id.

partisan oversimplification that increasingly dominates U.S. culture and, especially, the modern media environment.

In part, this is a book about climate change and energy law. It is a book about how society can transition from a fossil-fuel-based energy system to a low- or net-zero carbon system in time to avert the worst effects of climate change. There are deep dives into the federal Clean Air Act,[17] the distributional consequences of rooftop solar ratemaking,[18] and the intricacies of energy market restructuring.[19] In the debate about what form climate and energy legislation should take, Spence is firmly on the side of regulatory limits rather than industrial policy.[20] Spence is a defender of what he calls "well-regulated capitalism"[21] and does not support regulation that disincentivizes wealth creation.[22] He yearns, however, for a new "republican moment[]" in energy law that will produce comprehensive legislation like 1935's Federal Power Act or 1970's Clean Air Act.[23] In this sense, the book is a response to those who have championed the emergence of green industrial policy, either on its own terms or as a second-best alternative in the face of political impasse.[24] Spence, by contrast, refuses to accept the impasse as a given. His project attacks its roots.

This is therefore a book about much more than climate and energy law. It is also a book about human psychology, modern technology, and the way the two have collided to produce devastating consequences for law and governance in contemporary America. The impediments to tackling the climate crisis, Spence argues, are largely political. Collective action is inhibited by ideological polarization, populism, and tribalism. "When one's political party becomes central to one's identity, as it has for many today," Spence argues, a "suite of social and cultural biases comes with it."[25] Climate policy is a casualty of this dynamic.

The second part of the book is devoted to understanding the causes of this partisan paralysis. It focuses much of its attention on the online spread of propaganda and its tendency to exacerbate bias.[26] Spence argues

17. Id. at 55–58.

18. Id. at 91–93.

19. Id. at 74–86.

20. See id. at 3.

21. Id. at 12 (emphasis omitted).

22. Id.

23. Id. at 62–64, 129.

24. See, e.g., Daniel A. Farber, Toward a Future-Facing Climate Policy: Shifting the Focus From Emission Regulation to the Energy Transition, 50 Colum. J. Env't L. 1, 6 (2025) (defending government funding for new energy systems as an alternative to emission reduction legislation); Daniel A. Farber, Turning Point: Green Industrial Policy and the Future of U.S. Climate Action, 11 Tex. A&M L. Rev. 303, 306 (2024) (describing positive feedback loops that will amplify the effects of the major climate and energy spending bills passed during the Biden Administration).

25. Spence, Climate of Contempt, supra note 9, at 138.

26. See id. at 129–64.

that people increasingly rely on online sources as knowledge proxies and that those sources are sloppier, more ideologically tailored, and more negative in their characterizations of opposing views—and those who hold them—than traditional sources.[27] For Spence, therefore, a simple problem at the root of the current stalemate is that we no longer talk to one another.[28] Instead, we engage in shallow back-and-forth sniping online. By cultivating fear and skillfully manipulating the online information environment, he argues, partisan propagandists have been able to convert political preference into righteous indignation.[29]

Spence has long been interested in the effects of partisanship on law and policy. In a 2013 article, he pleaded for cool analysis to replace moral outrage in the partisan debate over shale gas production.[30] A few years later, he analyzed partisan opposition to the Obama Administration's regulation of coal-fired power plants.[31] Most recently, he contributed a chapter on partisan polarization and the bureaucracy to an edited volume.[32] In addition to his scholarly work, Spence founded the Energy Tradeoffs project, which publishes recorded conversations with energy experts on aspects of the energy transition.[33] The project's participants are all proponents of the transition. Their interviews, however, emphasize the genuine trade-offs that can arise in energy systems between affordability, reliability, and environmental performance.[34] In other words, the project presents the energy transition in all its messiness and complexity.

As Spence argued in an earlier article, these trade-offs and the political realities they entail mean that "the shortest (and surest) route to [decarbonization] may not be a straight line."[35] Or, as Spence puts it in *Climate of Contempt*, "We are more likely to build *durable* voter support for the transition and to minimize its opportunity costs by leaving all net-zero

27. Id. at 140–45.

28. See id. at 118–19.

29. Id. at 96, 129–30.

30. David B. Spence, Responsible Shale Gas Production: Moral Outrage vs. Cool Analysis, 25 Fordham Env't L. Rev. 141, 145–46 (2013).

31. David E. Adelman & David B. Spence, Ideology vs. Interest Group Politics in U.S. Energy Policy, 95 N.C. L. Rev. 339, 342–43, 355–60 (2017) (concluding that the rules' benefits outweighed their costs, even at the local level).

32. David B. Spence, The Effects of Partisan Polarization on the Bureaucracy, *in* Can America Govern Itself? 271 (Frances E. Lee & Nolan McCarty eds., 2019).

33. Energy Tradeoffs, https://www.energytradeoffs.com/ [https://perma.cc/Q9DC-HK5F] (last visited Sep. 12, 2025). I participated in the project as a site overseer and administrator, as well as an interviewer. Id.

34. See, e.g., id. ("Fossil fuel combustion . . . imposes enormous costs on society . . . . Nevertheless, someone must pay for the construction of new infrastructure necessary to make the [energy] transition a reality. . . . Acknowledging that fact, and making decisions about how those costs should be distributed, are important elements of a green transition.").

35. David B. Spence, Paradoxes of "Decarbonization", 82 Brook. L. Rev. 447, 452 (2017).

options open, by discussing trade-offs openly and frankly, and by engaging critical questions rather than dismissing them or attacking the questioner."[36]

One of the things that sets Spence's treatment apart is its willingness to practice the tolerance it preaches. The climate coalition, Spence argues, largely fails to acknowledge that some opposition to climate policy and the energy transition is not the product of ignorance but of good faith disagreement about, for example, how much to focus on mitigation versus adaptation, how to address renewable energy's intermittency problem, how much to discount the cost of present interventions, or the role of technological innovation.[37] By failing to engage in debate about these questions and others, he concludes, the coalition alienates potential allies.[38]

Climate of Contempt identifies genuine challenges that advocates of the energy transition must reckon with, including how to ensure reliability on a grid powered with more intermittent sources of electricity such as wind and solar, how to keep energy costs affordable as we transition to a zero-carbon future, and how to bring new generation online.[39]

The book does not explore possible answers to these challenges, perhaps because its focus is on identifying points of legitimate disagreement rather than arguing for particular solutions. Yet those solutions exist. Take grid reliability. Energy storage can balance the variability of wind and solar power.[40] Building new transmission lines to connect different parts of the national grid will allow for better balancing of power across regions.[41] A greater threat to grid reliability is the electricity demand growth driven by the power-hungry data centers that support artificial intelligence, cryptocurrency, and other technologies and, to a lesser extent, the electrification of homes and transportation.[42] The rapid growth

36. Spence, Climate of Contempt, supra note 9, at 168.

37. Id. at 123.

38. Id. at 168.

39. Id. at 168, 182.

40. See MIT Energy Initiative, The Future of Energy Storage, at xi (2022), https://energy.mit.edu/wp-content/uploads/2022/05/The-Future-of-Energy-Storage.pdf [https://perma.cc/FVE4-6CML] ("Electricity storage, the focus of this report, can play a critical role in balancing electricity supply and demand and can provide other services needed to keep decarbonized electricity systems reliable and cost-effective.").

41. See, e.g., Alexander Roth & Wolf-Peter Schill, Geographical Balancing of Wind Power Decreases Storage Needs in a 100% Renewable European Power Sector, iScience, July 21, 2023, at 1, 7 (finding that, in an idealized model of twelve European countries running on 100% renewable energy, geographical balancing of wind and grid interconnection would decrease storage requirements by about 30%).

42. See, e.g., Arman Shehabi et al., Lawrence Berkeley Nat'l Lab'y, 2024 United States Data Center Energy Usage Report 5–7 (2024), https://eta-publications.lbl.gov/sites/default/files/2024-12/lbnl-2024-united-states-data-center-energy-usage-report.pdf (on file with the *Columbia Law Review*) (predicting that data center electricity consumption would account for approximately 6.7%–12% of total U.S. consumption by 2028, compared with 1.9% in 2018 and 4.4% in 2023); Robert Walton, Five-Year US Load Growth Forecast Surges 456%, to 128 GW: Grid Strategies, Utility Dive (Dec. 6, 2024),

of data centers in particular has entered into the social consciousness only recently,[43] and thus it does not feature prominently in Spence's book. That growth is raising urgent questions for policymakers not only about reliability but also about equity and decarbonization. Yet those questions, too, have answers. Data center efficiency can be improved.[44] Data center operators can partner with carbon-free generation to support their operations.[45] And regulators can control the scope and pace of data center interconnection with the grid to mitigate reliability challenges.[46]

Electricity costs are proving a more intractable challenge, especially in places like California.[47] But rising costs are not coming primarily from the construction of new renewable generation, which is now cost-competitive with fossil-fuel sources, even without government subsidies.[48] Rather, rising rates are due to the increased costs of maintaining electrical systems, especially in parts of the country prone to wildfires and other climate-fueled natural disasters,[49] as well as social policies embedded in

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https://www.utilitydive.com/news/shocking-forecast-us-electricity-load-could-grow-128-gw-over-next-5-years-Grid-Strategies/734820/ [https://perma.cc/ZTN5-QH9U] (predicting a 15.8% increase in U.S. electricity demand by 2029, driven largely by manufacturing and data centers).

43. See, e.g., Tim McLaughlin, Big Tech's Data Center Boom Poses New Risk to US Grid Operators, Reuters (Mar. 19, 2025), https://www.reuters.com/technology/big-techs-data-center-boom-poses-new-risk-us-grid-operators-2025-03-19/ [https://perma.cc/3QNV-SM46] ("[T]he rapid expansion of data centers . . . is forcing grid operators to plan for new contingencies and complicating the already difficult task of balancing the country's supply and demand of electricity.").

44. See Juliana Ennes, Big Tech, Power Grids Take Action to Reign in Surging Demand, Reuters (Aug. 18, 2025), https://www.reuters.com/business/energy/big-tech-power-grids-take-action-reign-surging-demand-2025-08-18/ [https://perma.cc/4MFB-JU6A] (last updated Aug. 20, 2025) (describing the use of alternative cooling strategies, high-efficiency components, and direct current to increase efficiency).

45. See Yuki Numata, Alexandra Gorin, Laurens Speelman, Lauren Shwisberg & Chiara Gulli, Fast, Flexible Solutions for Data Centers, Rocky Mountain Inst. (July 17, 2025), https://rmi.org/fast-flexible-solutions-for-data-centers/ [https://perma.cc/KSH5-V6EM] (explaining colocation strategies).

