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Articles

Notes

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CONTENTS

ARTICLES

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Consistent with its unique development, the New York University Journal of Intellectual Property & Entertainment Law (JIPEL) is a nonpartisan periodical specializing in the analysis of timely and cutting-edge topics in the world of intellectual property and entertainment law. As NYU's first online-only journal, JIPEL also provides an opportunity for discourse through comments from all of its readers.There are no subscriptions or subscription fees; in keeping with the open-access and free discourse goals of the students responsible for JIPEL's existence, the content is available for free to anyone interested in intellectual property and entertainment law.

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PREFACE

Our Fall 2023 Issue—Volume 13, Number 1—takes a step back to reimagine foundations of IP law as the source of, and potentially the solution to, modern problems.

First, Professor Zachary Catanzaro questions the foundations of American copyright law—incentivization. Professor Catanzaro challenges the utility of incentivizing authors with copyright doctrine in the era of generative artificial intelligence ("AI"). His work takes a deep dive into creativity and its driving forces, and asks whether incentives will still be necessary as generative AI drives labor costs of production down toward zero.

Second, Jason Wu imagines a collective propertarian reform for data governance and ownership. The article examines consumer credit markets to bust myths about AI's role in alleviating inequality, and argues that we must depart from the framework of neoliberalism to achieve equality in credit underwriting. Through the lens of consumer credit reforms, Wu outlines the history of neoliberal policy, and argues that reform is necessary to protect consumers so that algorithmic harm does not dominate the digital age.

Third, Albert Simonyan aims to tackle a growing problem with an often forgotten solution—how the foreign equivalents doctrine can solve issues that globalization poses on the international trademark regime. Simonyan asks whether the inconsistent application of the foreign equivalents doctrine globally harms immigrants, businesses, and ethnic enclaves. The article proposes new language for the TRIPS Agreement to expand and cement the doctrine.

Fourth, Alexa Browning offers a note that asks the question we ask every October—is Freddy Krueger a scène à faire? Browning takes a look at the copyrightability of horror movie villains. Through a nuanced analysis of the foundations of the major players in America's favorite horror franchises, Browning isolates what makes these characters identifiable. She then questions what is truly unique about the characters and whether courts would and should provide protection for the characters in an infringement suit.

Finally, Charles Hill's note analyzes whether WWE wrestlers qualify for the statutory labor exemption. Hill details the history of unionization efforts in wrestling and the effects of wrestlers' status as independent contractors on their work. The note then demonstrates the need for the exemption and a path to unionization for wrestlers given a recent decision in the First Circuit.

Sincerely,

Joseph Salmaggi
Editor-in-Chief
NYU Journal of Intellectual Property & Entertainment Law

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BEYOND INCENTIVES: COPYRIGHT IN THE AGE OF ALGORITHMIC PRODUCTION

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Generative artificial intelligence (AI) systems disrupt longstanding assumptions about creativity, originality, and copyright law. Traditionally, copyright law is premised on an incentive theory—that monopolistic profits motivate human creators to be creative. The theory predicates that, without such protections, human authors would be disincentivized from creating new works in the face of potential free riders upon their creative labors. This framing presumes creativity arises from a human agent with intrinsic intentionality and experiences. Generative AI posits a challenge to copyright's anthropocentric premises. Generative AI systems autonomously generate novel artifacts devoid of human intentionality, lived context, or desire for artistic fulfillment.

As this technology evolves, the marginal cost of automated production trends toward zero. The resulting oversupply of automated content becomes a perfect substitute for human art in the marketplace. Thus, copyright's premise of incentivizing artists through profit motives becomes less relevant. Evaluating machine and human works primarily on substitutability or copyright eligibility ignores ontological differences in how creativity arises. If copyright is to continue to presume that humans are exceptional in the realm of creativity, then it follows that moral rights should become the focus of copyright law. Rather than dilute copyright theory to encompass the automated production of new works, we should reinforce protections for intrinsically human virtues—moral rights, like attribution, integrity, and consent. This preserves

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copyright's anthropocentrism amidst proliferating machine content. As technology challenges long-held theoretical premises, copyright policy should shift its focus from a sparse and increasingly irrelevant incentive theory to upholding humanistic values against non-human creativity.

INTRODUCTION

In June 2023, the music video "At War with the Matrix" featuring "Kanye West" debuted on YouTube.[1] However, Kanye did not participate in creating the song or video.[2] The Kanye featured is an AI-generated facsimile, with deepfake technology simulating his likeness and a synthesizer mimicking his voice and

[1] *See* SLOUCHY, *YANDHI - WAR WITH THE MATRIX (KANYE AI X BIG BABY GANDHI)*, YOUTUBE (June 19, 2023), https://www.youtube.com/watch?v=CGyPqImBOjY [https://perma.cc/SC7Q-5HSH].

[2] *See 'Deepfake' Kanye Video Warns of Disinformation and Civil Unrest: 'AI Will Kill The Media Industry'*, PR NEWSWIRE (July 4, 2023), https://finance.yahoo.com/news/deepfake-kanye-video-warns-disinformation-131100611.html [https://perma.cc/YB9E-ES9Y] [hereinafter *Deepfake*].

style.[3] Hip-hop artist Big Baby Gandhi and filmmaker Laila Rao created the video using the generative AI tool Midjourney to produce surreal depictions and armies of Kanye clones.[4] The video culminates in a scene from *The Matrix* in which Kanye's face is superimposed onto Laurence Fishburne's Morpheus, with AI-dubbed dialogue explaining reality to Keanu Reeves' Neo.[5] This unauthorized AI-generated video provocatively blurs the lines between human creativity and machine artistry.[6]

The music video took seven days to make and cost $30 dollars to produce.[7] In an interview with *Yahoo! Finance*, Big Baby Gandhi said, "[w]e're heading towards an arms race of content, where the stakes for attention are escalating, and the content will get more extreme. . . . The economic incentives upholding the media industry will fall apart."[8] He goes on to claim that, "[i]t's simple supply and demand: when supply goes up, price goes down. AI exponentially increases the supply of high-quality content. Many media professionals will become redundant and lose their jobs. That's the story of AI in every industry."[9]

A few weeks after the release of the AI-generated Kanye West music video, the Screen Actors Guild-American Federation of Television and Radio Artists ("SAG") announced a general labor strike prompted by concerns over allegedly exploitative working conditions as well as apprehensions about potential displacement of human actors by artificial intelligence technologies.[10] The strike was driven in part by concerns that movie studios were seeking irrevocable and permanent assignments of rights of publicity that would allow the use of actors' images, likenesses, and performances in conjunction with generative AI systems.[11] In calling for strike action, SAG aimed to secure enhanced protections for human performers in light of emerging technologies capable of digitally de-aging actors,

[3] The right of publicity implications are beyond the scope of this paper.

[4] *See Deepfake, supra* note 2.

[5] *See* SLOUCHY, *supra* note 1.

[6] It also raises rights of publicity questions beyond the scope of this article.

[7] *See Deepfake, supra* note 2.

[8] *Id.*

[9] *Id.*

[10] *See* Andrew Dalton & The Associated Press, *Writers Strike: Why A.I. is Such a Hot Button Issue in Hollywood's Labor Battle with SAG-AFTRA*, Fortune (July 24, 2023, 5:29 AM), https://fortune.com/2023/07/24/sag-aftra-writers-strike-explained-artificial-intelligence/ [https://perma.cc/Y382-W2BZ].

[11] *Id.*

reshooting performances, or even resurrecting deceased stars.[12] At the time of this writing, negotiations between SAG and the studios were still ongoing, with the union underscoring the need to preserve safeguards for "human-created works," including modifications to an actor's "voice, likeness or performance," by means of artificial intelligence.[13]

The AI Kanye video and SAG strike raise questions about copyright's incentive theory. Copyright law grants limited monopolies to incentivize human creativity, assuming output and production would decline without them. But AI challenges this by enabling creative works without human authorship. As AI advances, is copyright's incentive structure still relevant? Can it balance incentives for AI developers and human creators at risk of displacement? Does AI authorship threaten to displace human authorship? Or are we witnessing the emergence of a new medium of expression altogether? After all, "if you can't tell, does it matter?"[14]

I
What is Generative AI Art?

A. Early AI Systems

One of the first known public displays of computer-generated art dates to the 1965 exhibition "Generative Computergraphik," which showcased the work of German mathematician Georg Nees.[15] The field developed relatively slowly until 1973, when Professor Harold Cohen programmed AARON, a set of computer systems designed to produce AI art.[16] AARON was intended to evolve into a system that would eventually become "human-like" and capable of the similar cognitive capabilities similar to those used by us to make, understand, and compose images. Its early outputs, however, offered little distinction between characters and the ground or closed and open forms, with simple manipulation of image structures based on programmed syntax rule sets.[17] Despite Professor Cohen's

[12] *Id.*

[13] *Id.*

[14] *Westworld: Chestnut* (HBO television broadcast Oct. 9, 2016).

[15] Margaret A. Boden & Ernest A. Edmonds, *What is Generative Art?*, 20 Digit. Creativity 21, 23 (2009).

[16] Chris Garcia, *Harold Cohen and AARON—A 40-Year Collaboration*, Comput. Hist. Museum, (Aug. 23, 2016), https://computerhistory.org/blog/harold-cohen-and-aaron-a-40-year-collaboration/ [https://perma.cc/L2XF-TEAT].

[17] *Id.*

early aspirations for stochastic computational realism, the first AARON versions produced very rough abstract images.[18]

As Cohen described in his seminal 1973 essay, "concepts are formed on the basis of prior concepts, decisions are made on the basis of feedback from the environment and from the results of previous decisions."[19] Cohen thus believed that the syntactic relationship between physical characteristics of art (form, line, perspective, composition, and so on) could be reduced to a series of deterministic program code.[20] For this reason, "the probability is that, if one could identify the starting point for an artist's whole life's work, one would find a set of concepts completely formulated if not completely digested, given to him and not initiated by him."[21]

Cohen demonstrated this when he programmed AARON with nearly 4,000 rules for the drawing of a realistic human head, in which he defined a series of symbolic relationship between concepts, such as where a nose should be in relationship to a figure's face.[22] In 1980, Professor Cohen made a breakthrough in his study of young children's drawing behaviors. Applying his earlier developed theory, he realized that he could code redundancies into AARON using a set of pre-existing "core figure[s]," which would assist the system in learning simple strategies for pattern tracing and repetitive composition. This resulted in a marked jump in the "thing-likeness" of AARON's outputs and an artistic consistency (or style) for AARON.

By 1985, AARON had produced a representation of the Statue of Liberty with enough detail that Professor Cohen successfully submitted the work for an exhibition on the history of the Statue. By constructing objects or concepts and defining them in their relationship to one another, the AARON system began producing expressive works that invoked more of a "human-like" or realistic representation of reality in their style and aesthetic. And by 1992, AARON produced a remarkable portrait of Professor Cohen himself.

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[18] *Id.*

[19] Harold Cohen, *Parallel to Perception: Some Notes on the Problem of Machine-Generated Art*, 4 Comput. Stud. (1973); *see also* Jo Lawson-Tancred, *The Prophecies of Aaron*, Outland (Nov. 4, 2022), https://outland.art/harold-cohen-aaron [https://perma.cc/7LPU-P74Z].