46. See Mike Granowski, Opinion, Shaping the Future of Data Centers in Light of FERC's AWS, Talen Energy Ruling, Utility Dive (Nov. 25, 2024), https://www.utilitydive.com/news/data-centers-ferc-aws-amazon-web-services-talen-energy-nuclear/733865/ [https://perma.cc/M2BF-425C] (describing regulators' efforts to manage data center growth).

47. See Severin Borenstein, Meredith Fowlie & James Sallee, Designing Electricity Rates for an Equitable Energy Transition 10, 34–36 (Energy Inst. at Haas, Working Paper No. 314, 2021), https://haas.berkeley.edu/wp-content/uploads/WP314.pdf [https://perma.cc/F7YL-2A3J] [hereinafter Borenstein et al., Designing Electricity Rates] (describing California's high rates and exploring rate-design principles).

48. Benjamin Storrow & E&E News, Wind and Solar Energy Are Cheaper Than Electricity From Fossil-Fuel Plants, Sci. Am. (June 17, 2025), https://www.scientificamerican.com/article/wind-and-solar-energy-are-cheaper-than-electricity-from-fossil-fuel-plants/ [https://perma.cc/PXF4-RVRF].

49. Laurence Du Sault, Here's Why Your Electricity Prices Are High and Soaring, CalMatters: Cal. Divide (Mar. 12, 2021), https://calmatters.org/california-divide/2021/03/

electricity rates.[50] But here, the answer cannot be to pull back from the very investments that will mitigate carbon pollution and, by extension, the very disasters that are causing rates to spike. Rather, social programs currently subsidized by ratepayers can be supported instead through the tax code,[51] customer demand can be shifted away from times of peak consumption,[52] and greater grid interconnection can facilitate lower wholesale rates.[53]

Finally, there are difficult questions about where to locate the new infrastructure that a zero-carbon energy system will require.[54] Spence argues persuasively that the primary barriers to getting new transmission lines sited are regulatory, produced by a tragedy of the anticommons:[55] Transmission developers must secure permissions from state and local governments along their routes, many of which may be ill-disposed to grant such permissions to a line that will have few direct benefits for local

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california-high-electricity-prices/ [https://perma.cc/6NXD-M4WB] (last updated Apr. 19, 2023).

50. See, e.g., Borenstein et al., Designing Electricity Rates, supra note 47, at 10 ("If a utility charges a retail electricity price equal to social marginal cost, . . . it would probably not collect enough revenue to cover all of the costs of the grid, as well as other priorities that are currently supported via volumetric (i.e., per-kWh) rates."); see also Severin Borenstein, Meredith Fowlie & James Sallee, Energy Inst. at Haas, Paying for Electricity in California: How Residential Rate Design Impacts Equity and Electrification 18–21 (2022), https://www.next10.org/sites/default/files/2022-09/Next10-paying-for-electricity-final-comp.pdf [https://perma.cc/V62J-J9YU] [hereinafter Borenstein et al., Paying for Electricity] (arguing that, while electricity prices should capture the social cost of electricity consumption, they are overinclusive in passing costs that are not directly tied to supplying electricity on to the public).

51. Borenstein et al., Paying for Electricity, supra note 50, at 25.

52. See Demand Response (DR), Cal. Pub. Utils. Comm'n, https://www.cpuc.ca.gov/industries-and-topics/electrical-energy/electric-costs/demand-response-dr [https://perma.cc/42AK-JW77] (last visited Sep. 12, 2025) (explaining that demand response programs avoid the costs of purchasing high-priced energy and constructing new power plants and transmission infrastructure).

53. See Joshua D. Rhodes, The Old, Dirty, Creaky US Electric Grid Would Cost $5 Trillion to Replace. Where Should Infrastructure Spending Go?, The Conversation (Mar. 16, 2017), https://theconversation.com/the-old-dirty-creaky-us-electric-grid-would-cost-5-trillion-to-replace-where-should-infrastructure-spending-go-68290 [https://perma.cc/4WMF-Q58F] (noting that transmission grid expansion can lower power costs).

54. See Spence, Climate of Contempt, supra note 9, at 186–90 ("*All* new energy infrastructure attracts some sincere and rational local opposition, as well as sincere, rational local support, because new energy projects inevitably impose *some* costs on *some* locals, and *some* of those locals do not capture (or value) the benefits that the projects bring.").

55. See James W. Coleman, The Jurisdictional Anticommons, *in* Getting to Yes on Linear Infrastructure Projects 7, 8 (2021), https://macdonaldlaurier.ca/files/pdf/20201210_Linear_Infrastructure_Projects_COLLECTION_FWeb.pdf [https://perma.cc/NK8L-DQUC] ("The jurisdictional anticommons is a growing problem for resource development around the world—pipelines and power lines are being held up waiting for approvals from one or two of the jurisdictions they need to sign off.").

communities.[56] The cure for this regulatory patchwork, Spence hints in his book (and has argued more explicitly elsewhere[57]), is stronger federal permitting authority.[58] Siting processes may also need to be streamlined (though not hollowed out entirely[59]) to bring more generation online.[60]

Reliability, cost, and infrastructure siting are issues requiring thoughtful debate, and reasonable people may disagree about solutions. Spence has his own views about the kind of policies needed to meet the climate challenge. He suggests that we need a significant regulatory response not unlike that resulting from the environmental movement of the 1970s.[61] He points, for example, to the need for regulatory intervention to confront the shortcomings of competitive energy markets, which do not always produce the energy goods and services that people want or need without government involvement.[62] Policies like subsidies and state renewable portfolio standards, he argues, have also played an important role in bringing down the cost of renewable generation.[63]

Importantly, however, one need not agree with the book's specific policy conclusions to grasp its larger argument: that climate and energy policy in this country suffer from a surfeit of partisan posturing. The next Part argues that the problem is even worse than the book suggests and that developments since its publication require us to look beyond individual discord to the current attacks on the government's administrative competence.

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56. Spence, Climate of Contempt, supra note 9, at 89. For a recent example, see David Gelles, With One Call, Trump Alters the Fate of a Contested Power Project, N.Y. Times (July 17, 2025), https://www.nytimes.com/2025/07/17/climate/hawley-grain-belt-express-invenergy-trump.html (on file with the *Columbia Law Review*) (describing Missouri lawmakers' opposition to a transmission line that would bring new renewable power to population centers but whose benefits would not be concentrated in Missouri).

57. David Spence, Energy Policy's Orphaned Good Idea, Regul. Rev. (Mar. 5, 2018), https://www.theregreview.org/2018/03/05/spence-energy-policys-orphaned-good-idea/ [https://perma.cc/S32P-AVX3].

58. See Spence, Climate of Contempt, supra note 9, at 89 ("Because the [Federal Power Act] reserves permitting authority for interstate transmission lines to the states, barriers to entry are especially high for long-distance lines that cross multiple states.").

59. See, e.g., Ian M. Stevenson, Interior Wants to Do NEPA Reviews in 28 Days. Is That Even Possible?, E&E News: Energywire (May 15, 2025), https://www.eenews.net/articles/interior-wants-to-do-nepa-reviews-in-28-days-is-that-even-possible/ [https://perma.cc/72XQ-Z6GF] (describing the Interior Department's plan to "fast-track environmental reviews").

60. See Alexandra B. Klass & Matthew Appel, The Law of Energy Abundance, 104 N.C. L. Rev. 63, 94–104 (2025) (proposing solutions to permitting bottlenecks for clean energy); J.B. Ruhl & James Salzman, The Greens' Dilemma: Building Tomorrow's Climate Infrastructure Today, 73 Emory L.J. 1, 6–7, 26–34 (2023) (describing the ways that infrastructure siting laws can slow down development).

61. See Spence, Climate of Contempt, supra note 9, at 64 (lamenting the fact that the political conditions for such a moment are not present in Congress today).

62. See id. at 81–86 (describing how "those who oversee the competitive parts of the U.S. electricity market continue to struggle to make those markets work for the benefit of consumers").

63. Id. at 87–88.

II. CONTEMPT AND THE UNDERMINING OF GOVERNMENT CAPACITY

In his final chapter, Spence argues that the growth of "group contempt . . . weakens the liberal democratic institutions through which we must craft solutions to national problems such as climate change."[64] He reminds readers that "[t]hose institutions require care and maintenance, which require some minimum threshold amount of respect for pluralism (across social and political groups)."[65] Yet *Climate of Contempt* was published before President Donald Trump began his second term in office. Perhaps for this reason, the book devotes little attention to the health of the government agencies whose work underpins climate and energy policy.

The problem of agency decline deserves greater consideration, however, for two reasons. First, the decline is ultimately a product of the same forces Spence singles out—partisanship, polarization, and tribalism—magnified by the new media environment. Today, trust in government is at an all-time low.[66] Over 70% of those polled during the Eisenhower and Johnson Administrations said they trusted the federal government to do what is right "just about always" or "most of the time," compared with just 17% in 2025.[67]

There is a partisan dimension to this lack of trust, with skepticism about federal agencies, in particular, deeper on the Right than on the Left.[68] Administration has thus become a political issue. The Heritage Foundation's *Project 2025* report sought to prepare "conservatives to go to work on Day One to deconstruct the Administrative State."[69] It is also no accident that the breakdown of trust in government coincides with the

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64. Id. at 201.

65. Id.

66. See Pew Rsch. Ctr., Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role 8 (2022), https://www.pewresearch.org/wp-content/uploads/sites/20/2022/06/PP_2022.06.06_views-of-government_REPORT.pdf [https://perma.cc/3KJK-8UK3] (reporting that only 9% of Republicans say they trust government just about always or most of the time, compared with 29% of Democrats, the lowest levels reported in the last sixty years).

67. Public Trust in Government: 1958–2025, Pew Rsch. Ctr. (Dec. 4, 2025), https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2025/ [https://perma.cc/6NFT-4NFD].

68. See Andy Cerda, Americans See Many Federal Agencies Favorably, but Republicans Grow More Critical of Justice Department, Pew Rsch. Ctr. (Aug. 12, 2024), https://www.pewresearch.org/short-reads/2024/08/12/americans-see-many-federal-agencies-favorably-but-republicans-grow-more-critical-of-justice-department/ [https://perma.cc/T5LA-Q78L] (finding that a majority of Democrats expressed more favorable than unfavorable views for all sixteen federal agencies in a poll, whereas Republicans expressed more unfavorable than favorable views for eleven of the sixteen).