[20] *See* Lawson-Tancred, *supra* note 19.

[21] *Id.*

[22] *Id.*

Figure A[23]

Figure B[24]

[23] Harold Cohen, *Untitled Amsterdam Suite 11*, 1977.
[24] Harold Cohen: *First Athletes, Athlete Series*, 1986.

Figure C[25]

Early rules-based art systems like AARON demonstrated that computer programs could autonomously generate original artistic works. However, these early systems were constrained by their reliance on human-coded rules and datasets. While exhibiting the appearance of some creative capacity, their outputs ultimately reflect their programmers' originality.[26] Much like Searle's Chinese Room thought experiment, these algorithms produced artistic representations without any deeper comprehension of the meaning or significance of their creations.[27] While superficially resembling human artistry, the programs

[25] Harold Cohen: *AARON with Decorative Panel*, 1992.

[26] *See* Lawson-Tancred, *supra* note 19 ("AARON represents a set of outdated responses to the idea of artificial intelligence: a fixation on whether machines are capable of creativity; the pouring of time and energy into making autonomous entities rather than useful tools.").

[27] *See* David Cole, *The Chinese Room Argument*, Stan. Encyclopedia of Phil. (Mar. 19, 2004), https://plato.stanford.edu/entries/chinese-room/ [https://perma.cc/J5HF-6GA7] ("Searle['s Chinese Room] argues that the thought experiment underscores the fact that computers merely use syntactic rules to manipulate symbol strings but have no understanding of meaning or semantics.").

themselves lacked true artistic agency or purpose, remaining limited tools for carrying out the creative visions of their developers. It would require an evolutionary leap in AI for computer systems to advance beyond merely executing preset deterministic programming and instead exhibit more flexible, generalizable, and human-like creative abilities.

B. Machine Learning and Generative AI

In contrast with Professor Harold's deterministically programmed AARON system, modern generative AI systems use stochastic programming.[28] Modern generative models like DALL-E 2, Stable Diffusion, MidJourney, GPT-3, and others employ stochastic machine learning techniques, like neural networks and large language models, trained on massive datasets to find associations and statistical correlations between data points.[29] By looking for correlative patterns, these systems create new outputs that reflect the statistical regularities and averages in their training data sets.[30] After training on vast datasets, these models synthesize novel outputs like images, audio, and text. While influenced by their training data, the most advanced generative models may exhibit emergent creativity in recombining aggregated representations of syntactic concepts.[31] This has profound implications for copyright law.

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[28] *See* Jon Stokes, *Please Stop Talking About the ELIZA Chatbot*, Blaze (July 24, 2023), https://www.theblaze.com/return/stop-talking-about-eliza [https://perma.cc/UK2R-947V] ("A *deterministic algorithm* is an algorithm that, given a particular input, will always produce the same output, with the underlying machine always passing through the same sequence of states.... Stochastic... refers to the property of being well described by a random probability distribution... In artificial intelligence, *stochastic programs* work by using probabilistic methods to solve problems.").

[29] *See generally* Boden & Edmonds, *supra* note 15. As a new art form, the term "generative AI art" does not have a generally accepted taxonomy. *See id.* ("The names preferred by the artists involved include: generative art, computer art, digital art, computational art, process-based art, electronic art, software art, technological art, and telematics."). I use "generative AI art" as an umbrella term.

[30] *See generally* Letter from U.S. Copyright Off. to Van Lindberg, Esq. (Feb. 21, 2023), https://www.copyright.gov/docs/zarya-of-the-dawn.pdf [https://perma.cc/AQ3N-CGY7] [hereinafter Lindberg Letter].

[31] *See* Daneel Olivaw, *The Impact of Generative AI Art on Society and Culture: Will it Replace Human Artists?*, Medium (Dec. 24, 2022), https://medium.com/@Daneel_Olivaw/the-impact-of-generative-ai-art-on-society-and-culture-will-it-replace-human-artists-ace60691f038 [https://perma.cc/Q3ZD-H4XH].

Machine learning is a multi-step process that starts with the harvesting of large data sets.[32] In a typical machine learning model, data is prepared as a training set, with larger data sets producing better results.[33] From there, a computer programmer chooses a machine learning model to apply to the data set, and instructs that model to train itself to find syntactic patterns to make predictions using stochastic logic.[34] For generative AI models, these data sets are constructed of digital pictures, sounds, movie clips, or text. As it processes information within the data set, the algorithm begins to observe statistical relationships between those points of data.[35] This means that the robustness and accuracy of the initial data—the seed set—can have a tremendous influence on the outputs generated.[36] Additionally, the systems themselves may have limitations imposed upon them by their programmer or owner. In 2022, Stability AI, for example, made changes to Stable Diffusion Version 2 to prevent the generation of "nude and pornographic output, photorealistic pictures of celebrities, and images that mimic the artwork of specific artists."[37]

Users interacting with generative AI art systems start by providing text prompts.[38] Using MidJourney, as an example, the system starts by reducing these prompts into discrete "tokens." These tokens are not parsed for grammar, sentence structure, or semantic meaning.[39] MidJourney does not understand what

[32] *See* Sara Brown, *Machine Learning, Explained*, MIT Sloan (Aug. 21, 2023), https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained [https://perma.cc/2SJG-R6TC]; *see also* Andersen v. Stability AI Ltd., 23-CV-00201-WHO, 2023 WL 7132064, at *2 (N.D. Cal. Oct. 30, 2023) ("Consumers use these products by entering text prompts into the programs to create images "in the style" of artists. The new images are created "through a mathematical process" that are based entirely on the training images and are "derivative" of the training images.").

[33] *Id.* ("In general, none of the Stable Diffusion output images provided in response to a particular Text Prompt is likely to be a close match for any specific image in training data. This stands to reason: the use of conditioning data to interpolate multiple latent images means that the resulting hybrid image will not look exactly like any of the Training Images that have been copied into these latent images.").

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] James Vincent, *Stable Diffusion Made Copying Artists and Generating Porn Harder and Users Are Mad*, The Verge (Nov. 24, 2022), https://www.theverge.com/2022/11/24/23476622/ai-image-generator-stable-diffusion-version-2-nsfw-artists-data-changes [https://perma.cc/HPQ2-5R9K].

[38] Lindberg Letter, *supra* note 30.

[39] *Id.* (stating generative AI systems are incapable of understanding anything about their inputs); *see also* Larry Hauser, *Chinese Room Argument*, Internet Encyclopedia of Phil., https://iep.utm.edu/chinese-room-argument/ [https://perma.cc/Z8JL-CJHW] ("[N]o matter how intelligent-seeming a computer

a "dragon" is or who "John Oliver" may be.[40] Rather, the system starts "with a field of visual noise, like television static, [used] as a starting point to generate the initial image grids."[41] It then uses algorithms to reduce this noise into an averaged version of human-recognizable images.[42] The process lacks any human input beyond the prompt stage; a human user has no superintendence or knowledge of what outputs the system will create at the time of prompting.[43] Additional prompt engineering can refine or rework the image, but the user still lacks direct superintendence over the produced outputs.[44]

A generative AI art system neither reproduces nor transforms existing works, but rather creates aggregated statistical averages of conceptual representations like "dragon" based on its comparison of all representations of these tokenized concepts. Images are then generated using hashed token representations of other images containing "dragon"-like qualities. A large enough data set creates a statistically representative average "dragon" picture, such that the system has "learned" how to make its own representative "dragon." All without understanding what a "dragon" is. For example, consider DALL-E, which generates images based on text prompts. If a user inputs "John Oliver eating a bag of popcorn with a dragon on his shoulder in the style of Andy Warhol," DALL-E will output images that likely do not exist in its training data (or anywhere, for that matter). And because each generative AI system uses different data sets, their outputs on a particular prompt will vary.

behaves and no matter what programming makes it behave that way, since the symbols it processes are meaningless (lack semantics) to it, it's not really intelligent.").

[40] *See* Stokes, *supra* note 28 ("Humans are pragmatic functionalists about intelligence—they attribute intelligent, conscious, directed behavior of a range of stochastic processes, from weather to slot machines to chatbots—because humanity lacks a sophisticated explanation for consciousness. And because humanity lacks even a minimally satisfactory model of how consciousness arises from matter, we can't say with any confidence which complex configurations of matter are and are not conscious.").

[41] Lindberg Letter, *supra* note 30.

[42] *Id.*

[43] *Id.*

[44] *Id.*

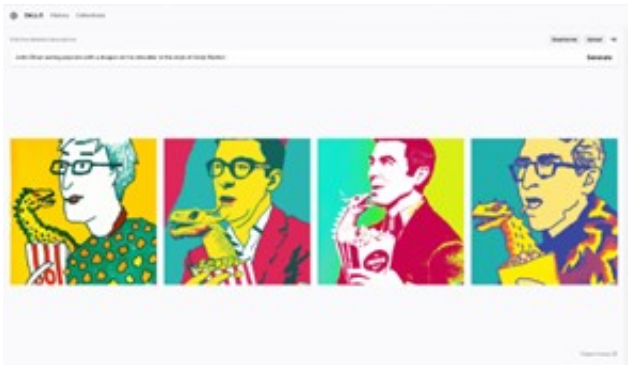

Figure D[45]

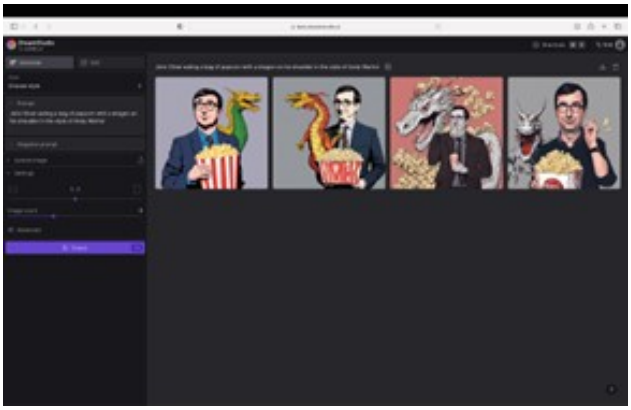

Figure E[46]

While influenced by its training, the system recombines disparate concepts into new works of expression, without any human creativity. So these systems exhibit some degree of autonomous creativity in combining novel data points aggregated from the metadata within a particular large data set to independently create a new work of expression. In this way, generative AI art systems produce works not contained within their initial training data. Unlike rules-based AI confined to recombining predefined elements, these models can extrapolate new visions from "learning." This directly implicates copyright's incentive theory. If AI can autonomously generate original works without monetary motivations or human involvement, the traditional copyright justification may not apply.

[45] Created in DALL-E using the prompt "John Oliver eating a bag of popcorn with a dragon on his shoulder in the style of Andy Warhol."

[46] Created in Dreamstudio using the prompt: "John Oliver eating a bag of popcorn with a dragon on his shoulder in the style of Andy Warhol." https://dreamstudio.com/about/ [https://perma.cc/P2P7-GPEN].

At the prompt refinement stage, a user may reassert superintendence over the generative AI system's outputs. Consider the previous "John Oliver" "Dragon" "eating popcorn" example. DALL-E's output better matched Warhol's style but missed on John Oliver's likeness. Stability better matched John Oliver's likeness but missed on Warhol's style. Using prompt refinement techniques, I can overcome some of the restrictions implemented into each system, such as the bar on producing a work in a particular individual's style. This allows me to refine the works closer to my intent. Other tools, like Photoshop, allow me to turn the output into raw materials for a new work, no different than how a photographer can heavily edit a picture depicting facts from the real work into a work of individualized expression.

But then a definitional problem arises. If I use over 600 prompts in my prompt engineering, at what threshold does the output become mine, if at all? Why is this different from capturing a photograph and editing it with Photoshop tools, themselves being a different form of algorithmic editing? Where is the line between spell check on the one hand and a service like Grammarly and Chat-GPT on the other? If the Copyright Office finds these boundaries difficult to ascertain, the consuming public will likely find it impossible. This raises several challenges to conducting standard infringement analyses in copyright disputes. [47]

Therefore, it is increasingly unclear where the boundary between human and algorithmically generated art is. Developments in technology, starting with photography, have and will continue to blur the line between human and machine authorship. As generative AI systems continue to evolve and the boundary between human and machine erodes, copyright theory must evolve to account for algorithmic rather than incentivized human creation. If the end consumer ultimately cannot discern whether a machine created a work or not, then market substitution is all but assured and market displacement risk grows. Examining this market change is critical as copyright adapts to an age of automated, costless machine creation.

[47] Those issues, like the impact of generative AI on substantial similarity and fair use, are outside the scope of this article.

II
Copyright in Algorithmically Generated Art

A. Copyright Basics

The Constitution's Progress Clause states that "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[48] Pursuant to this Power, Congress has devised a scheme of copyright protection, currently codified pursuant to the Copyright Act of 1976.[49] The Copyright Act protects "original works of authorship fixed in any tangible medium of expression,"[50] granting to qualifying authors a limited durational monopoly[51] to exploit a bundle of exclusive rights in the copyrighted work.[52]

The Progress Clause is "both a grant of power and a limitation" and Congress "may not overreach the restraints imposed by the stated constitutional purpose."[53] The Supreme Court has said that "[t]he *sine qua non* of copyright is originality."[54] Originality is a constitutional requirement.[55] Originality means that a work is the product of the human mind.[56] Artistic originality is not analogous to copyright

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[48] Eldred v. Ashcroft, 537 U.S. 186, 223 (2003) (quoting U.S. Const. art. I, § 8, cl. 8).

[49] 17 U.S.C. §§ 101–1511 (1976).

[50] 17 U.S.C § 102 (1976).

[51] *See* 17 U.S.C § 302 (1976) (defining copyright terms).

[52] *See* 17 U.S.C. § 106 (protecting the copyright owner's right to: (1) reproduce the work; (2) make derivatives; (3) distribute the work; (4) publicly perform the work; (5) publicly display the work; and (6) digitally transmit the work).

[53] *Eldred*, 537 U.S. at 223 (quoting Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 5–6 (1966)).

[54] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

[55] *Id.* at 346 (citing L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 Ucla L. Rev. 719, 763 n.155 (1989) (emphasis in original)); Patterson & Joyce, *supra*, at 759–60 n.140; 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 1.06[A] (1990) (stating that "originality is a statutory, as well as a constitutional, requirement"); *id.* at § 1.08[C][1] ("[A] modicum of intellectual labor . . . clearly constitutes an essential constitutional element.").

[56] Letter from Copyright Rev. Bd. to Ryan Abbot, Esq. (Feb. 14, 2022), https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf [https://perma.cc/V2ZM-A2UG] ("Copyright law only protects 'the fruits of intellectual labor' that 'are founded in the creative powers of the [human] mind.'") (citations omitted) [hereinafter Abbot Letter]; *see also* U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 313.2 (3d ed. 2014) (stating "the Office will not register works produced by a machine or mere mechanical process that operates . . . without any creative input or intervention from a human author" because under the statute "a work must be created by a human being") [hereinafter Compendium].

originality,[57] nor does originality require novelty.[58] Rather, originality "means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity"[59] or "a modicum of creativity."[60] Importantly, the fact that expressive aspects of the work are independently protected does not extend the copyright privilege to the entire work.[61] Rather, "copyright protection may extend only to those components of a work that are original to the author."[62] This is reflected under longstanding doctrines like the idea/expression dichotomy, which prohibits the monopolization of ideas under the copyright privilege.[63]

The Supreme Court has stated that "[t]he economic philosophy behind the clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare."[64] The author's benefit, however, is clearly a "secondary" consideration.[65] "[T]he ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[66] As Justice Breyer explained in his dissent in *Eldred*:

> The [Progress] Clause authorizes a "tax on readers for the purpose of giving a bounty to writers." Why? What constitutional purposes does the "bounty" serve? The Constitution itself describes the basic Clause objective as one of "promot[ing] the Progress of Science," *i.e.*, knowledge and learning. The Clause exists not to "provide a special private benefit," but "to stimulate artistic creativity for the general public good." It does so by "motivat[ing] the creative activity of authors" through "the provision of a special reward." The "reward" is a means,

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[57] *See* Gracen v. Bradford Exch., 698 F.2d 300, 304 (7th Cir. 1983).

[58] *Feist*, 499 U.S. at 345 ("Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.").

[59] *Id.* (citing Nimmer & Nimmer, *supra* note 55, at §§ 2.01[A], [B]).

[60] *Id.* at 346 (citing *In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879)).

[61] *Id.* at 340.

[62] *Id.*

[63] Baker v. Selden, 101 U.S. 99, 105 (1879) (codified at 17 U.S.C. § 102(b) (1976) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.")).

[64] Mazer v. Stein, 347 U.S. 201, 219 (1954).

[65] United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948).

[66] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

> not an end. And that is why the copyright term is limited. It is limited so that its beneficiaries—the public—"will not be permanently deprived of the fruits of an artist's labors."[67]

Thus, under the U.S. Constitution, "the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors' labors."[68] And the public benefits twice from copyright: once when the work is created, and later when the work falls into the public domain.

Creating art can be expensive. Before the internet, distributing art was too. Historically, the high costs associated with production and distribution of creative works posed challenges for artists seeking to profit from their labors. In response, copyright law emerged as a means of promoting artistic innovation and dissemination by providing creators with certain exclusive rights over their works for a limited term. Modern Copyright Incentive Theory posits a straightforward exchange between artists and society: in return for producing original works that enrich the cultural landscape, authors are temporally granted bounded monopolies enabling them to profit from their creations. Absent such protections, the theory suggests that artists would lack adequate economic incentive to create, as uncompensated third parties could freely copy and distribute their works. Thus, copyright law aims to remedy market failures stemming from the non-rivalrous nature of artistic goods.

But copyright law never foresaw a post-scarcity marketplace for art. Generative AI art and digital distribution now let machines create, copy, and distribute art for *de minimis* cost. Processing power and storage are the only limits before a deluge of infinite content. How should Congress respond to the coming artistic singularity? Early cases, Congress, and the Copyright Office focus on art's human aspects. If originality requires intention in the mind of a human, then it follows that denying machines protection accomplishes the goals of copyright law. But denying copyright to AI art is aesthetic discrimination masquerading as human exceptionalism. Art does not stop being art just because machines make it. Strictly applying Copyright Incentive Theory to AI art is tricky. Congress wants to reward artists when they create, but generative AI enables free creation. Simply ending our

[67] Eldred v. Ashcroft, 537 U.S. 186, 247 (2003) (Breyer, J., dissenting) (citations omitted).

[68] *Id.* (quoting H.R. Rep. No. 100–609, at 22 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3727).

inquiry at machine authorship is insufficient to address these larger public policy concerns, yet it is nonetheless a necessary starting point.

B. Generative AI and Authorship

The Copyright Act does not expressly identify computer programs nor computer-generated works as works of authorship.[69] Rather, human authored computer programs are treated as literary works,[70] and computer-generated works are treated as audiovisual works.[71] Copyright law draws no meaningful distinction between physical and digital copies of a work.[72] Digital information is stored on physical hard drives, such that the act of arranging the bits—the ones and zeros comprising that information—is treated no differently than carving a sculpture or painting a painting. All three acts involve the rearrangement of atoms on a physical medium, and copyright law does not require that any rearrangement of physical matter be perceived by a consumer without the aid of a machine.[73]

The question of whether computers can be authors has received extensive discussion in the literature.[74] The outputs of generative AI models are not the

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[69] William F. Patry, *Copyright and Computer Programs: A Failed Experiment and a Solution to a Dilemma*, 46 N.Y.L. Sch. L. Rev. 201, 203 (2003); *see also* 17 U.S.C. § 102.

[70] Patry, *supra* note 69, at 204.

[71] James Grimmelmann, *There's No Such Thing as a Computer-Authored Work - And It's a Good Thing, Too*, 39 Colum. J.L. & Arts 403, 404 (2016) ("A computer-generated work is at some point emitted by a computer, it exists in digital copies, as contrasted with traditional works that exist in analog copies.").

[72] *Id.* at 404.

[73] 17 U.S.C § 102.

[74] *See* Grimmelmann, *supra* note 71 (arguing against computer authorship) (citing Timothy L. Butler, *Can a Computer Be an Author - Copyright Aspects of Artificial Intelligence*, 4 Hastings Commc'ns & Ent. L.J. 707, 739–42 (1982)); Ralph D. Clifford, *Intellectual Property in the Era of the Creative Computer Program: Will the True Creator Please Stand Up*, 71 Tul. L. Rev. 1675, 1685–86, 1694–95 (1997); Evan H. Farr, *Copyrightability of Computer-Created Works*, 15 Rutgers Comput. & Tech. L.J. 63, 79 (1989); Dane E. Johnson, *Statute of Anne-Imals: Should Copyright Protect Sentient Non-Human Creators*, 15 Animal L. 15, 19–21 (2008); Karl F. Milde, Jr., *Can a Computer Be an "Author" or an "Inventor"?*, 51 J. Pat. Off. Soc'y 378, 392–95 (1969); Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, Harv. L. Rev. 977, 1056–72 (1993); William T. Ralston, *Copyright in Computer-Composed Music: HAL Meets Handel*, 52 J. Copyright Soc'y U.S.A. 281, 302–03 (2005); Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. Pitt. L. Rev. 1185, 1192–1200 (1986); Andrew J. Wu, *From Video Games to Artificial Intelligence: Assigning Copyright Ownership to Works Generated by Increasingly Sophisticated Computer Programs*, 25 AIPLA Q. J. 131, 155–57 (1997). *But see* Grimmelmann, *supra* note 71, at 404 n.5 (citing Bruce Boyden, *Emergent Works*, 39 Colum. J.L. & Arts 377, 389 (2016)) (arguing that works generated by unpredictable computer programs raise authorship issues that are genuinely different in kind); Annemarie Bridy, *The Evolution*

product of human authorship.[75] So while generative AI systems are capable of producing new (and perhaps novel) works of expression, they do not qualify for protection under the Copyright Act, as they lack human authorship and human originality.[76] As a result, any outputs of generative AI tools immediately fall into the public domain.[77] It was not until fairly recently that anyone claimed that a computer system was capable of authorship.