69. Paul Dans, The 2025 Presidential Transition Project: A Note on "Project 2025", *in* Mandate for Leadership: The Conservative Promise, at xiii, xiv (Paul Dans & Steven Groves eds., 2023), https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf [https://perma.cc/FM8C-M57H] [hereinafter Project 2025].

election of a President who ran on a platform of "drain[ing] the swamp"[70] and dismantling government agencies.[71] The Trump Administration's subsequent actions have made good on those commitments, threatening agency capacity.[72]

The second reason that institutional decline deserves greater attention is that government agencies are vital to the success of Spence's mission. Through the expansion of its data-gathering and research capacities—its knowledge-production functions—the federal government has come to play a key role in societal knowledge making.[73] To engage in the genuine policy debate and policymaking that *Climate of Contempt* longs for, citizens and policymakers alike must operate from a common base of understanding. Historically, the government has played a major role in supplying that factual foundation, whether through data gathering and production, its own research, or sponsoring outside studies.[74]

The federal government's role as knowledge producer is so established that even its critics rely on its findings. Spence cites the example of "former Trump environmental advisor Steve Milloy, who told his 123,400 Twitter/X followers in 2023 that '[the National Oceanic and Atmospheric Administration (NOAA)] makes it official. Last 8 years . . . global cooling.'"[75] In fact, NOAA had found that the last eight years were

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70. Ted Widmer, Draining the Swamp, New Yorker (Jan. 19, 2017), https://www.newyorker.com/news/news-desk/draining-the-swamp (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting President Trump).

71. See Fact Sheet: President Donald J. Trump Creates New Federal Employee Category to Enhance Accountability, White House (Apr. 18, 2025), http://whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-creates-new-federal-employee-category-to-enhance-accountability/ [https://perma.cc/F3F2-NUJX] ("President Trump is delivering on his promise to dismantle the deep state and reclaim our government from Washington corruption.").

72. The federal government's general communications function has also been threatened by the defunding of the Corporation for Public Broadcasting and the consequential devastation of public media stations across America. Benjamin Mullin, Corporation for Public Broadcasting Votes to Shut Down, N.Y. Times (Jan. 5, 2026), https://www.nytimes.com/2026/01/05/business/media/corporation-for-public-broadcasting.html (on file with the *Columbia Law Review*); Steven Portnoy & Sarah Beth Hensley, What $9B Spending Cuts Could Mean for PBS, NPR Stations, Especially in Rural Areas, ABC News (July 17, 2025), https://abcnews.go.com/Politics/9b-spending-cuts-pbs-npr-stations/story?id=123838955 [https://perma.cc/PV5H-ZRFU].

73. On knowledge making in environmental law, see generally William Boyd, Genealogies of Risk: Searching for Safety, 1930s–1970s, 39 Ecology L.Q. 895 (2012) (noting that environmental law "has always faced difficult challenges in acquiring knowledge of the specific problems that it seeks to regulate and translating that knowledge into regulatory practice").

74. This is what Professor William Boyd calls "the regulatory state's substantial role in fact making." William Boyd, De-Risking Environmental Law, 48 Harv. Env't L. Rev. 153, 166 (2024) [hereinafter Boyd, De-Risking].

75. Spence, Climate of Contempt, supra note 9, at 158 (alteration in original) (quoting Steve Milloy).

the *warmest* on record.[76] But Milloy clearly found it helpful to invoke NOAA as a source of authority, even while mischaracterizing its data.

But federal knowledge production is under attack in the United States today, and partisan dissensus about the role government should play in society is at an all-time high.[77] On the Right, anti-administrativism is on the rise.[78] In her 2017 *Harvard Law Review* foreword, Professor Gillian Metzger described a broad attack on administrative government by the first Trump Administration, the Supreme Court, lower court judges, and a handful of academics.[79] Metzger recounted an "almost visceral resistance to an administrative government perceived to be running amok"[80] and argued that "contemporary anti-administrativism may serve to undercut the legitimacy of national administrative governance."[81]

A few years later, Professor Freeman and I wrote about a key weapon of anti-administrativism that we called structural deregulation.[82] *Substantive* deregulation involves the rollback of rules and other government policies through established legal channels.[83] It is largely transparent and provides opportunities for contestation. *Structural* deregulation, by contrast, is the deliberate undermining of federal agency capacity through a combination of staffing reductions, funding deprivations, expertise depletions, and reputational attacks.[84] Its implementation is largely informal and therefore harder to track, and it is more difficult to challenge under existing laws.[85] It leaves federal agencies unable to perform their statutory duties effectively.[86] Moreover, this depletion of agency resources and capabilities can be difficult and time-consuming to repair and thus can do long-term damage to the machinery of government.[87]

The tools of structural deregulation were not invented by the Trump Administration.[88] But this Administration, especially in its second incarnation, has used the techniques of structural deregulation more

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76. Id.

77. See supra notes 67–69 and accompanying text.

78. See Gillian E. Metzger, The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 3–4 (2017) (describing the rise of anti-administrative rhetoric and attacks on the constitutionality of administrative government as typifying "contemporary anti-administrativism").

79. See id. at 17–34.

80. Id. at 34.

81. Id. at 49.

82. Freeman & Jacobs, Structural Deregulation, supra note 12.

83. Id. at 588.

84. Id. at 591–92.

85. Id. at 635, 638–52 (describing the problems with using existing law to challenge structural deregulation).

86. See id. at 664 (noting that structural deregulation erodes "the foundational capacities on which agencies rely").

87. Id at 665.

88. See id. at 591–623 (offering examples from the Reagan, Clinton, Obama, and Trump Administrations).

fearlessly and more pervasively than any of its predecessors to decimate administrative programs and, in some cases, entire agencies.[89] The Administration's targets include key programs supporting the energy transition and the broader response to climate change.[90]

As the sections below will show, this great unraveling of the federal government's capacity has significant implications. It threatens both the production and the credibility of government information. Unless that capacity can be preserved, people may be unable to agree on even the factual starting points of the climate debate, and Spence's dialogue-building project will falter.

The remainder of this Part first describes structural deregulation at two agencies critical to the climate response and the energy transition: NOAA and the Department of Energy (DOE). It then describes other agency programs that have been undermined, including research programs at the National Science Foundation (NSF) and cross-government programs to assess climate impacts.

A. *Climate Monitoring: The Incapacitation of NOAA*

The federal government has long been a key source of information and research about energy, the atmosphere, and, more recently, climate change. NOAA was founded in 1970 and took over work originally performed by the U.S. Coast and Geodetic Survey (founded in 1807), the Weather Bureau (founded in 1870), and the U.S. Commission of Fish and Fisheries (founded in 1871).[91]

NOAA is the nation's preeminent climate science organization,[92] and it has been targeted by the Trump Administration at least in part for that reason.[93] The Administration has laid off more than eight hundred Agency

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89. See Jody Freeman & Sharon Jacobs, President Trump's Campaign of 'Structural Deregulation', Lawfare (Feb. 12, 2025), https://www.lawfaremedia.org/article/president-trump-s-campaign-of–structural-deregulation [https://perma.cc/S7G5-B88N] (discussing the Administration's "steps to abolish the U.S. Agency for International Development" and "siege" on the Consumer Financial Protection Bureau).

90. The speed and scope of this assault are such that the observations here will necessarily be out of date by the time of publication. Yet they tell an important history of the first year of the second Trump Administration. They also convey an overall sense of a deregulatory movement that seeks institutional retrenchment and restructuring rather than a simple rolling back of particular policies.

91. Our History, Nat'l Oceanic & Atmospheric Admin., https://www.noaa.gov/heritage/our-history [https://perma.cc/KH8U-73CG] (last updated Dec. 11, 2025).

92. NOAA also provides weather information and forecasting that private actors rely on. See, e.g., Paul Voosen, NOAA Firings Hit the Birthplace of Weather and Climate Forecasting, Science (Mar. 4, 2025), https://www.science.org/content/article/noaa-firings-hit-birthplace-weather-and-climate-forecasting (on file with the *Columbia Law Review*).

93. *Project 2025*, the manifesto written by former Trump Administration officials, identified NOAA as "one of the main drivers of the climate change alarm industry." Thomas F. Gilman, Department of Commerce, *in* Project 2025, supra note 69, at 663, 675; see also Amy Sherman, Fact-Checking What Project 2025 Says About the National Weather Service

staff members.[94] About five hundred more departed after accepting the Administration's deferred resignation offers.[95] Cancellation of contracts could result in the termination of thousands of additional workers.[96] At an Agency that employs only about twelve thousand personnel worldwide (more than half of whom are scientists or engineers),[97] these departures are significant. To date, NOAA's staffing has been reduced by at least 10%.[98] At the same time, leases for the Agency's buildings have purportedly been canceled and employees' work credit cards have been frozen.[99]

Internal documents reported on by *Science* suggest that the Administration sought to prevent NOAA from spending all of its appropriated research funds in 2025.[100] The President's budget request for fiscal year 2026 would further diminish the Agency. It would shrink NOAA's overall budget by 25% and its office of Oceanic and Atmospheric Research's budget by 75%.[101] The proposed budget eliminates significant climate and weather research functions and cuts investments in satellite technology that supports not only weather forecasting but also climate

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and NOAA, PBS News (Sep. 29, 2024), https://www.pbs.org/newshour/politics/fact-checking-what-project-2025-says-about-the-national-weather-service-and-noaa (on file with the *Columbia Law Review*).

94. Thomas Mackintosh, Hundreds in US Climate Agency Fired in Latest Cuts, BBC (Feb. 28, 2025), https://www.bbc.com/news/articles/cdell8n14x2o [https://perma.cc/8DD7-BBBC].

95. Christopher Flavelle, Austyn Gaffney & Camille Baker, Hundreds Are Said to Quit NOAA in a New Round of Departures, N.Y. Times (Feb. 28, 2025), https://www.nytimes.com/2025/02/28/climate/noaa-trump-staff-cuts.html (on file with the *Columbia Law Review*).

96. Christopher Flavelle, Austyn Gaffney, Camille Baker & Ana Swanson, Mass Layoffs Begin at NOAA, With Hundreds Said to Be Fired in One Day, N.Y. Times (Feb. 27, 2025), https://www.nytimes.com/2025/02/27/climate/noaa-layoffs-trump.html (on file with the *Columbia Law Review*) [hereinafter Flavelle et al., Mass Layoffs Begin at NOAA]; Valerie Volcovici, Rich McKay & Leah Douglas, Trump's Firings at US Weather Agency Will Put Lives at Risk, Scientists Say, Reuters (Feb. 28, 2025), https://www.reuters.com/world/us/trumps-firings-us-weather-agency-will-put-lives-risk-scientists-say-2025-02-28/ [https://perma.cc/78UJ-L8TJ].

97. About Our Agency, Nat'l Oceanic & Atmospheric Admin., https://www.noaa.gov/about-our-agency [https://perma.cc/4HK6-CXJ3] (last updated Mar. 5, 2025).

98. Zack Colman, 'Set Up for Failure': Trump's Cuts Bring Climate and Energy Agencies to a Standstill, Workers Say, Politico (June 17, 2025), https://www.politico.com/news/2025/06/17/trumps-energy-cuts-means-agencies-failure-00406526 (on file with the *Columbia Law Review*).