The first registration application of a generative-AI-authored work occurred on November 3, 2018, when Stephen Thaler filed a copyright registration application for the image "A Recent Entrance to Paradise," which was generated by his AI system, "the Creativity Engine."[78] Thaler did not edit or otherwise contribute to the creation of the picture beyond programming the algorithm. The Copyright Office refused to issue a registration on the grounds that the work lacked a human author. The Copyright Office noted in its letter that "copyright law only protects 'the fruits of intellectual labor' that 'are founded in the creative powers of the [human] mind'" and that it would not register works "produced by a machine or mere mechanical process" that operate "without any creative input or intervention from a human author" because, under the statute, "a work must

of Authorship: Work Made by Code, 39 Colum. J.L. & Arts 395, 396–98 (2016) (giving interesting and challenging examples of works generated by computer programs).

[75] Thaler v. Perlmutter, No. 22-1564, 2023 U.S. Dist. LEXIS 145823, at *8 (D.D.C. Aug. 18, 2023) (citing Mazer v. Stein, 347 U.S. at 214; Urantia Found. v. Kristen Maaherra, 114 F.3d 955, 958–59 (9th Cir. 1997) (holding celestial beings not human, but arrangements of 'revelations' protectable); Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, No. 96-cv-4126 (RWS), 2000 WL 1028634, at *2, *10–11 (S.D.N.Y. July 25, 2000); Oliver v. St. Germain Found., 41 F. Supp. 296, 297, 299 (S.D. Cal. 1941) (finding no copyright infringement where plaintiff claimed to have transcribed "letters" dictated to him by a spirit named Phylos the Thibetan, and defendant copied the same "spiritual world messages for recordation and use by the living" but was not charged with infringing plaintiff's "style or arrangement" of those messages); Kelley v. Chicago Park District, 635 F.3d 290, 304–06 (7th Cir. 2011) (holding garden not product of human authorship); Naruto v. Slater, 888 F.3d 418, 420 (9th Cir. 2018) (holding monkey's photograph not a product of human authorship).

[76] *See* Sara Bro et al., *Author or Algorithm: Recent Developments at the Intersection of Generative AI and copyright Law*, McDermott Will & Emery (Sept. 14, 2024), https://www.mwe.com/insights/author-or-algorithm-recent-developments-at-the-intersection-of-generative-ai-and-copyright-law/ [https://perma.cc/UW37-GJP9] ("The Copyright Office and US courts have repeatedly held that AI-generated work cannot be owned/authored by the AI itself because a valid copyright requires human authorship and creativity.").

[77] *See generally* Andrew Gilden, *Raw Materials and the Creative Process*, 104 Geo. L.J. 355 (2016).

[78] Abbot Letter, *supra* note 56.

be created by a human being."[79] On August 18, 2023, the District Court for the District of Columbia affirmed the Copyright Office's determination, holding that human creativity remains "the *sine qua non* at the core of copyrightability."[80]

Contrast Thaler's claims with those of Damien Riehl and Noah Rubin in 2020, when the duo developed a brute-force algorithm to generate every 8-note, 12-beat melody combination found in Western music theory.[81] "Under copyright law, numbers are fact, and under copyright law, facts either have thin copyright, almost no copyright, or no copyright at all," said Riehl in his TED Talk. "So maybe if these numbers have existed since the beginning of time and we're just plucking them out, maybe melodies are just math, which is just facts, which is not copyrightable." To "fix" the algorithm's resulting work (a requirement of the Copyright Act), the system creates midi-files and saves them onto a hard drive at about 300,000 melodies per second. While their claim has not been tested in Court or at the Copyright Office, the pair hopes to "illustrate that there are a finite number of ways to combine notes to create pop melodies, and these combinations existed before any songwriter actually put them to paper."[82]

Their argument is reductive of the abstraction-filtration-comparison test found in the Second Circuit's decision in *Altai*.[83] Applying the test to a claim of infringement in computer code, the Court held that:

> In ascertaining substantial similarity under this approach, a court would first break down the allegedly infringed program into its constituent structural parts. Then, by examining each of these parts for such things as incorporated ideas, expression that is necessarily incidental to those ideas, and elements that are taken from the public domain, a court would

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[79] *Id.* (citing COMPENDIUM, *supra* note 56, at § 306 (quoting *In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879)); *see also* COMPENDIUM, *supra* note 56, at § 313.2.

[80] *Thaler*, 2023 U.S. Dist. LEXIS 145823, at *8 (citing Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59 (1884)) ("[P]hotographs amounted to copyrightable creations of 'authors' despite issuing from a mechanical device, because the photographic result nonetheless 'represent[ed]' the original intellectual conceptions of the author.").

[81] Matt Binder, *New Algorithm Generates Every Possible Melody to Curb Copyright Lawsuits*, MASHABLE (Mar. 1, 2020), https://mashable.com/article/music-melody-algorithm-midi-copyright [https://perma.cc/BW2A-T9GP].

[82] Peter Cramer, *68 Billion Melodies*, COLUM. J.L. & ARTS: JLA BEAT (Apr. 2, 2020), https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/297 [https://perma.cc/QC43-P3K7].

[83] Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 706 (2d Cir. 1992).

> then be able to sift out all non-protectable material. Left with a kernel, or possible kernels, of creative expression after following this process of elimination, the court's last step would be to compare this material with the structure of an allegedly infringing program. The result of this comparison will determine whether the protectable elements of the programs at issue are substantially similar so as to warrant a finding of infringement.[84]

The pair extend this approach to copyright analysis into its end conclusion. All expression fixed into a material object can be reduced and abstracted to its compositional arrangement of atoms. At what point does random stochastic noise cross the threshold into originality? And if there are only so many arrangements of matter in which a work can be produced from, is anything truly original? Or are we merely discovering facts about the physical world that already exist? If so, that would violate the idea/expression dichotomy.

According to the abstractions-filtration-comparison test, there is some definable point in which random noise crosses into originality. But the boundary is unclear, and, as suggested by the Second Circuit, factually intensive. So, it is more accurate to say that creativity requires intentionality in its constitutive act. Consider Tupper's self-referential formula:

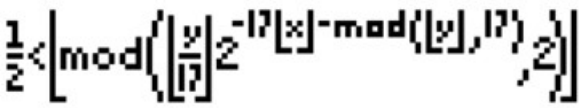
$$\frac{1}{2} < \left\lfloor \mathrm{mod}\left(\left\lfloor \frac{y}{17} \right\rfloor 2^{-17\lfloor x \rfloor - \mathrm{mod}(\lfloor y \rfloor, 17)}, 2\right)\right\rfloor$$

This formula is mathematically unique because it plots itself. Between a certain k and k+17 on the y-axis and between 0 and 106 on the x-axis, the plot of the formula is itself.[85] For k=48584506361897134235820959624942020445814005879832445494830930-850619347047088099284506447698655243648499972470249151191104116057391774078569975432657185544205721044573588368182982375413963433822519945219165128434833290513119319995350241375876523926487461-339490687013056229581321948111368533953556529085002387509285689269455597428154638651073004910672305893358605254409666435126534936364395712556569593681518433485760526694016125126695142155053955-

[84] *Id.*

[85] Margaret Fortman, *Tupper's Self Referential Formula* (June 2, 2015), https://campus.lakeforest.edu/trevino/Tupper_Paper.pdf [https://perma.cc/92FT-6495].

4519153785457525756590740540157929001765967965480064427829131488-
5482599147212485063526866304763 0, if you plot the equation and look at it between a height of k and k + 17 up the y-axis, it gives the plot of the equation:[86]



Copyright law would say that both the formula and the expression of the formula itself contained within the graph of the formula are ideas, unprotectable under the idea/expression dichotomy.

But Tupper's self-referential formula not only plots itself, it plots every 106 × 17 grid of white and black pixels. For example, when k=144520248970897582847942537337194567481277782215150702479718813968549087356829873488882513209057664381788832319769234400166677647492421251289952659070537080204739153208416317920255490054180047-6865720169973046638339490160137431971552099618114524978194501906835950051065780432564080119786755686314228025969420625409608166564-2417367403946384170774537427319606443899923010379398938675025786929455234476319291860957618345432248004921728033349419816206749854-4720381939397385138489604767597826733134376970519945806818698193304463677404726886 4, the plot is:[87]

This image of Pac-Man is not the product of a human mind or human intentionality, but application of mathematical law derived from Tupper's self-referential formula. Applying the abstraction-filtration-comparison test, it is unclear whether these shapes, as derived, would survive a substantial similarity analysis.

[86] *Id.*
[87] *Id.* at 2.

On September 15, 2022, Kristina Kashtanova submitted an application for "Zarya of the Dawn," a comic book they created with the assistance of generative AI tools.[88] Rather than rely solely on the generative AI system to create the final work as Thaler did, Kashtanova used MidJourney to create the raw materials for their work.[89] By treating the output as raw materials that they recombined into a new work, Kashtanova was granted a copyright in their comic book as a compilation.[90] The Copyright Office has taken the position that, where the output of a generative AI system is used as raw material into new expression and a human author superintends that work into a new compilation of materials, Copyright law permits the human author to claim authorship over the final work.[91] So with proper disclosure, a human author, in theory, can claim at least superintendence over the machine's creativity if they contribute sufficient expressive contributions to that first output.

On September 21, 2022, the Copyright Office received an application for digital artist Jason Allen's award-winning, two-dimensional work, "Théâtre D'opéra Spatial."[92] Unlike Thaler, who denied any superintendence over the creation of "A Recent Entrance to Paradise," Allen stated that he used Midjourney and "input numerous revisions and text prompts at least 624 times to arrive at the initial version of the image."[93] Once the initial version was produced, Allen then refined the image using Adobe Photoshop and upscaled it using Gigapixel AI. The Copyright Office initially refused registration on the grounds that Allen's work "inextricably merged, inseparable contributions" from both Allen and Midjourney.[94]

In its January 24, 2023 reconsideration letter, the Office again concluded that the work could not be registered without limiting it to Allen's contributions

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[88] Lindberg Letter, *supra* note 30.

[89] *See id.*

[90] *See id.*; 17 U.S.C. § 103

[91] Lindberg Letter, *supra* note 30, at 12.

[92] Kevin Roose, *AI-Generated Art Won an Art Prize. Artists Aren't Happy*, N.Y. Times, (Sept. 2, 2022), https://www.nytimes.com/2022/09/02/technology/ai-artificial-intelligence-artists.html [https://perma.cc/3DSC-78AE]; Letter from Copyright Rev. Bd. to Tamara Pester (Sept. 5, 2023), https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf [https://perma.cc/3J8F-DZV5] [hereinafter Pester Letter].

[93] Pester Letter, *supra* note 92.

[94] *Id.*

to the work.[95] The Office agreed that the editing in Photoshop showed some creativity on Allen's part, but that the outputs from Midjourney and Gigapixel AI did not.[96] Because Allen sought to register the entire work and not his contributions, the Copyright Office denied registration.[97] Allen filed a second request for reconsideration on July 12, 2023.[98] Allen argued that the Copyright Office failed to account for his "'creative input' into Midjourney, which included 'enter[ing] a series of prompts, adjust[ing] the scene, select[ing] portions to focus on, and dictat[ing] the tone of the image,' is 'on par with that expressed by other types of artists and capable of copyright protection.'"[99] Allen also contended that his use of the AI generative output as raw material should be sufficient for him to claim authorship in the final product.[100] And he asserted that requiring human applicants to disclose every AI tool used in the creative process would be an unreasonable burden on applicants.[101]

The Copyright Office denied Allen's second request for consideration on September 5, 2023.[102] Applying the human authorship standard and existing guidance rules, the Copyright Office found Allen's work "contain[ed] more than a de minimis amount of AI-generated content, which must be disclaimed in an application for registration."[103] The Copyright Office explained:

> If all of a work's "traditional elements of authorship" were produced by a machine, the work lacks human authorship, and the Office will not register it. If, however, a work containing AI-generated material also contains sufficient human authorship to support a claim to copyright, then the Office will register the human's contributions. In such cases, the applicant must disclose AI-generated content that is "more than de minimis." Applicants may disclose and exclude such material by placing a brief description of the AI-generated content in the "Limitation of Claim" section on the registration application. The description may be

[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*

> as brief and generic as "[description of content] generated by artificial intelligence." Applicants may provide additional information in the "Note to CO" field in the online application. Applicants are not required to list the AI tools used in the creation of the work.[104]

Yet the Copyright Office's second denial of Allen's work offers inadequate solutions to the wrong problem.[105] The letter's narrow construction of the Copyright Act encourages inaccurate disclosure to the Copyright Office, as authors may fail to disclose AI use to avoid registration refusal. In the case of failing to disclose public domain materials as grounds for cancellation, the proof was straightforward, as a work's fixation or publication serve as the evidence of creation. Disclosure of generative AI systems asks for negative proof: that a machine did not in fact author a work or a portion of a work at any time. Proving this negative can be difficult, and AI detection tools offer no solution.[106]

It also forces difficult line-drawing around the extent of an AI system's contributions. Does spell check offer more than a de minimis contribution? What about Grammarly's editorial function? Why allow Photoshop to delete objects using AI detection tools while denying Gigapixel's upscaling capabilities? The inconsistencies reveal the difficulty in delineating creative collaboration from infringement when AI is involved.

But ultimately, the question of whether a computer can be an author is irrelevant to the purpose of the Copyright Act.[107] The goal of American copyright law is to incentivize the creation of works that benefit the public, not reward authors. It does so by "motivating the creative activity of authors" through "the provision of a special reward."[108] But with the boundary between human and

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[104] *Id.* (citations omitted).

[105] *See also* U.S. Copyright Off., Copyright Registration Guidance: Works Containing Material Generated by A.I. (2023), https://www.copyright.gov/ai/ai_policy_guidance.pdf [https://perma.cc/U2B3-BCM8].

[106] *See Teaching Center Doesn't Endorse Any Generative AI Detection Tools*, U. Times U. Pitt. (June 22, 2023), https://www.utimes.pitt.edu/news/teaching-center-doesn-t [https://perma.cc/9LP3-NBCJ]. Requiring disclosure of generative AI systems on registration applications also raises questions about independent creation that are beyond the scope of this article.

[107] Nothing in the constitutional boundaries of the Progress Clause would limit Congress from amending the definition of author to include generative AI or other new technologies. Whether it *should* do so is a policy question, not a constitutional powers question.

[108] Eldred v. Ashcroft, 537 U.S. 186, 247 (2003) (Breyer, J., dissenting) (citations omitted).

machine authorship blurring, we must re-evaluate this means-end goal of copyright policy. If AI systems can produce marketable works, then the "reward" should follow the benefit, regardless of human authorship. Rather than starting and ending the inquiry with authorship, copyright doctrine must evolve to maximize public access to creativity, regardless of who or what is acting as an author. Congress has traditionally viewed authorship as a *policy* question, not a metaphysical or teleological one. And that policy question historically had been about Congress using copyright as a tool of competition policy.

C. Generative AI and Fair Use

When considered from a competition policy perspective, the dangers of market substitution come to predominate Getty Images' copyright infringement lawsuit against Stability AI.[109] There, Getty sued over Stability AI's use of 12 million of Getty's copyrighted images and associated metadata from its database to train the Stability generative AI system.[110] At the heart of Getty's complaint are concerns about the risk of market substitution for its licensing deals for its compilation of digital pictures.[111] In Getty's copyright infringement complaint, Getty alleges that this compilation of images took "great expense, over the course of nearly three decades" to assemble.[112] But copyright law does not reward an author's "sweat of the brow."[113] The fact that Getty expended significant time, labor, and expense to compile its database of copyrighted images does not render it per se protectable under the Copyright Act.[114]

Getty's complaint misstates the computational nature of generative AI and the metadata contained within its own database.[115] One of Getty's allegations point to the wholesale copying of metadata as evidence of direct infringement of its

[109] Getty Images (US), Inc. v. Stability AI, Inc., No. 23-cv-00135 (D. Del. filed Sept. 23, 2023).

[110] *See id.*; Dictionary of IBM & Computing Terminology 55–56, www.ibm.com/ibm/history/documents/pdf/glossary.pdf [https://perma.cc/J5ND-EFB7] (defining "metadata" as "data that describes the characteristics of stored data; descriptive data").

[111] Likely to anticipate a fair use defense.

[112] Amended Complaint at 1–2, Getty Images (US), Inc. v. Stability AI, Inc., No. 23-cv-00135 (D. Del. filed Sept. 23, 2023).

[113] Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359–60.

[114] *Id.*

[115] *See* Amended Complaint, *supra* note 112, at 3.

copyrights.[116] But metadata is just uncopyrightable facts about the image file.[117] As explained in the previous section, modern computer systems algorithmically parse and construct many aspects of a file's associated metadata. A digital photograph, for example, may automatically generate information about the image creator, keywords specific to the image, captions, titles, comments, or other information.[118] These types of metadata typically concern the file structure of the digital file in which the image is stored.[119]

Data scraping this information and applying machine learning techniques to it enables generative AI to make entirely new, non-derivative versions of existing works. Generative AI tools are not simply copying the works in the database but making statistical observations about the syntax of the metadata itself. It does not learn meaning (semantics) from its use of the database, but structure. In theory, generative AI tools utilize vast datasets of existing works to identify patterns and correlations in the metadata—information about the works such as keywords, captions, titles, style tags, etc. The tools employ statistical methods to discern averages and tendencies about how these metadata elements relate to one another across the dataset. In this way, the tools are not directly copying or deriving from any one specific work, but rather discovering symbolic rules about how the

[116] *See id.* at 20; *see also* Kadrey v. Meta Platforms, Inc., No. 23-CV-03417-VC, 2023 WL 8039640, at *1 (N.D. Cal. Nov. 20, 2023) (citing Litchfield v Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984)) ("The plaintiffs are wrong to say that, because their books were duplicated in full as part of the LLaMA training process, they do not need to allege any similarity between LLaMA outputs and their books to maintain a claim based on derivative infringement. To prevail . . . the plaintiffs would indeed need to allege and ultimately prove that the outputs "incorporate in some for a portion of" the plaintiffs' books."); Andersen v. Stability AI Ltd., No. 23-CV-00201-WHO, 2023 WL 713206, at *7–8 (N.D. Cal. Oct. 30, 2023) ("[T]he alleged infringer's derivative work must still bear some similarity to the original work or contain the protected elements of the original work."); 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8.09 (Matthew Bender rev. ed. 2023) ("Unless enough of the preexisting work is contained in the later work to constitute the latter an infringement of the former, the latter, by definition, is not a derivative work"); 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 3.01 (Matthew Bender rev. ed. 2023) ("A work is not a derivative unless it has substantially copied from a prior work.").

[117] *See* Amended Complaint, *supra* note 112, at 20.

[118] Of course, the metadata that Getty has sued over was almost entirely autonomously generated by a computer algorithm.

[119] This includes camera model and make and information that varies with each image such as orientation (rotation), aperture, shutter speed, focal length, metering mode, and ISO speed information. *See* CamJapan Elec. Indus. Dev. Ass'n, Digital Still Camera Image File Format Standard (version 2.1 1998), https://web.archive.org/web/20131111073619/http://www.exif.org/Exif2-1.PDF [https://perma.cc/7FPH-7WZN].

metadata can be recombined in novel ways according to the overall statistics of the dataset.

The tools then apply these rules to generate new metadata pairings and compositions. While the output contains symbolic structures reminiscent of the original dataset, the semantic meaning is emergent rather than copied. The key principles are that the tools do not learn the meaning, only the relationships between structural patterns, as they leverage statistics across the dataset rather than deriving from any singular work. Through this process of discerning and applying abstract rules about metadata composition, the generative AI tools can produce original works that do not directly copy or infringe upon any one existing work.[120]

So, if Getty cannot claim copyright in its metadata as raw facts, it cannot object to the stochastic averaging of these facts into something new, any more than Rural Telephone Service in *Feist* could complain about the copying of raw facts contained in its phonebook.[121] Like those phonebook listings, metadata provides the raw materials for new expressions. Art builds upon the works of predecessors. Students study masters, learning associations and developments from centuries of practice, eventually recombining discrete data points into unique interpretive styles. Similarly, generative AI systems do not merely capture moments like photographs. They "learn" as does a student who mimics their masters.

Copyright is structured to disseminate this metadata about art to future creatives. Without the reproduction of material objects, the incentive theory argues that insufficient production of copies of expression will prevent future artists from developing artistic study and creating new works of expression. The end goal is not encouraging expressive labors but a specific marketplace for expression, one in which transaction costs are kept low in a marketplace that encourages the free exchange of ideas. For this reason, strictly requiring human authorship is an aesthetic judgment that reads the "sweat of the brow" theory back into conversations about the extent to which machines can possess or exhibit creativity. The deeper concern is, and should be, that costless AI art will displace economic

[120] I recognize the need for further empirical study of this assertion but note that it is outside the scope of this paper.

[121] Getty's complaint conflates two separate acts of alleged reproduction, the necessary reproduction of works in the training set for the generative AI system and the reproduction that occurs when the system results in a new output. *See generally* Amended Complaint, *supra* note 112.

incentives for human creativity, which can in turn harm the very incentives that drive humans to create art.

Within its copyright infringement complaint, Getty offered the following photograph as evidence of direct copying:

Figure F[122]

Getty points to similarities in the composition and the appearance of a distorted watermark as evidence of the generative AI system's direct copyright infringement.[123] But this ignores that the associated metadata is itself factual in nature and that the Getty Images watermark is not a copyrightable work of expression.[124] As noted above, Stability did not slavishly copy the demonstrative photograph. It amalgamated metadata about the indexed photographs contained in the Getty Images database then independently created its own new work based on the calculated averages of what a tokenized representation of a photograph of a soccer game should contain.[125] If the picture depicts two players in a contrasting dark and light soccer jersey, it's because the average photograph of soccer players

[122] Amended Complaint, *supra* note 112, at 20.

[123] *See id.* at 19–20. The watermark is not evidence of direct copying, as Getty alleges, but arguably falls under the doctrine of copyright estoppel/asserted truths. Getty may find better relief in an allegation of trademark dilution or under § 1201 of the Digital Millennium Copyright Act ("Circumvention of copyright protection systems"). Such arguments are outside the scope of this article.

[124] *See* Corbello v. Valli, 974 F.3d 965, 974 (9th Cir. 2020) ("Similarity only as to unprotected aspects of a work does not result in liability for copyright infringement.").