99. Flavelle et al., Mass Layoffs Begin at NOAA, supra note 96.

100. Paul Voosen, Trump Administration Pushes Ahead With NOAA Climate and Weather Cuts, Science (Aug. 25, 2025), https://www.science.org/content/article/trump-administration-pushes-ahead-noaa-climate-and-weather-cuts (on file with the *Columbia Law Review*).

101. Alejandra Borunda, Major Budget Cuts Proposed for the National Oceanic and Atmospheric Administration, NPR (Apr. 11, 2025), https://www.npr.org/2025/04/11/nx-s1-5361366/major-budget-cuts-proposed-for-the-national-oceanic-and-atmospheric-administration [https://perma.cc/K62U-ECPZ].

research.[102] According to internal documents reflecting discussions between NOAA and OMB, the Administration's plan is to "eliminate all funding for climate, weather, and ocean laboratories and cooperative institutes" at the Agency.[103]

B. *Support for Research and Development: Retrenchment at the DOE*

The establishment of the DOE and its national laboratories were key events in the history of government research. Their origins can be traced to America's efforts to develop an atomic bomb in World War II after Albert Einstein wrote to President Franklin D. Roosevelt in August 1939 warning that Germany was likely intent on developing such a weapon.[104] The work spanned sites that would eventually become the Argonne, Livermore, Los Alamos, Oak Ridge, and Sandia National Laboratories.[105]

In 1977, Congress established the DOE and consolidated a suite of energy planning, research, and development responsibilities in the new Department,[106] including a comprehensive national laboratory system.[107] DOE's seventeen national laboratories are federally funded but are managed by private organizations under contract with the federal government.[108] In the wake of the 1970s oil crisis, these laboratories began to place special emphasis on nonnuclear energy research, including research on geothermal power, solar power, energy storage, and electricity transmission.[109] Today, they produce cutting-edge research on topics such as climate dynamics, electric vehicles, wind and solar power, lower-

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102. Id.

103. Paul Voosen, Trump Seeks to End Climate Research at Premier U.S. Climate Agency, Science (Apr. 11, 2025), https://www.science.org/content/article/trump-seeks-end-climate-research-premier-u-s-climate-agency (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting an internal document).

104. The Top-Secret Laboratory, Oak Ridge Nat'l Lab'y: ORNL Rev. (Dec. 21, 2018), https://www.ornl.gov/news/top-secret-laboratory [https://perma.cc/6Y4F-LEUR] (last updated Oct. 30, 2025).

105. Robert W. Seidel, Science Policy and the Role of the National Laboratories, 21 Los Alamos Sci. 218, 220–21 (1993); see also Our History, Argonne Nat'l Lab'y, https://www.anl.gov/our-history [https://perma.cc/HR2H-FKZQ] (last visited Sep. 16, 2025) (describing the Argonne National Laboratory's early history as a laboratory for creating a nuclear weapon).

106. A Brief History of the Department of Energy, U.S. Dep't Energy, https://www.energy.gov/lm/brief-history-department-energy [https://perma.cc/A47G-J4G9] (last visited Sep. 12, 2025).

107. See 42 U.S.C. § 7139 (2018) (placing responsibility with the Office of Energy Research to advise the Secretary with respect to management of the laboratories under the DOE's jurisdiction).

108. Olof Hallonsten & Thomas Heinze, Institutional Persistence Through Gradual Organizational Adaptation: Analysis of National Laboratories in the USA and Germany, 39 Sci. & Pub. Pol'y 450, 451 (2012).

109. Seidel, supra note 105, at 225.

emission diesel fuel, energy efficiency, carbon capture and storage, and the electrical grid.[110]

At the DOE, return-to-office rules and incentive offers during the first few months of the second Trump Administration apparently produced voluntary resignations by several thousand employees (out of a total of around sixteen thousand).[111] The Administration also conducted a mass firing of probationary employees[112] and placed Department contractors on paid leave.[113] The impact on particular offices was even more substantial. More than half of the staff in the Loan Programs Office (now known as the Office of Energy Dominance Financing[114]), which, under the Biden Administration, provided loans and guarantees to clean energy, advanced transportation, and tribal energy projects,[115] opted for voluntary resignation.[116] While the Department's "reduction in force" plan has not been made public, sources report that only about nine thousand Department positions have been identified as "essential," leaving about 40% of its workforce vulnerable.[117]

Meanwhile, the Administration's proposed 2026 budget proposes large cuts to DOE science programs and a reorientation of research to

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110. Innovation, Nat'l Lab'ys, https://nationallabs.org/innovation/ [https://perma.cc/CY7E-YBUV] (last visited Sep. 12, 2025).

111. Maeve Allsup, 100 Days of Chaos at the Department of Energy, Latitude Media (May 1, 2025), https://www.latitudemedia.com/news/100-days-of-chaos-at-the-department-of-energy/ [https://perma.cc/KYS4-ES3F].

112. Some of these probationary employees were subsequently reinstated following a court order. Brian Dabbs, DOE Reinstates Fired Employees, E&E News: Energywire (Mar. 14, 2025), https://www.eenews.net/articles/doe-reinstates-fired-employees/ [https://perma.cc/STL7-FT8S].

113. Allsup, supra note 111.

114. Hannah Northey & Christa Marshall, Wright Overhauls DOE, Reflecting Shift in US Energy Priorities, E&E News: Greenwire (Nov. 20, 2025), https://subscriber.politicopro.com/article/eenews/2025/11/20/wright-overhauls-doe-reflecting-shift-in-us-energy-priorities-00662388 (on file with the *Columbia Law Review*).

115. Office of Energy Dominance Financing, U.S. Dep't Energy, https://www.energy.gov/lpo/loan-programs-office [https://perma.cc/34V3-FTHX] (last visited Jan. 9, 2026); see also Off. of Energy Dominance Fin., LPO Year in Review 2024, U.S. Dep't Energy (Jan. 17, 2025), https://www.energy.gov/lpo/articles/lpo-year-review-2024 (on file with the *Columbia Law Review*) (reporting on activities for the year).

116. Callie Patteson, DOE Loan Programs Office Poised to Lose Nearly 60% of Staff Amid DOGE Cuts, Wash. Exam'r (Apr. 17, 2025), https://www.washingtonexaminer.com/policy/energy-and-environment/3384111/energy-loan-programs-office-poised-lose-staff-doge-cuts/ (on file with the *Columbia Law Review*).

117. Jory Heckman, Energy Department Extends Hiring Freeze, Deems 43% Workforce Non-'Essential' in Reorganization Plan, Fed. News Network (Apr. 4, 2025), https://federalnewsnetwork.com/workforce/2025/04/energy-department-extends-hiring-freeze-deems-43-workforce-non-essential-in-reorganization-plan/?readmore=1 [https://perma.cc/4TZJ-NHJZ]; Lindsay McKenzie, DOE Secretary Defends Proposed Budget Cuts, Denies Freezing Funds, Am. Inst. Physics: Sci. Pol'y News (May 8, 2025), https://www.aip.org/fyi/doe-secretary-defends-proposed-budget-cuts-denies-freezing-funds [https://perma.cc/J6QZ-CSVF].

"Administration priorities, including high-performance computing, fusion energy, artificial intelligence/machine learning, quantum information science, critical minerals and materials, and microelectronics."[118] The DOE's Office of Clean Energy Demonstrations, established by the Bipartisan Infrastructure Law in 2021 to support early-stage demonstration projects in areas including grid-scale storage, small modular nuclear reactors, and carbon capture,[119] would "wind down [sic] operations" entirely.[120] The Office of Energy Efficiency and Renewable Energy would see its budget cut by about 75%, from $3.46 billion in fiscal year 2024 to $888 million in 2026.[121]

C. *Other Programs and Capabilities*

Budget cuts have also significantly impacted other agencies and programs responsible for climate or energy research and development. The NSF supports science and engineering research nationwide and is the source of 25% of the federal government's support to American colleges and universities for basic research.[122] To date, the NSF has terminated more than sixteen hundred grants totaling more than one billion dollars to researchers[123] and in April froze new funding "until further notice."[124] The NSF has also announced new screening procedures for grants in order to weed out "topics or activities that may not be in alignment with

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118. OMB, Technical Supplement to the 2026 Budget: Appendix 281–82 (2025), https://www.whitehouse.gov/wp-content/uploads/2025/05/appendix_fy2026.pdf [https://perma.cc/P3VD-6RM4].

119. Press Release, U.S. Dep't of Energy, DOE Establishes New Office of Clean Energy Demonstrations Under the Bipartisan Infrastructure Law (Dec. 21, 2021), https://www.energy.gov/articles/doe-establishes-new-office-clean-energy-demonstrations-under-bipartisan-infrastructure-law [https://perma.cc/9BXR-6KXF].

120. Sean Reilly, Andres Picon, Heather Richards & Nico Portuondo, White House Releases Details About Proposed Budget Cuts, E&E News: Greenwire (May 30, 2025), https://www.eenews.net/articles/white-house-releases-details-about-proposed-budget-cuts/ [https://perma.cc/W3KY-M8AA] (internal quotation marks omitted) (quoting OMB, supra note 118, at 291) (misquotation); see also Maeve Allsup, What It Means to Cut the Office of Clean Energy Demonstrations, Latitude Media (Apr. 4, 2025), https://www.latitudemedia.com/news/what-it-means-to-cut-the-office-of-clean-energy-demonstrations/ [https://perma.cc/MY7K-XQ5M].

121. 4 Off. of the Chief. Fin. Officer, U.S. Dep't of Energy, DOE/CF-0215, Department of Energy: FY 2026 Congressional Justification 4 (2025), https://www.energy.gov/sites/default/files/2025-08/doe-fy-2026-vol-4-v01.pdf [https://perma.cc/D4QP-SSFR].

122. About NSF, U.S. Nat'l Sci. Found., https://www.nsf.gov/about [https://perma.cc/2AP6-U24Z] (last visited Sep. 12, 2025).

123. Am. Ass'n of Physics Tchrs., Inc. v. Nat'l Sci. Found., No. 25-cv-1923 (JMC), 2025 WL 2615054, at *1 (D.D.C. Sep. 10, 2025).