[125] *See id.* There, the Ninth Circuit explained:

> The extrinsic test requires a three-step analysis: (1) the plaintiff identifies similarities between the copyrighted work and the accused work; (2) of those similarities, the court disregards any

does.[126] Getty's arguments simply rehash those that failed to overcome Google's fair use defense in the Google Book Indexing Case, *Authors Guild v. HathiTrust*.[127] Those arguments about substantial similarity lead to the same conclusion—there are only so many ways to depict a soccer game. To the extent that Getty relies on these narrow facts within its complaint, the Court should discount those as *scenes a faire* or under the merger doctrine.[128]

Getty's argument represents an impermissible aesthetic claim regarding AI mimicking a photographic style for soccer players. Copyright law protects specific original works, not general styles or aesthetics.[129] Just as Warhol's estate cannot prohibit others from adopting Warhol's signature styles, Getty cannot monopolize the marketplace for photographs depicting a soccer game. Generative AI prompts questions around human creativity's scope, though style itself falls squarely in the public domain. AI may independently reproduce works evoking a given aesthetic (to the extent they have not been limited by their programmers), but this market substitution does not implicate copyright absent actual infringement. Utilitarian copyright assumptions that incentives spur human creation are still challenged. However, copyright was never intended to monopolize

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that are based on unprotectable material or authorized use; and (3) the court must determine the scope of protection ("thick" or "thin") to which the remainder is entitled "as a whole."

It is in the second prong of the test that Getty's complaint fails. None of the generated outputs of the system had appropriated any protectable expression from Getty's image. The subjective view argument raised in Getty's complaint is not raised until the intrinsic examination that follows the extrinsic test. Because Getty cannot show the requisite appropriation, its claim should fail.

[126] FIFA regulations require this. *See* FIFA Equipment Regulations 16, 6.2.1 https://digitalhub.fifa.com/m/7474d3addab97747/original/FIFA-Equipment-Regulations_2021_EN.pdf [https://perma.cc/67K7-XKYM] (listing 126 pages of FIFA Equipment color regulations).

[127] While outside the scope of this paper, such a use of the data scraping associated metadata should be treated as fair use. *See generally* Authors Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).

[128] *See* Atari, Inc. v. N. Am. Phillips Consumer Elecs. Corp., 672 F.2d 607, 616 (7th Cir. 1982) (quoting 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03(A)(1) (1981)) ("[S]imilarity of expression, whether literal or nonliteral, which necessarily results from the fact that the common idea is only capable of expression in more or less stereotyped form will preclude a finding of actionable similarity."); Morrissey v. Proctor & Gamble Co., 379 F.2d 675, 678 (1st Cir. 1967) (holding that where there is "one form of expression, [or] at best only a limited number [of ways to express an idea or system], to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance.").

[129] Steinberg v. Columbia Pictures, 663 F. Supp. 706, 715 (S.D.N.Y. 1987).

stylistic concepts, only particular expressions.[130] While the implications of AI art merit examination, copyrightability thresholds remain grounded in specific original works of authorship. Unless AI replicates protected elements rather than uncopyrightable style, copyright law maintains vital boundaries limiting monopolies to discrete creations. This upholds its purpose of promoting creative progress, not rewarding authors. AI expands expression at copyright's frontiers, but stylistic claims exceed its legal limits.

An objection to this argument is found in my prior example of John Oliver depicted in the style of Andy Warhol. On first appearance, the associated metadata of "John Oliver" does not neatly fit within my prior argument. There are many ways to express a picture of a dragon, there are fewer to depict the British comedian. But the likeness of John Oliver, in a copyright sense, is simply a fact about the physical world—that is, an unprotectable fact.[131] However, while the celebrity's likeness itself may be unprotectable, this example exposes subtle complexities around AI mimicking distinctive stylistic flourishes. While copyright protects specific original works, not general style or aesthetic, the line blurs when an AI model is explicitly trained on a narrow artist's *oeuvre* rather than generalized creative concepts. This raises complex questions around derivative works and transformative fair use when the input data and parameters narrow substantially, even if the output differs.[132] So a nuanced re-evaluation of the Copyright Incentive Theory is needed

[130] *See* Richard A. Posner, *Intellectual Property: The Law and Economics Approach,* 19 J. Econ. Persps. 57, 68 (2003), https://pubs.aeaweb.org/doi/pdfplus/10.1257/0895330054048704 ("A legal monopoly is not necessarily an economic monopoly; if close substitutes exist for a patented product, the patent may confer little power over price.").

[131] *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59 (1884); *see also* Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258, 1270 (10th Cir. 2008). Whether John Oliver has a right of publicity claim for generative AI depictions of him is beyond the scope of this article.

[132] While these legal issues are beyond the scope of this article, Nelson Goodman's *Languages of Art* best educes this distinction. Katherine Thomson-Jones & Shelby Moser, *The Philosophy of Digital Art*, Stan. Encyclopedia of Phil. (Oct. 11, 2022), https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=digital-art [https://perma.cc/RT4M-D6KS]. A broad, structuralist interpretation of what is "art" supports the economic foundations of the Copyright Incentive Theory. After all, if all "art" is reductive to its syntactic structures, any machine that is capable of fixing a digital work must contain all the possible constructions of those necessary tokenized syntactic representations of "art." If copyright's goal is to maximize the production of reproductions of works into material objects fixed with those tokenized representations of reality, then any computer capable of producing an output must be capable of producing *all* outputs within the boundaries of its data set. If we were to accept this proposition as true, then it would necessarily follow that human exceptionalism does not exist in originality. There is ongoing research in the field of neuroscience

in response to AI models mimicking, but not appropriating, highly-specific human styles and expressions.[133] If economic incentives prove increasingly irrelevant in an age of machine creativity, copyright's foundational premises warrant reevaluation. Generative AI's implications extend beyond specific instances of infringement, calling into question the theoretical basis for copyright itself—the Copyright Incentive Theory.

D. Incentives and Post-Scarcity

The copyright monopoly represents a *quid pro quo*—rights holders temporarily control the exploitation of works in exchange for their eventual addition to the public domain.[134] The copyright monopoly, limited by traditional hostility toward monopolization, aims to stimulate creativity for public benefit rather than provide private windfalls.[135] The dominant American legal theory justifying this "reader's tax" is the Copyright Incentive Theory, which remedies an identified market failure.[136] Copyright makes the reward to the author a secondary consideration as a result.[137] It is "intended . . . to allow the public access to the products of [authors'] genius after the limited period of exclusive control has expired."[138] It does not "provide a special private benefit,"[139] but rather exists "to stimulate artistic creativity for the general public good"[140] and to promote

on animal creativity. *See, e.g.*, Dahlia W. Zaidel, *Creativity, Brain, and Art: Biological and Neurological Considerations*, Frontiers in Hum. Neuroscience, June 2, 2014, at 2 (listing brain size, neurotransmitters, intelligence level, ecological niches, and personality attributes as creativity-related factors which have already been identified). Notably, the neuroscientist Dahlia Zaidel suggests that the key difference between animal and human creativity lies in the cultural function of human art, *id.*, which supports the Copyright Incentive Theory argument.

[133] *See* Posner, *supra* note 130.

[134] Eldred v. Ashcroft, 537 U.S. 186, 224–25 (2003) (Stevens, J., dissenting).

[135] *Id.*

[136] *Id.* at 245 (Breyer, J., dissenting).

[137] *See* Mazer v. Stein, 347 U.S. 201, 219 (1954); *see also* L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. Copyright Soc. 365, 379 (2000); L. Ray Patterson, Copyright in Historical Perspective 144–47 (1968); Madison on Monopolies 756–57; Papers of Thomas Jefferson 442–43; The Constitutional Convention and the Formation of the Union 334, 338 (Winton U. Solberg ed., 2d ed. 1990).

[138] Sony Corp. of Am. v. Universal City Studios, Inc,, 464 U.S. 417, 429 (1984).

[139] *Eldred*, 537 U.S. at 242 (Breyer, J., dissenting) (quoting *Sony*, 464 U.S. at 417, 429).

[140] *Id.* (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

the creation and dissemination of information.[141] Were it not, copyright would be outside the boundaries of Congress' constitutional authority.[142]

The Theory offers a remedy to an identified form of market failure. It argues that when things are scarce, they become more subjectively valuable.[143] So the theory holds that the scarcer property is, the more valuable it becomes to consumers.[144] The scarcity of the capital and labor resources is needed to make a good inference regarding how scarce the property is. Economists call these the "factors of production"—labor, capital, land, and entrepreneurship.[145] Each is required, in differing amounts, to produce tangible property.[146] And each of the factors is scarce depending on the type of goods being produced.[147]

Intangibles are different as they lack natural scarcity.[148] Expressions are intangibles that are freely copyable. My enjoyment of a book does not diminish your enjoyment or use of the same book.[149] For this reason, once expressions

[141] *Id.* at 244 (Breyer, J., dissenting).

[142] *Id.* at 247 (citing H.R. Rep. No. 2222, at 6–7 (2d Sess. 1909)).

[143] Ruth Towse et al., *The Economics of Copyright Law: A Stocktake of the Literature*, 5 Rev. Econ. Rsch. on Copyright Issues 1, 2 (2008), https://core.ac.uk/download/pdf/4897291.pdf [https://perma.cc/C9VK-WVGS] (quoting Gillian K. Hadfield, *The Economics of Copyright: A Historical Perspective*, 38 A.S.C.A.P. Copyright L. Symp. 1, 29–30 (1992)) ("[T]he effect of a monopoly is to make articles scarce, to make them dear, and to make them bad. . . . It is good that authors be remunerated; and the least exceptional way of remunerating them is by a monopoly.").

[144] Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. Rev. 460, 460 (2015) https://ssrn.com/abstract=2413974 [https://perma.cc/S4MX-3DWF].

[145] *See generally* Adam Smith, An Inquiry into the Nature and Causes of the Wealth; of Nations, of the Component Parts of the Price of Commodities (S.M. Soares. ed., 2007) (1776).

[146] *See* U. Minn., Principles of Economics 28 (2016) (Univ. of Minn. Librs. ed., 2011), https://open.lib.umn.edu/principleseconomics/ [https://perma.cc/GEM6-JTS9].

[147] Julia Kagan, *Subjective Theory of Value: Definition, History, Examples*, Investopedia (Oct. 31, 2021), https://www.investopedia.com/terms/s/subjective-theory-of-value.asp [https://perma.cc/GNX8-CM8D].

[148] *See* Mark Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. Rev. 460, 482 (2015); *see also* Smith, *supra* note 145 ("Value, it is to be observed, has two different meanings, and sometimes expresses the utility of some particular object, and sometimes the power of purchasing other goods which the possession of that object conveys.").

[149] *See* Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 6 The Papers of Thomas Jefferson 379, 384 (J. Jefferson Looney ed., 2009) ("He who receives an idea from me, receives instruction himself without lessening mine; as he who lites his taper at mine, receives light without darkening me.").

are created, they belong to the public.[150] Economists call this a "public good."[151] When intangibles become widely available to the public, one market effect is an increase in free riders.[152] Why would you pay an author for creating a work of expression when you can freely copy it?[153] But if you are not willing to pay, then authors will not be willing to invest their capital and labor into creating new works. The result is market failure.[154] So the Copyright Incentive Theory offers artificial scarcity as a way of fixing this market failure.[155] Copyright creates artificial scarcity by tying freely copyable intangible expressions to monopolies in scarce material objects.[156] Copyright does not protect expression *per se*, nor creativity as an act of social utility; it protects specific fixations of expressions onto material objects in the hope of encouraging future creativity.[157] It does not protect *anyone* selling these expressions, but rather uses specific market structures to create artificial scarcity and thus incentivize creative expression.

Scarcity of a thing does not make it intrinsically valuable.[158] Value is not intrinsic to things but is instead based on the consumer's perceived subjective marginal utility.[159] Economists offer the diamond-water paradox to explain why.[160]

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[150] Copyright Law: A Handbook of Contemporary Research 154 (Paul Torremans ed. 2009)

[151] *See* Jason Fenando, *What Are Public Goods? Definition, How They Work, and Example*, Investopedia (Mar. 20, 2022), https://www.investopedia.com/terms/p/public-good.asp [https://perma.cc/52TN-G7Z8] (defining a public good as a commodity or service that is made available to all members of society).

[152] *See generally* Mark Lemley, *Property, Intellectual Property, and Free Riding*, 83 Tex. L. Rev. 1031 (2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=582602 [https://perma.cc/7E7N-2ZLY].

[153] Russell Hardin & Garrett Cullity, *The Free Rider Problem*, Stan. Encyclopedia of Phil. (Oct. 18, 2020), https://plato.stanford.edu/entries/free-rider/ [https://perma.cc/8TPP-RRVA].

[154] *See* William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law 37 (2003); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 326 (1989).

[155] Towse et al., *supra* note 143, at 4 (citing Richard Caves, Creative Industries: Contracts Between Art and Commerce (2000)) ("The typically high sunk cost of producing copyrightable works, for which the variable costs are often low, makes marginal cost pricing impossible for the profit-maximising producer and gives rise to the specific features of the creative industries in which these works are utilised.").

[156] *See* Lemley, *supra* note 148.

[157] 17 U.S.C. § 102.

[158] *See generally* Kei Shibata, *THE SUBJECTIVE THEORY OF VALUE AND THEORIES OF THE VALUE OF MONEY*, 6 Kyoto U. Econ. Rev. 71 (1931), https://repository.kulib.kyoto-u.ac.jp/dspace/bitstream/2433/125198/1/ecb0061_071.pdf [https://perma.cc/DVQ8-3C5T].

[159] *Id.* at 81.

[160] *See* Smith, *supra* note 145, at 26.

Water has greater social utility, but diamonds are more expensive.[161] Diamonds have aesthetic and industrial utility, but we die without water. So why are diamonds worth more? If value was determined solely by intrinsic utility, then water would be more expensive. But the value of diamonds and water is a function of the scarcity of the factors of production needed to create and consume a unit of either, not a function of their corresponding social utility. It is generally much harder to locate and mine diamonds and cut them into gems than it is to pump water from the ground or collect it from the rain.[162] At the microeconomic level, what matters is not the general utility of a good in the marketplace, but the immediate consumer's preference for it.[163] A diamond commands a much different price to shoppers in New York City's Diamond District than it does to the dehydrated person dying of thirst in Death Valley.[164] That person would pay all the diamonds in the world for a glass of water. Of course, once they have had that first glass, the second and subsequent glasses become worthless—economists call this diminishing marginal utility.

Price and production share a bidirectional causal relationship, each influencing the other according to basic economic principles. In a market of perfect competition, the price of a good or service is found at the intersection of its supply and demand.[165] The law of supply holds that as prices rise, producers will produce more of a good.[166] Conversely, the law of demand states the opposite for consumers

[161] *Id.* ("Nothing is more useful than water; but will purchase scarce any thing; . . . [a] diamond, on the contrary, has scarce any value in use; but a very great quantity of other goods may be had in exchange for it.").

[162] Additionally, the theory of marginal utility also teaches us that diamonds are only more expensive when one isn't dying of thirst in a desert. Consumer value preferences are defined, in part, due to consumer's subjective preferences toward the scarcity of competing options in a competitive market.

[163] *See generally* Posner, *supra* note 130.

[164] *See* Smith, *supra* note 145; *see also* Carl Menger, Principles of Economics 140 (1976) ("Diamonds and gold are so rare that all the diamonds available to mankind could be kept in a chest and all the gold in a single large room, as a simple calculation will show. Drinking water, on the other hand, is found in such large quantities on the earth that a reservoir can hardly be imagined large enough to hold it all.").

[165] Boundless, Economics § 10.1 (2014) https://socialsci.libretexts.org/Bookshelves/Economics/Economics_(Boundless)/10%3A_Competitive_Markets/10.1%3A_Perfect_Competition [https://perma.cc/NNW4-NERN].

[166] The Investopedia Team, *The Law of Supply Explained, With the Curve, Types, and Examples*, Investopedia (Sept. 30, 2023), https://www.investopedia.com/terms/l/lawofsupply.asp#:~:text=The%20law%20of%20supply%20says,disincentivized%20from%20producing%20as%20much [https://perma.cc/Z7VK-PSYJ].

with rising prices of a good or service translating into less consumers.[167] Producers find that the invisible hand of the market constrains them.[168] But for the consumer and their willingness to come to market, producers would produce into the infinite.[169] Yet, the law of marginal utility further constrains them.[170] Because intrinsic utility does not define value, a consumer's subjective marginal preference toward a unit of a thing means that producers will never be able to sell as much product as they would like.[171]

Perfect competition requires complete, symmetrical information between transacting parties—a rare scenario. Real-world markets are dynamic, with firms deciding optimal output levels. A perfectly competitive firm has but one decision: what output of a good to produce. Both parties to the transaction benefit from exchange in this market, but the consumer is robbed of the creative destructive forces of the market.[172] Economists define the benefit to the consumer as the consumer surplus; the benefit to the producer as the producer surplus.[173] These together create the total economic benefit to the public realized through free trade and competition. Highly competitive marketplaces are characterized by high amounts of consumer surplus, while oligopolistic and monopolistic markets have low amounts of consumer surplus.[174]

When a marketplace is in an oligopolistic or monopolistic state, the producer in that marketplace reaps additional producer surplus at the expense

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[167] *See* U. Minn., *supra* note 146.

[168] *See* Smith, *supra* note 145, at 349.

[169] *Id.* at 259.

[170] *Section 01: Consumer Behavior*, BYU – Idaho, https://courses.byui.edu/econ_150/econ_150_old_site/lesson_05.htm [https://perma.cc/C4PW-TLTK].

[171] *See* Menger, *supra* note 164, at 7–8.

[172] Joseph A. Schumpeter, Capitalism, Socialism, & Democracy 83 (1943).

[173] *See* Chris B. Murphy, *Consumer Surplus Definition, Measurement, and Example*, Investopedia (Mar. 19, 2023), https://www.investopedia.com/terms/c/consumer_surplus.asp#:~:text=A%20consumer%20surplus%20happens%20when,they%20were%20willing%20to%20pay [https://perma.cc/B47V-S2ME] (describing consumer surplus as the occurrence when the price that consumers pay for a product or service is less than the price they're willing to pay); *see also* The Investopedia Team, *Producer Surplus: Definition, Formula, and Example*, Investopedia (Aug. 1, 2022), https://www.investopedia.com/terms/p/producer_surplus.asp [https://perma.cc/QZ3P-GMCY] (defining producer surplus as the difference between how much a person would be willing to accept for a given quantity of a good versus how much they can receive by selling the good at market price).

[174] Goodwin et. al., Microeconomics in Context (3d ed. 2013), https://www.bu.edu/eci/files/2019/06/MIC_3e_SSG_Ch17.pdf. [https://perma.cc/FZ6E-M294].

of consumers.[175] Copyright's lawful monopoly creates deadweight loss, granting producers temporary monopolies over works to remedy disincentives to create freely-copyable expressions. Copyright policy limitations aim to balance this loss against market failures from lack of incentives. Historically, high production and distribution costs, barriers to entry, and government regulations reinforced copyright's artificial scarcity.

Economies of scale, and the physical nature of books and other works have historically reinforced copyright's artificial scarcity.[176] For centuries, the high costs of production and distribution needed to scale production accordingly, served as a barrier to entry that helped limit piracy. Governmental regulation, licensure, censorship, and copyright further legitimized the status quo. Yet the Founders saw "monopoly as a two-edged sword"; a necessary evil to increase the public good.[177] Because while copyright encourages production of new works, it restricts the dissemination of works once produced.[178] The absence of competition translates into higher consumer prices and transaction costs.[179] It can be difficult for potential users of copyrighted works to locate owners and strike a bargain.[180] And monopolists invariably reap more consumer surplus than necessary.

Copyright's artificial scarcity is said to drive two separate but complementary incentives: the production of new forms of creative original expression and the cultivation of a marketplace for material objects containing those expressions.[181] To the extent this shaping of information market structures reduces the direct and search cost of information dissemination, the copyright regime reinforces the patent system, furthering the goals of the Progress Clause.[182] However, much of the economic literature in copyrights makes a fatal error: copyright

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[175] *Id.*

[176] *But see* Jake Linford, *Copyright and Attention Scarcity*, 42 Cardozo L. Rev. 143, 144 (2020) ("[P]reserving copyright protections – especially the derivative right – may have unexpected benefits for consumers, including keeping attention costs in check").

[177] Golan v. Holder, 565 U.S. 302, 346 (2012).

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] Feist, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 354 (1991) (citing Harper & Row, 471 U.S. 539, 563; *accord* Robert A. Gorman, *Fact or Fancy: The Implications for Copyright*, 29 J. Copyright Soc'y 560, 563 (1982)) ("Throughout history, copyright law has recognize[d] a greater need to disseminate factual works than works of fiction or fantasy.").

does not incentivize production of *one* homogeneous product.[183] Each of the Section 106 rights individually and together result in several differing product offerings, sometimes in direct competition with an author's other existing rights, and sometimes in completely different marketplaces or channels of distribution.[184] Copyright does not directly reward creativity or encourage creativity, nor does it reward authors for their labors of creativity.[185]

While copyright's stated goal is incentivization, the outcome is the commodification of art.[186] The American copyright system developed to solve a specific market failure—the lack of incentives to invest in the expensive capital and labor structures needed to disseminate and distribute information throughout the country. Ultimately, "[t]he possibility of eliciting new production is, and always has been, an essential precondition for American copyright protection."[187] Copyright exists to create a specific monopolistic or oligopolistic market structure with specific congressionally defined boundaries. It seeks to create a market of a few firms engaged in the mass production of works.[188]

As technology reduces entrenched firm's marginal costs, Congress has repeatedly rebalanced copyright's incentives.[189] Amendments to the copyright term, scope, licensing, renewals, termination and works for hire doctrine have adjusted the scale toward additional producer surpluses.[190] Substantive doctrines like fair use, the idea-expression dichotomy, merger, and others—in theory but

[183] *See generally* Towse et al., *supra* note 143.

[184] *Id.*

[185] *Id.* at 2, 6–7; *Feist*, 499 U.S. at 349.