124. Dan Garisto & Nature Mag., National Science Foundation Halts Funding Indefinitely, Sci. Am. (May 2, 2025), https://www.scientificamerican.com/article/under-trump-national-science-foundation-cuts-off-all-funding-to-scientists/ [https://perma.cc/M9P7-6S3A] (internal quotation marks omitted) (quoting an NSF email).

agency priorities."[125] The Administration has proposed cutting the NSF's budget by more than half.[126]

The funding crisis could deepen if Congress accepts the President's budget proposal for fiscal year 2026. The proposal made clear that climate research is a target. A budget fact sheet entitled *Cuts to Woke Programs* touted the elimination of awards and grants that it alleges were "irresponsibly dedicating funds to climate radicalism and Green New Deal Causes" and directing money to "green energy initiatives."[127] It also celebrated a proposed cut of $5.2 billion from the NSF, which it argued has funded "climate change alarmism."[128] It boasted that the "NSF no longer funds speculative research on impacts from extreme climate scenarios."[129] The National Center for Atmospheric Research, established by the NSF in 1960 to study the Earth's atmosphere and other planetary systems,[130] would see its budget slashed by 40%.[131]

Another fact sheet, *Ending the Green New Scam*, announced that "President Trump is committed to eliminating funding for the globalist climate agenda while unleashing American energy production."[132] As noted above, the budget proposal would cut $2.5 billion from the DOE's Energy Efficiency and Renewable Energy program,[133] which the fact sheet alleged "funneled billions of taxpayer dollars into unreliable energy and [electric vehicles] to advance the destructive 'Green New Deal' agenda" and produced "outlandish regulations that drive up costs for American families, like banning gas stoves and incandescent light bulbs."[134] The

125. Id. (internal quotation marks omitted) (quoting an NSF policy).

126. Dan Gearino, Proposed Cuts to Energy and Environment Programs in Trump's Budget Worry Advocates and Elected Officials, Inside Climate News (May 5, 2025), https://insideclimatenews.org/news/05052025/trump-budget-worry-energy-environment-advocates/ [https://perma.cc/SM4L-9ETS].

127. White House, Cuts to Woke Programs (2025), https://www.whitehouse.gov/wp-content/uploads/2025/05/Cuts-to-Woke-Programs-Fact-Sheet.pdf [https://perma.cc/3E2Q-WEYJ].

128. Id.

129. Id.

130. History, U.S. Nat'l Sci. Found., https://www.nsf.gov/about/history [https://perma.cc/7L3L-Q9X6] (last visited Sep. 12, 2025); see also History: Meeting Challenges With Creativity, Nat'l Ctr. Atmospheric Rsch., https://ncar.ucar.edu/who-we-are/history [https://perma.cc/M9MN-NR9R] (last visited Sep. 12, 2025).

131. Sam Brasch, Trump's Latest Budget Proposal Could Gut Climate and Weather Research in Colorado, CPR News (June 12, 2025), https://www.cpr.org/2025/06/12/trump-budget-proposal-impact-colorado-climate-weather-research/ [https://perma.cc/SJ8J-BFMN].

132. White House, Ending the Green New Scam (2025), https://www.whitehouse.gov/wp-content/uploads/2025/05/Ending-the-Green-New-Scam-Fact-Sheet.pdf [https://perma.cc/AQ2J-EFUL] [hereinafter White House, Ending the Green New Scam].

133. See supra text accompanying note 121.

134. White House, Ending the Green New Scam, supra note 132. In fact, gas stoves were never banned. Austin Williams, Gas Stoves Will Likely Not Be Banned in the US Anytime Soon, Live NOW Fox (Mar. 6, 2024), https://www.livenowfox.com/news/gas-stoves-will-likely-not-be-banned-in-the-us-anytime-soon [https://perma.cc/5KDA-WC8Q].

budget would also reduce funding for the Advanced Research Projects Agency-Energy and noted that the Agency will "refocus its research on technologies that produce reliable, domestic power, while eliminating funding for technologies favored by the globalist climate agenda."[135]

The Administration has also dismissed scientists working on the National Climate Assessment (NCA), a congressionally mandated report "seen by experts as the definitive body of research about how global warming is transforming the country."[136] The Global Change Research Act of 1990 established an interagency Committee on Earth and Environmental Sciences.[137] The Act tasked the Committee with creating a research plan to study global change and its effects on the natural environment and human systems and producing a report at least every four years summarizing its findings.[138] The result is the NCA, "the most trustworthy and comprehensive source of information about how global warming affects the United States," which combines material from fifteen federal agencies and includes information about sea level rise, rainfall, and wildfires.[139]

In April 2025, the Administration dismissed all of the authors of the NCA and terminated the majority of the program's staff and contractors.[140] In June, the Administration eliminated the federal website that had hosted previous iterations of the NCA, but NASA promised that it would continue to make the reports available on its own website.[141] In July, however, NASA

Efficiency standards required by Congress and set by the DOE did result in a phaseout of incandescent light bulbs in favor of more energy-efficient LED bulbs. Vivien Bui, Debunking Myths About Phasing Out the Incandescent Lightbulb, U.S. Dep't Energy: Blog (Aug. 11, 2023), https://www.energy.gov/articles/debunking-myths-about-phasing-out-incandescent-lightbulb [https://perma.cc/3EY9-BVNJ].

135. White House, Ending the Green New Scam, supra note 132.

136. Scott Waldman, Trump Dismisses Scientists Writing the National Climate Assessment, E&E News: Climatewire (Apr. 29, 2025), https://subscriber.politicopro.com/article/eenews/2025/04/29/trump-dismisses-scientists-writing-the-national-climate-assessment-00314494 (on file with the *Columbia Law Review*).

137. See Global Change Research Act of 1990, Pub. L. No. 101-606, § 102, 104 Stat. 3096, 3097 (codified at 15 U.S.C. § 2932 (2018)).

138. Id. § 106.

139. Rebecca Hersher, White House Dismisses Authors of Major Climate Report, NPR (Apr. 29, 2025), https://www.npr.org/2025/04/29/nx-s1-5380816/climate-assessment-authors-released [https://perma.cc/X345-PRZK]. For more information about the agencies involved, see About USGCRP, U.S. Glob. Change Rsch. Program, https://www.globalchange.gov/about-us [https://perma.cc/NC9W-BCZW] (last visited Apr. 17, 2025).

140. Beth Gibbons, Opinion, Trump Gutted the National Climate Assessment. America Will Suffer as a Result., The Hill (June 11, 2025), https://thehill.com/opinion/energy-environment/5343540-trump-gutted-the-national-climate-assessment-america-will-suffer-the-consequences/ (on file with the *Columbia Law Review*).

141. Rebecca Hersher, The White House Took Down the Nation's Top Climate Report. You Can Still Find It Here, NPR (July 1, 2025), https://www.npr.org/2025/07/01/nx-s1-5453501/national-climate-assessment-nca5-archive-report [https://perma.cc/KV8W-X4WS].

declined to do so, arguing that it had "no legal obligations to host" the information.[142]

More broadly, the Administration has censored climate-related communications. Information about climate change has been removed from multiple agency websites.[143] Contract employees who work on Climate.gov, NOAA's climate information portal, have been told that their positions are being eliminated.[144] The website has long been a source of public information about climate change and its impacts. According to its mission statement, it "provides timely and authoritative scientific data and information about climate science, adaptation, and mitigation."[145] Its authority stems from several federal statutes directing federal agencies to collect and analyze climate data as well as to produce information for policymakers.[146] NOAA has also removed a website listing climate and weather disasters since 1980 that cost more than one billion dollars to create and maintain.[147]

Scientists have decried this Administration's moves as "an unprecedented assault on humanity's understanding of how global warming is transforming the planet."[148] One professor likened it to "losing your eyesight."[149] The undermining of administrative capacity is especially worrisome when we consider the role government plays in producing the basic science and data that support policy action in areas like climate change and energy. Since at least World War II, the federal government has played a key role in providing or supporting the kinds of basic research

142. Kate Yoder, Why the Federal Government Is Making Climate Data Disappear, Grist (July 14, 2025), https://grist.org/language/trump-administration-climate-data-disappear-national-climate-assessment/ [https://perma.cc/S73H-FTCK] (internal quotation marks omitted) (quoting a NASA spokesperson).

143. Oliver Milman, Scientists Brace 'for the Worst' as Trump Purges Climate Mentions From Websites, The Guardian (Feb. 4, 2025), https://www.theguardian.com/us-news/2025/feb/04/trump-climate-change-federal-websites [https://perma.cc/JV8E-7F6E].

144. Daniel Cusick, NOAA's Climate Information Portal to Go Silent, E&E News: Greenwire (June 18, 2025), https://www.eenews.net/articles/noaas-climate-information-portal-to-go-silent/ (on file with the *Columbia Law Review*).

145. About NOAA Climate.gov, Climate.gov, https://www.climate.gov/about [https://perma.cc/V2R7-N9DB] (last visited Sep. 12, 2025).

146. Id.

147. Cusick, supra note 144.

148. Scott Waldman, How Trump's Assault on Science Is Blinding America to Climate Change, E&E News: Climatewire (June 16, 2025), https://www.eenews.net/articles/how-trumps-assault-on-science-is-blinding-america-to-climate-change/ [https://perma.cc/5733-TWBC].

149. See Saul Elbein, Trump Cuts to NOAA, NASA 'Blinding' Farmers to Risks, Scientists Warn, The Hill (June 18, 2025), https://thehill.com/policy/equilibrium-sustainability/5357564-trump-cuts-noaa-nasa-farmers-climate-change-food-supply/ (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Jonathan Martin, Professor, Univ. of Wisc.).

necessary to sustain a thriving modern democracy.[150] The government produces research that private sector actors do not have the financial incentive to pursue on their own.[151] Work by the DOE's National Laboratories, the NIH, the Agricultural Research Service, the NSF, and many other government agencies supports projects across the economy.[152]

Congress has committed agencies to the job of research and information provision, and nearly 80% of Americans consider government investments in scientific research worthwhile.[153] As this Part has suggested, however, a determined chief executive can stall and even destroy many of those programs by undermining agency capacity either wholesale or in particular areas. The government may also become a source of *mis*information. In a 2024 article, Professor Janet Freilich documented cases of government institutions publishing inaccurate or misleading information.[154] These examples were largely cases of the government failing to vet information submitted by third parties.[155] But intentional misrepresentation, or at least reckless disregard for the truth, is also a risk. In July 2025, the DOE published a 150-page report evaluating the impact of greenhouse gases on the U.S. climate.[156] A pending lawsuit alleges that the Secretary of Energy violated the Federal Advisory Committee Act by

150. See, e.g., Donald E. Stokes, Pasteur's Quadrant: Basic Science and Technological Innovation 2–3 (1997) (describing the establishment of national research programs).

151. See Rebecca Mandt, Kushal Seetharam & Chung Hon Michael Cheng, Federal R&D Funding: The Bedrock of National Innovation, 1 MIT Sci. Pol'y Rev. 44, 45 (2020) (arguing that federal science addresses market failures of private sector research and development and catalyzes innovation).

152. Of course, the government cannot and should not be the *only* source of information. As discussed in greater detail below, universities, the private sector, and civil society organizations are all crucial wellsprings of knowledge. Indeed, the private sector is a frequent partner in government knowledge-generation efforts. Sometimes academic, industry, or nonprofit partners take the lead, supported by government resources. In other cases, the government brings in private-sector individuals as advisors to support its own work. See, e.g., Sheila Jasanoff, The Fifth Branch: Scientific Advisers as Policymakers 1 (1990) (describing government scientific advisory committees as "a flexible, low-cost means for government officials to consult with knowledgeable and up-to-date practitioners in relevant scientific and technical fields").

153. Brian Kennedy & Alec Tyson, Pew Rsch. Ctr., Americans' Trust in Scientists, Positive Views of Science Continue to Decline 16 (2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/11/PS_2023.11.14_trust-in-scientists_REPORT.pdf [https://perma.cc/BV5A-B6W9].

154. See Janet Freilich, Government Misinformation Platforms, 172 U. Pa. L. Rev. 1537, 1552–62 (2024) (discussing examples of unvetted information disseminated by the EPA, NIH, FDA, and USPTO).

155. Id. at 1540–41.

156. Climate Working Grp., U.S. Dep't of Energy, A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate (2025), https://www.energy.gov/sites/default/files/2025-07/DOE_Critical_Review_of_Impacts_of_GHG_Emissions_on_the_US_Climate_July_2025.pdf [https://perma.cc/YP7E-NGES].

hand-picking climate skeptics to compile the report in secret,[157] and a group of eighty-five scientists issued a joint rebuttal to the report identifying errors and misrepresentations.[158] The recent announcement that the Trump Administration will be rewriting past editions of the NCA raises similar concerns about misinformation.[159]

III. ADMINISTRATION AND DISTRUST

Spence rightly identifies one of the biggest barriers to the energy transition as "voters in the thrall of misinformation and frustration."[160] For that reason, the project of unifying around trusted sources of information could not be more urgent. This Part considers possible responses to the decline of government as a source of trusted information. These responses are very different in form from the solutions proposed by Spence in *Climate of Contempt*. Spence's remedy is to build a coalition, conversation by conversation, through more positive, open interactions with those with whom we disagree.[161] In other words, he wants to unravel the deepest knots of our social dysfunction. This is commendable. But given the ways in which the policy and governance landscapes have shifted since January 2025, it feels insufficient. Spence's prescriptions must be paired with a more active defense of government institutions and their knowledge-production functions. They must be accompanied by the rehabilitation of trust in those institutions and functions. And they must be supplemented, at least in the short term, by the creation of alternatives to government knowledge production that can continue the important work of research and data collection.

To protect federal knowledge production, we need to understand it more clearly. Legal scholars have only just begun to explore the information-production function of government agencies in a comprehensive way. Scholars have examined individual statutes, like the Freedom of Information Act, that grant public access to agency documents.[162] They have also

157. Complaint for Declaratory, Injunctive, and Mandamus Relief at 2–4, Env't Def. Fund, Inc. v. Wright, No. 1:25-cv-12249-WGY (D. Mass. filed Aug. 12, 2025).

158. Julia Simon, Dozens of Scientists Find Errors in a New Energy Department Climate Report, NPR (Sep. 2, 2025), https://www.npr.org/2025/09/02/nx-s1-5521384/energy-report-scientists-climate-change [https://perma.cc/6XFT-QC4S].

159. See Ella Nilsen, Energy Chief Suggests Trump Administration Is Altering Previously Published Climate Reports, CNN (Aug. 7, 2025), https://www.cnn.com/2025/08/07/climate/wright-national-climate-assessments-updating [https://perma.cc/ZKZ9-HEQ2] (stating that the Trump Administration "will come out with updated reports . . . and with comments on those reports" (internal quotation marks omitted) (quoting Chris Wright, U.S. Sec'y of Energy)).

160. Spence, Climate of Contempt, supra note 9, at 2.

161. Id. at 201–29.

162. See, e.g., Margaret B. Kwoka, FOIA, Inc., 65 Duke L.J. 1361, 1363–64 (2016) (identifying government transparency as a public good necessary for a robust democracy and pointing to ways in which FOIA's implementation has been at odds with this goal).

explored the tension between agency expertise and political control.[163] This includes work on the legal safeguards of government expertise and the fate of that expertise in the face of expansive conceptions of presidential power.[164]

But a variety of important questions remain to be explored in more depth. These include how what Professor Daniel Walters has recently named "communicative administration"[165] fits within the existing framework of federal administrative law. Walters emphasizes the importance of communicative administration, which he describes as "part of the essential business of the administrative state."[166] Information generation, Walters argues, is not only needed to support agencies' regulatory functions[167] but also to support some agencies' work as "public knowledge producers."[168]

If and when a coalition emerges that can drive the kinds of regulatory responses to climate change that Spence envisions, those responses will require factual grounding. Moreover, knowledge produced by the federal government, if broadly trusted, can ameliorate the problem of partisanship and siloing that Spence identifies. Walters suggests that agency-produced information "could be used to counterbalance private communication and thereby serve as a partial solution to one of the most pressing problems of our time—the fraying of the epistemic conditions necessary for democracy to function."[169] For both of these reasons, it is important to safeguard government knowledge production when possible, and, when it is not, to develop substitutes.

A. *Protecting Federal Knowledge Production*

It may still be possible to defend the federal government's climate and energy information-production functions either through Congress or through the courts. Thus far, however, congressional Republicans, who

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163. See, e.g., Thomas McGarity & Wendy Wagner, U.S. Agency Experts in Shackles: The Quest for Information, 35 J. Env't L. 65, 67 (2023) (suggesting that more work should be done on establishing the line between legitimate and illegitimate constraints on agency expertise).

164. See, e.g., Wendy E. Wagner, A Place for Agency Expertise: Reconciling Agency Expertise With Presidential Power, 115 Colum. L. Rev. 2019, 2064–68 (2015) (proposing constraints on White House interference with agency science). On theories of strong presidentialism, see, e.g., Gary Lawson, Command and Control: Operationalizing the Unitary Executive, 92 Fordham L. Rev. 441, 444–48 (2023).

165. Daniel E. Walters, Communicative Administration: The Administrative State Beyond Legal Administration, 78 Stan. L. Rev. (forthcoming 2026) (manuscript at 33), https://ssrn.com/abstract=5376707 [https://perma.cc/8HJT-UBHQ] [hereinafter Walters, Communicative Administration].

166. Id. at 15.

167. Id. at 12–13.

168. Id. at 14 (internal quotation marks omitted) (quoting Heidi Kitrosser, Protecting Public Knowledge Producers, 4 J. Free Speech L. 473, 477–78 (2024)).

169. Id. at 42.

hold majorities in both chambers, have proved willing partners in the President's unraveling of administration.[170] And while some federal courts have granted injunctions halting civil servant firings,[171] funding freezes,[172] and the shuttering of agencies,[173] the Supreme Court has largely allowed these efforts to proceed or has made pausing them more difficult.[174] As a result, the federal government will look very different in four years than it does today. There will be fewer civil servants,[175] and some knowledge-production programs—even those authorized by Congress—will be no more.[176]

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170. See David A. Graham, A Congress that Votes Yes and Hopes No, The Atlantic: Atl. Daily (July 18, 2025), https://www.theatlantic.com/newsletters/archive/2025/07/congress-vote-trump-administration/683605/ (on file with the *Columbia Law Review*) (noting that, for several weeks in July 2025, "Republican members of Congress" appeared to be "wringing their hands furiously over bills under consideration, criticizing the White House's legislative priorities . . . and then voting for them" (alteration in original)).

171. See, e.g., Am. Fed'n of Gov't Emps. v. Trump, 784 F. Supp. 3d 1316, 1360 (N.D. Cal.) (issuing a preliminary injunction to pause large-scale reductions in force and reorganizations from Executive Order 14,210), vacated and remanded, 155 F.4th 1082 (9th Cir. 2025); Maryland v. U.S. Dep't of Agric., 770 F. Supp. 3d 779, 820–22 (D. Md. 2025) (granting a temporary restraining order preventing the termination of probationary employees). The temporary restraining order was converted into a preliminary injunction, which was later vacated. Maryland v. U.S. Dep't of Agric., 777 F. Supp. 3d 432, 493 (D. Md.), vacated and remanded, 151 F.4th 197 (4th Cir. 2025).

172. See, e.g., AIDS Vaccine Advoc. Coal. v. U.S. Dep't of State, Nos. 25-00400 (AHA), 25-00402 (AHA), 2025 WL 2537200, at *19–20 (D.D.C. Sep. 3), stayed pending appeal, 222 L. Ed. 2d 1235 (2025) (mem.); Climate United Fund v. Citibank, 778 F. Supp. 3d 90, 99 (D.D.C. 2025).

173. See, e.g., Widakuswara v. Lake, 779 F. Supp. 3d 10, 39–40 (D.D.C. 2025) (granting a preliminary injunction requiring continued staffing, grant funding, and programming by Voice of America).

174. See, e.g., *AIDS Vaccine Advoc. Coal.*, 222 L. Ed. 2d at 1235 (granting a stay of a district court order directing the spending of over ten billion dollars in appropriated aid funding); Trump v. Am. Fed'n of Gov't Emps., 145 S. Ct. 2635, 2635 (2025) (mem.) (allowing federal agency layoffs to proceed pending resolution of the case); Trump v. CASA, Inc., 145 S. Ct. 2540, 2562–63 (2025) (restricting the use of universal injunctions); Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps., 145 S. Ct. 1914, 1914 (2025) (mem.) (staying a district court injunction ordering reinstatement of over sixteen thousand federal employees).

175. See Eileen Sullivan, Year Will End With 300,000 Fewer Federal Workers, Trump Official Says, N.Y. Times (Aug. 22, 2025), https://www.nytimes.com/2025/08/22/us/politics/trump-federal-workers.html (on file with the *Columbia Law Review*).

176. See, e.g., Julian E. Barnes & Helene Cooper, Gabbard Ends Intelligence Report on Future Threats to U.S., N.Y. Times (Sep. 26, 2025), https://www.nytimes.com/2025/09/26/us/politics/gabbard-intelligence-report-cancellation.html (on file with the *Columbia Law Review*) (discussing former officials' conclusions that warnings on climate change had become politically inconvenient for the administration); Scott Waldman, Why Trump Axed the Global Change Research Program, E&E News: Climatewire (Apr. 10, 2025), https://www.eenews.net/articles/why-trump-axed-the-global-change-research-program/ (on file with the *Columbia Law Review*) (describing the "dismantling" of the agency responsible for issuing the NCA, a statutorily mandated report).

What can be done? Any solution will rely to some extent on legislative action, which assumes a Congress willing to defend existing law and its own legislative prerogative.[177] The traditional legislative approach to defending agency capacity has been to insulate government experts in a way that shields them from partisan attack.[178] That approach looks increasingly challenging in the wake of the Supreme Court's opinion in *Seila Law v. CFPB*[179] and its emergency docket decision in *Trump v. Wilcox*.[180] Contrary to the practice of past administrations, the President has also sought to erase the distinction between executive and independent agencies by extending presidential directives to both types.[181]

Beyond traditional methods of insulation, there are several possibilities worth considering. The first is to enhance the transparency of government data and science to allow for public oversight. Administrative law already requires some transparency.[182] As trust in government erodes further, however, more measures will be needed to reassure the public of the trustworthiness of the data and research it produces. Courts currently require agencies to produce the data used to support informal rulemaking,[183] but that requirement is not explicit in the Administrative Procedure Act,[184] and it does not apply when the agency makes policy in

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177. There is some indication that Congress could be open to such an approach. Currently, senators from both parties are attempting to add safeguards to next year's spending bills to restrict presidential discretion. Carl Hulse, Senate Adds Guardrails in an Effort to Force Trump to Obey Spending Bills, N.Y. Times (Aug. 20, 2025), https://www.nytimes.com/2025/08/20/us/politics/senate-spending-guardrails-trump.html (on file with the *Columbia Law Review*).

178. See, e.g., Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 19–21 (2010) (explaining how insulation promotes expertise and nonpartisan decisionmaking within agencies).

179. 140 S. Ct. 2183, 2211 (2020) (narrowing the exception from plenary removal by the President for the heads of multimember, independent commissions).

180. 145 S. Ct. 1415, 1416–17 (2025) (lifting a lower court stay and opining, without deciding, that for-cause removal protections for NLRB and Merit Systems Protection Board members were likely unconstitutional).

181. See Exec. Order No. 14,215, 90 Fed. Reg. 10,447, 10,447 (Feb. 18, 2025) (declaring that independent regulatory agencies' actions are subject to review by the Office of Information and Regulatory Affairs).

182. See Boyd, De-Risking, supra note 74, at 166 ("[T]he principal virtues of modern American administrative law—transparency, participation, and accountability—all reflect a commitment to sound knowledge as a basis for legitimacy.").

183. See United States v. N.S. Food Prods. Corp., 568 F.2d 240, 253 (2d Cir. 1977) (holding that a regulation was arbitrarily promulgated because the Agency had initially failed to provide the data that it used to develop the regulation).

184. See 5 U.S.C. § 553(c) (2018) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."); see also Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 539–48 (1978) (finding that courts cannot require agencies undertaking informal rulemaking to employ procedures beyond the minimum statutory requirements without "substantial justification for doing otherwise" (internal quotation marks omitted) (quoting Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 333 (1976))).

individual adjudications[185] or when it issues guidance.[186] Congress could amend the Administrative Procedure Act to specify that staff reports and the materials they rely on are to be made public, for example, so that it is clear when agency actions have been modified by political principals.

Another option is for Congress to require, by statute, strong internal cultures of data and scientific integrity within agencies. Some agencies have adopted such policies voluntarily. One example is the policy adopted by the EPA in 2012 and updated in early January 2025. The updated policy reaffirmed the role of the Agency's internal Scientific Integrity Committee in promoting and maintaining a strong culture of independent science at the Agency.[187] It also prohibited Agency leadership from suggesting "scientifically unjustified changes to scientific content" and required that the Agency's scientific activities be conducted "independent of any predetermined or desired outcome," "[e]xpect the independent validation of . . . methods and models," lean on peer review of such methods and models, and ensure independent assessment of Agency science when appropriate.[188] On August 21, 2025, EPA Administrator Lee Zeldin revoked the updated policy, although the Agency's 2012 policy remains in place.[189] By requiring such policies by statute, rather than relying on agencies to implement them voluntarily, Congress could instill greater trust in agency science production.[190]

Finally, it might be necessary for the government to partner with more trusted entities in order to gain public trust. Professional organizations

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185. See 5 U.S.C. § 555; Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 653–55 (1990) (extending to informal adjudication *Vermont Yankee*'s general prohibition on courts imposing additional procedural requirements on agency proceedings beyond those required by statute).

186. See 5 U.S.C. § 553(b)(A).

187. EPA, Scientific Integrity Policy 10–11 (2025), https://www.epa.gov/system/files/documents/2025-01/us-epa-scientific-integrity-policy.pdf [https://perma.cc/6YCC-KZ3K] (reaffirming the EPA's commitment "to promot[ing] a culture of scientific integrity across the agency").

188. Id. at 11–12.

189. Robin Bravender & Sean Reilly, EPA Deletes Biden-Era Scientific Integrity Policy, E&E News: Greenwire (Aug. 21, 2025), https://www.eenews.net/articles/epa-deletes-biden-era-scientific-integrity-policy/ (on file with the *Columbia Law Review*). Zeldin was responding to an executive order from President Trump that directed agencies to return to scientific integrity policies that existed as of January 19, 2021, the final day of President Trump's first term. Id.

190. Of course, implementation matters. In May 2020, the EPA's Office of Inspector General described several areas in which adherence to the policy could be improved. See Off. of Inspector Gen., EPA, Report No. 20-P-0173, Improving EPA Research Programs: Further Efforts Needed to Uphold Scientific Integrity Policy at EPA 20 (2020), https://www.epaoig.gov/sites/default/files/2020-05/documents/_epaoig_20200520-20-p-0173.pdf [https://perma.cc/6EZE-YC3U] (identifying areas for potential improvements to the policy's implementation, including completing previously planned implementation activities, improving training and transparency, enhancing adjudication procedures, clarifying committee members' roles, and bettering tracking and communication around adjudication outcomes).

without perceived political commitments can be helpful partners in this regard. While the federal courts have interpreted the Constitution as prohibiting delegation of legislative functions to private entities,[191] such entities can still serve a variety of advisory and verification functions provided that the agency retains ultimate authority to act. Private entities' involvement in producing information—and their public endorsement of the results of government action based on that information—might increase public confidence.

B. *Considering Substitutes*

Congress, however, may choose not to reinforce government knowledge production by statute. In that case, and in the face of the Trump Administration's determined assault on both the administrative state in general and federal climate science and clean energy research in particular, it may also be time to consider more seriously how other entities could compensate, at least in part, for the federal government's abdication of its role in these areas.

Global coalitions like the UN's IPCC will continue their important work assessing climate science. Of course, the United States has historically been a major funder of these organizations, and the Trump Administration has already cut off technical support for the IPCC.[192] Other nations or private institutions may step up to provide additional funding, however, as the Rockefeller Foundation and Wellcome have recently done for the World Health Organization–World Meteorological Organization's Climate and Health Joint Programme.[193] Because the IPCC's annual budget is not large[194]—in part because its contributors volunteer their time—alternative funding from other nations or private sources can replace American support.[195] Regional partnerships and individual nations also have programs to track climate conditions. These include the European Union's Copernicus program, which monitors planetary

191. See Fed. Commc'ns Comm'n v. Consumers' Rsch., 145 S. Ct. 2482, 2511 (2025) (explaining that the government may rely on advice and assistance from private actors so long as the relevant agency retains decisionmaking power).

192. Paul Voosen, NASA Cuts Off International Climate Science Support, Science (Feb. 24, 2025), https://www.science.org/content/article/nasa-cuts-international-climate-science-support [https://perma.cc/5WPX-YK8J].

193. WHO-WMO Climate and Health Programme Is Strengthened, World Meteorol. Org. (May 21, 2025), https://wmo.int/media/news/who-wmo-climate-and-health-programme-strengthened [https://perma.cc/Z5ER-T5RA].

194. See Intergovernmental Panel on Climate Change, IPCC Trust Fund Programme and Budget, at 5 (2025), https://apps.ipcc.ch/eventmanager/documents/88/180220250655-Doc.%202,%20Rev.1%20-%20IPCC%20Programme%20and%20Budget.pdf [https://perma.cc/5K3P-CLS3] (disclosing expenditures of 5,505,000 Swiss Francs, or approximately 6.8 million U.S. dollars, for 2024).

195. Press Release, Intergovernmental Panel on Climate Change, IPCC Opens First Virtual Session to Consider Budget (Dec. 7, 2020), https://www.ipcc.ch/2020/12/07/ipcc-53-opening [https://perma.cc/8ABZ-CMZM].

conditions through satellites and other technologies,[196] as well as the Japan Meteorological Agency.[197]

Within the United States, individual states are monitoring climate change and conducting research on how to mitigate it, including research on the energy transition. Large states like California and New York already have well-developed programs. The California Energy Commission invests in research to "build[] the state's clean energy future."[198] Its Office of Environmental Health Hazard Assessment also publishes *Indicators of Climate Change in California*, a report tracking both the causes of climate change and its impacts on the state and its residents.[199] Similarly, New York partners with nongovernmental organizations and universities to produce a state climate impacts assessment.[200]

Professional organizations are also stepping up. The American Geophysical Union and the American Meteorological Society are creating a special collection of climate-focused research in light of the firing of the Sixth National Climate Assessment's authors and staff.[201] Another example worth noting, albeit one outside of the climate and energy domain, is the American Academy of Pediatrics' issuance of alternative vaccination recommendations after the CDC failed to recommend COVID-19 boosters for healthy children.[202]

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196. About Copernicus, Copernicus, https://www.copernicus.eu/en/about-copernicus [https://perma.cc/K9ZJ-NZYB] (last visited Sep. 29, 2025).

197. Mari Yamaguchi, Japan Launches a Climate Change Monitoring Satellite on Mainstay H2A Rocket's Last Flight, AP News, https://apnews.com/article/japan-space-rocket-satellite-carbon-climate-f5a2cdc4e8e0611288c3e72b9e965c1b [https://perma.cc/WE63-CCRQ] (last updated June 29, 2025); see also Japan Meteorol. Agency, Climate Change Monitoring Report 2023 (2024), https://www.jma.go.jp/jma/en/NMHS/ccmr/ccmr2023.pdf [https://perma.cc/HNX6-YJ8B].

198. Energy Research and Development Division, Cal. Energy Comm'n, https://www.energy.ca.gov/about/divisions-and-offices/energy-research-and-development-division [https://perma.cc/7ZK3-CVKX] (last visited Sep. 12, 2025).

199. Carmen Milanes, Tamara Kadir, Bennett Lock, Gwen Miller, Laurie Monserrat & Karen Randles, Cal. EPA, Indicators of Climate Change in California (4th ed. 2022), https://oehha.ca.gov/sites/default/files/media/downloads/climate-change/document/2022caindicatorsreport.pdf (on file with the *Columbia Law Review*).

200. New York State Climate Impacts Assessment: Understanding and Preparing for Our Changing Climate, N.Y. St. Climate Impacts Assessment, https://nysclimateimpacts.org [https://perma.cc/5G2L-4TZG] (last visited Sep. 12, 2025).

201. Press Release, Am. Geophysical Union & Am. Meteorol. Soc'y, AGU and AMS Join Forces on Special Collection to Maintain Momentum of Research Supporting the U.S. National Climate Assessment (May 2, 2025), https://news.agu.org/press-release/agu-and-ams-join-forces-on-special-collection-to-maintain-momentum-of-research-supporting-the-u-s-national-climate-assessment [https://perma.cc/HQR4-MM5D]. The organizations note, however, that "[t]he new special collection does not replace the NCA." Id.

202. Am. Acad. of Pediatrics, Recommended Child and Adolescent Immunization Schedule for Ages 18 Years or Younger, https://downloads.aap.org/AAP/PDF/AAP-Immunization-Schedule.pdf [https://perma.cc/8W52-LVZD] (last updated Nov. 21, 2025); see also Alice Park, CDC Stops Recommending COVID-19 Vaccines for Pregnant Women

Universities will continue to be an important source of research on climate and the energy transition. But climate research is one of the areas that the Trump Administration has targeted for grant termination. For example, the Administration has cut nearly four million dollars in federal funding for climate change research grants at Princeton University,[203] citing the purported promotion of "'exaggerated and implausible climate threats' and increased 'climate anxiety.'"[204] Climate funding may also be a casualty of more general funding cuts to universities based on the Administration's disagreements with their policies, politics, or actions, as in the case of the cuts to Columbia University, the University of Pennsylvania, and Harvard University.[205]

Nongovernmental organizations will also continue to provide important data on climate and the energy transition. The World Resources Institute collects climate datasets and makes them available for others to access and use,[206] as does the Data Foundation's Climate Data Collaborative.[207] Another example is Climate TRACE, a platform built by a coalition of not-for-profit actors to track greenhouse gas emissions across the globe.[208]

Ultimately, it is difficult to imagine that these efforts—even in combination—can replace federal government programs, at least in the short term.[209] Nevertheless, they can provide a backstop while other strategies to restore government knowledge production proceed.

C. *Rebuilding Trust*

In the longer term, maintaining—and, in some cases, rebuilding—trust in government knowledge production is key to the larger project of restoring trust in government and in one another. In *Climate of Contempt*'s

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and Children, Time, https://time.com/7288915/cdc-covid-19-vaccines-pregnant-women-children/ (on file with the *Columbia Law Review*) (last updated May 27, 2025).

203. Press Release, U.S. Dep't of Com., Ending Cooperative Agreements' Funding to Princeton University (Apr. 8, 2025), https://www.commerce.gov/news/press-releases/2025/04/ending-cooperative-agreements-funding-princeton-university (on file with the *Columbia Law Review*).

204. Brad Plumer & Austyn Gaffney, Trump Administration Cuts Research Funding, Claiming It Creates 'Climate Anxiety', N.Y. Times (Apr. 9, 2025), https://www.nytimes.com/2025/04/09/climate/trump-noaa-princeton-climate-research.html (on file with the *Columbia Law Review*) (quoting Press Release, U.S. Dep't of Com., supra note 203).

205. Id.

206. Data, World Res. Inst., https://www.wri.org/data (on file with the *Columbia Law Review*) (last visited Oct. 7, 2025).

207. Climate Data Collaborative, Data Found., https://datafoundation.org/pages/Climate-Data-Collaborative [https://perma.cc/94SJ-89MX] (last visited Sep. 12, 2025).

208. Climate TRACE, https://climatetrace.org/ [https://perma.cc/ZPG7-EA45] (last visited Sep. 12, 2025).

209. See, e.g., Walters, Communicative Administration, supra note 165, at 15–25 (explaining the unique role federal agency communications play in producing knowledge and influencing public perception).

final chapter, Spence argues that the long-term solution to partisanship and tribalism is to walk away from the noise and relearn how to speak to one another about what we want from our government.[210] After that, we must figure out how to trust our government representatives to provide it.

"Americans don't trust one another, and they don't trust the government," wrote Professor Jedediah Britton-Purdy in the *Atlantic* last year.[211] Trust is essential to knowledge, Britton-Purdy observed, since most of what we know comes not from our own experiences but from what we accept from trusted sources.[212] Trust is also difficult, especially when it requires us to live "with sharp moral disagreement."[213] But while we need not "love one another," he concedes, we must "get along enough to wrestle with climate change" and other challenges "together."[214]

One way to understand the possibilities for democratic decision-making in the face of persistent disagreement is through the lens of democratic agonism. As Professor Walters wrote in an article about understanding the democracy of administration, agonistic accounts portray stakeholders in a democracy as engaged in enduring struggles over policy.[215] Even when they lose, stakeholders are able to maintain respect for their adversaries and remain engaged in the process because of the chance that they will prevail another day.[216] Yet this process, too, requires trust: in other stakeholders and in the process of governance itself.

All of this seems consonant with Spence's account. His last chapter is, after all, entitled "Hope and Conversation."[217] It is clear that Spence would embrace Britton-Purdy's proposal that institutions from government agencies to universities make efforts to throw people with different perspectives together.[218] He would also likely agree that the work required to regain trust must be individual as well as collective. "Each of us," Britton-Purdy exhorts, "can also develop practices to modulate our own balance

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210. Spence, Climate of Contempt, supra note 9, at 238–40.

211. Jedediah Britton-Purdy, We've Been Thinking About America's Trust Collapse All Wrong, The Atlantic (Jan. 8, 2024), https://www.theatlantic.com/ideas/archive/2024/01/trust-democracy-liberal-government/677035/ (on file with the *Columbia Law Review*).

212. See id. ("Only through trust can anyone ever know much of anything. Almost all of what anyone treats as knowledge is not part of their own experience, but the upshot of a social process . . . .").

213. Id.

214. Id.

215. See Daniel E. Walters, The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State, 132 Yale L.J. 1, 47 (2022) [hereinafter Walters, The Administrative Agon] ("Agonistic democratic theory . . . rejects the unifying assumption of conventional democratic theory that conflict can or should be extinguished in the lawmaking process.").

216. See id. at 54 (arguing that, by recognizing the inevitability of conflict and the possibility of "friendly adversarialism," agonism protects society from "democratic illness").

217. See Spence, Climate of Contempt, supra note 9, at 201.

218. See Britton-Purdy, supra note 211 (describing how government and educational institutions can and should expose people of different backgrounds to each other).

of trust and skepticism, and gently push others to do the same."[219] Similarly, Spence suggests that we engage more frequently with those who hold differing views and that we push ourselves to consider news sources more critically.[220] He would also like us to "try to be humble about what we believe we know and don't know, to resist certainty, and to avoid moral judgment in the absence of deep understanding."[221]

Spence would likely also be sympathetic to some of Walters's institutional interventions to promote democratic agonism, including the proposal that administrative processes accommodate more open regulatory agendas subject to influence by rulemaking petitions, advisory committees, focus groups, and the like.[222] These proceedings create opportunities to engage with our policy adversaries in a way that acknowledges our shared goals and our mutual interdependence.

None of this offers an immediate solution to the climate crisis. Nor can it rebuild the governmental institutions responsible for climate science or clean energy research—at least not overnight. That is why the shorter-term interventions described in earlier sections must be attempted. But if we do not do the longer-term, harder work of reestablishing trust in each other and in our institutions, our government will continue to fail us in the face of existential threats. We, as a public, are capable of transitioning our energy systems to mitigate the worst harms of climate change. The technical capacity is there, as are the legal and policy approaches that will deploy that capacity. But we are standing in our own way.

CONCLUSION

A large majority of the public (including 83% of Republicans) still believes that the federal government has a responsibility to provide things like clean air and water for all Americans.[223] As of May 2020, two-thirds of Americans thought that the federal government was doing too little to confront climate change.[224] In March 2025, the highest number of Americans since polling began in 1997 believed that global warming will

219. Id.

220. See Spence, Climate of Contempt, supra note 9, at 221, 228, 240.

221. Id. at 207.

222. Walters, The Administrative Agon, supra note 215, at 68.

223. Andrew Daniller, Americans See a Role for the Federal Government in Many Domains, but Some Large Partisan Divisions Persist, Pew Rsch. Ctr. (May 6, 2025), https://www.pewresearch.org/short-reads/2025/05/06/americans-see-a-role-for-the-federal-government-in-many-domains-but-some-large-partisan-divisions-persist/ [https://perma.cc/PER8-AVDB].

224. Alec Tyson & Brian Kennedy, Pew Rsch. Ctr., Two-Thirds of Americans Think Government Should Do More on Climate 4 (2020), https://www.pewresearch.org/wp-content/uploads/sites/20/2020/06/PS_2020.06.23_government-climate_REPORT.pdf [https://perma.cc/D26K-R2PP].

pose a serious threat to them or their way of life in their lifetime.[225] As of May 2025, approximately 64% of registered voters said that developing clean energy should be a high or very high priority for the President and Congress and 74% said that renewable energy use should be increased.[226] As Spence puts it, Americans "want the energy transition, even if its particulars worry them."[227] The challenge is that providing social goods requires a functioning federal bureaucracy that can both generate and act on research.

Climate of Contempt reminds us that law exists as part of a social system. Our inability to act as a nation in the face of an existential threat like climate change, Spence argues, is a product of all-too-human impulses. Spence has faith that we can rise above our worst instincts. Humility and more productive engagement with those with whom we disagree, Spence concludes, can help us to forge a durable climate coalition and chart a path forward.

But policy conversations about whether and how to transition away from fossil fuels depend at least in part on government research on climate science, climate impacts, and new technologies. This research is now under threat in the United States. Tragically, our society seems to have lost sight of the idea of government as a common project. Instead, it has become yet another field of partisan conflict. Reaching a collective understanding of the role that government agencies can and should play in producing, sourcing, and disseminating knowledge—and then ensuring that our laws support and defend that role—is therefore of urgent importance.

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225. Lydia Saad, Record-High 48% Call Global Warming a Serious Threat, Gallup (Apr. 16, 2025), https://news.gallup.com/poll/659387/record-high-call-global-warming-serious-threat.aspx [https://perma.cc/HA3W-8896] (finding that 48% of respondents agreed in March 2025, compared with 25% in 1997). 63% of respondents thought that the effects of global warming had already begun, and 63% were worried about climate change. Id.

226. Anthony Leiserowtiz et al., Yale Program on Climate Change Commc'n & George Mason Univ. Ctr. for Climate Change Commc'n, Climate Change in the American Mind: Politics & Policy, Spring 2025, at 4–5 (2025), https://climatecommunication.gmu.edu/wp-content/uploads/2025/06/climate-change-american-mind-politics-policy-spring-2025_FULL-REPORT.pdf [https://perma.cc/G98R-J382]. For a helpful visualization of the data on public opinion regarding climate change, see Jennifer Marlon et al., Yale Climate Opinion Maps 2024, Yale Program on Climate Change Commc'n (Aug. 28, 2025), https://climatecommunication.yale.edu/visualizations-data/ycom-us/ [https://perma.cc/LTZ5-RQC4].

227. Spence, Climate of Contempt, supra note 9, at 237.

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