[186] I use commodification as an economic term, not in a pejorative sense. Commodification is an industrial arrangement of the factors of production to mass produce fungible commodities for sale in the marketplace. *See* Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction, in* Illuminations 1, 24 (Hannah Arendt ed., Harry Zohn trans., 1969) (1935) (quoting Aldous Huxley, Beyond the Mexique Bay: A Traveller's Journal 274 (1934)), https://web.mit.edu/allanmc/www/benjamin.pdf [https://perma.cc/8KPF-NLFT] ("Universal education and relatively high wages have created an enormous public who know how to read and can afford to buy reading and pictorial matter. A great industry has been called into existence in order to supply these commodities.").

[187] Golan v. Holder, 565 U.S. 302, 345 (2012).

[188] While beyond the scope of the paper, it is worth noting that this arrangement is mutually beneficial for the Sovereign granting the copyright privilege. If Congress defines the market, Congress picks the winners of the marketplace. And Congress can jawbone the types of information it wants disseminated to the public as a result. In this way, copyright advances both competition and political information marketplace policies.

[189] *See* Eldred v. Ashcroft, 537 U.S. 186, 188 (2003).

[190] *See id.* at 248–49 (Breyer, J., dissenting).

perhaps not in practice—have all been held to further unify the Copyright Act and the First Amendment's dual mandate of advancing American culture and freedom.[191] These disparate rules each attempt to limit producer overreach and prevent producers from capturing too much of the consumer surplus while also ensuring that the consumer surplus is generated in the first place.[192]

Technological obsolescence of historical market barriers routinely threatens this equilibrium. For example, in the late 1960s, Congress became increasingly concerned that reproduction technologies were eliminating the cost disincentives to pirate copyrighted works.[193] Concerned that the internet and digital copying technology were driving these costs down (and purportedly to harmonize American and international copyright law), Congress enacted a number of modern reforms to copyright law, under the belief that producers would stop making new works if any consumer could easily and cheaply make a copy of a work.[194] The Judiciary Committee report that accompanies the 1976 amendments to the Copyright Act explains:

> The history of copyright law has been one of gradual expansion in the types of works accorded protection. . . . [S]cientific discoveries and technological developments have made possible new forms of creative expression that never existed before. In some of these cases the new expressive forms—electronic music, filmstrips, and computer programs, for example—could be regarded as an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new legislation.[195]

The conversations surrounding generative AI do not occur in a vacuum. Many of these issues are not novel from a policy perspective. Painters thought photography was the end of the fine arts. Video killed the radio star. File-sharing

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[191] *See id.* at 219–20.

[192] *See generally* Murphy, *supra* note 173; *Eldred* at 130 (Breyer, J., dissenting) ("[T]he statute's legislative history suggests another possible justification. That history refers frequently to the financial assistance the statute will bring the entertainment industry, particularly through the promotion of exports.").

[193] Zachary L. Catanzaro, *NFT-tethered Sound Recordings and Digital Resale*, 14 Harv. J. Sports & Ent. L. 17, 37 (2023).

[194] *See id.* at 17; *see also* Patry, *supra* note 69.

[195] H.R. Rep. No. 94-1476, at 51 (1976); S. Rep. No. 94-473, at 50 (1975).

was to be the death of the music industry. Congress has amended the Copyright Act on several occasions in response to these and other advancements in technology and the invention of new mediums of expression.[196] Digital art itself has existed since the 1960s, and the threat of the unauthorized distribution of copyrighted works has dominated most of the public policy debates since.[197] A study of the historical development of the American copyright system and the changing perspectives toward the Incentive Theory show that the Theory is really a post-hoc rationale for copyright. As I discuss in the next section, copyright was, is, and continues to be, a means for advancing specific industrial policies in a manner that is perceived to advance the sciences and useful arts.

III
Beyond Incentives: Copyright as Competition Policy

A. Mechanical Reproduction in Europe

Expression predates copyright, and copyright was unknown before the printing press.[198] According to modern theory, copyright should not serve competition-related goals under the Progress Clause, but the Copyright Incentive Theory in application has always served as a *post hoc* rationale for copyright.[199] The historical development of the American copyright system shows why. Every major technological leap has, in some way, raised the same fundamental structural questions that the development of generative AI tools have. Historically, copyright is a competition policy tool first and foremost, one used by Congress to orient the marketplace toward specific economic goals. The idea of incentivizing authors to create works, while germane, is a wholly modern conceptualization of copyright.

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[196] *See* National Commission on New Technological Uses of Copyrighted Works, Final Report 3 (1978) [hereinafter CONTU Report].

[197] *See id.* ("By 1967, when Congress was considering to revise the 1909 Act, it was apparent that the copyright problems raised by computer uses had not be dealt with directly in the [amendment bills].").

[198] *See* 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 2A.02 (2023) (citing Bernard Lang, *Orphan Works and the Google Book Search Settlement: An International Perspective*, 55 N.Y.L. Sch. L. Rev. 111, 154 (2011)); *see also* Elizabeth Armstrong, Before Copyright: The French Book Privilege System 1498-1526 2 (1990) ("[A]t an early stage it was realized also that a particular book might qualify for a privilege, at the request of an author, publisher or printer.").

[199] *See* CONTU Report, *supra* note 196 (arguing that the need to modernize copyright was driven by national and international information control policy; protecting copyright holders; and promoting public access to protected works).

The starting place of our inquiry is found in the information market structures that existed around the advent of mechanical printing. The manual reproduction of books was economically labor and capital intensive before mechanical forms of reproduction.[200] Following the European Monastic tradition, monks crafted a book's raw materials, including the parchment, ink, binding materials, and linen.[201] They painstakingly hand-copied each work, a laborious and time-consuming activity.[202] This expensive process and economically inefficient exploitation of the factors of production made supply scarce, restricting the dissemination of knowledge throughout Europe.[203] In this period, due to high production costs, books were expensive luxury goods, reserved in their limited supply to the religious and political castes.[204]

This changed with the advent of mechanical printing. The mechanical reproduction of books came to Europe in 1450, when Gutenberg founded his printing press.[205] Printing, along with other socio-economic and political pressures, led to a gradual collapse of Europe's then existing monopolistic information market structures.[206] After 1436, the price of a book fell from a week's wages to less than a day's, with the average cost falling at 2.4% per annum for nearly a hundred years in the period following.[207] By the first decade of the 16th century,

[200] See Fran Rees, Johannes Gutenberg: Inventor of the Printing Press 25–26 (2006) ("Books were so valuable and costly that they were chained to tables or high shelves so they could not be removed from the room."); *see also* Ernest A. Savage, Old English Libraries: The Making, Collection, and Use of Books During the Middle Ages 81 (1999) ("You know not what it is to write, it is excessive drudgery."), https://www.gutenberg.org/cache/epub/1615/pg1615-images.html [https://perma.cc/L5EW-6NTP].

[201] Zack Kertcher & Ainat N. Margalit, *Challenges to Authority, Burdens of Legitimization: The Printing Press and the Internet*, 8 Yale J.L. & Tech. 1, 16 (2005).

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] Johann Gutenberg invented the first printing press in 1450 in the city of Mainz, Germany, and printed his first book in 1454. *See* Miriam Eliav-Fledon, The Printing Revolution 29 (2000); *see also* Robert Hoe, A Short History of the Printing Press 5 (1902).

[206] *See generally* Elizabeth L. Eisenstein, The Printing Revolution in Early Modern Europe 164–208 (2d ed., 2005); *see also* Kertcher & Margalit, *supra* note 201, at 17.

[207] *See generally* Jeremiah Dittmar & Skipper Seabold, *New Media and Competition: Printing and Europe's Transformation after Gutenberg* (Ctr. for Econ. Performance, Discussion Paper No. 1600, 2019), https://cep.lse.ac.uk/pubs/download/dp1600.pdf [https://perma.cc/5VBT-FAEB].

it is estimated that some 2 million books were printed in Europe.[208] Production grew exponentially, and the continent saw 20 million printings by 1550, and 150 million printings by 1590.[209]

Advances in production techniques also reduced the overall size and weight of books, making them easier to transport and distribute throughout Europe.[210] Falling distribution costs, coupled with larger supplies of works drove literacy rates up, which increased demand for further printings.[211] As supply increased, price fell, and literacy rates rose correspondingly in a cyclical feed-back loop.[212]

The impact of this new technology was an economy of European information marketplaces. The old hand reproduction method of creating reproductions of books created a highly elastic demand curve. Books were a luxury good, reserved for the aristocracy and religious castes of Europe. This began to change with the advent of book printing. As the technology pushed reproduction and distribution costs down, the demand for works trended toward an elastic demand curve. But the benefits of the technology were not perceived as unlimited, and regulation and monopoly soon followed.

Though initially characterized by free market competition, the book publishing industry gradually developed oligopolistic structuring due to inefficient transportation networks and prohibitive barriers to entry.[213] Paper-based books were heavy and cumbersome in bulk, constraining dissemination outside local distribution channels.[214] Copies spread via transportation links as far-flung printers produced their own print runs of works. High fixed costs and long recoupment horizons compounded barriers to entry.[215]

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[208] Mark Cartright, *The Printing Revolution in Renaissance Europe*, World Hist. Encyclopedia (Nov. 2, 2020), https://www.worldhistory.org/article/1632/the-printing-revolution-in-renaissance-europe/ [https://perma.cc/N83N-355L].

[209] *Id.*

[210] *See id.*

[211] *See id.*

[212] *See* Kertcher & Margalit, *supra* note 201.

[213] *See* Dittmar & Seabold, *supra* note 207, at 22 ("[C]ompetition within cities was salient, and that local industrial organization influenced competitive conduct in printing, because inter-city transport costs were high. Printers developed arrangements to limit competition.").

[214] *See* Cartright, *supra* note 208.

[215] *See* Dittmar & Seabold, *supra* note 207, at 144 ("Because high transport costs limited trade, historians observe that local production provides a measure of local exposure to content").

Consequently, market division agreements and governmental privileges led to increased cartelization.[216] Incumbent printers artificially restricted production runs to maximize monopolistic profits. Technological and infrastructure limitations enabled rent-seeking behaviors that transformed book publishing into a concentrated, anti-competitive industry.[217] Political and religious censorship soon followed.[218] Between 1469 and 1517, the Venetian Republic granted a series of increasingly draconian monopoly privileges over printing.[219] Similar legislation followed in France in 1475 and Germany in 1531.[220] In 1476, Caxton founded his printing press at Westminster.[221] One-hundred fifty years of English censorship followed.[222]

The first English copyright privilege was granted to the King's Printer, Richard Pynson, in 1518, with a series of royal privileges following.[223] In the aftermath of the War of the Roses, Henry VIII issued a series of Proclamations consolidating the political and religious power of England within the Crown.[224] The first list of prohibited books appeared in 1529, followed by the grant of licenses the year after.[225] Henry VIII granted the Stationer's Company a royal charter,

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[216] *Id.* at 6–7.

[217] David Finkelstein, The Book History Reader 324–43 (2002) ("Although there might be a brisk demand for books of a certain kind, the number available was limited to those that the privileged bookseller desired or was able to produce in his own shop. There could be no competition and no healthy multiplication of such books.").

[218] *See* Kertcher & Margalit, *supra* note 201, at 17–21.

[219] George Havent Putnam, Books and Their Makers during the Middle Age: A Study of the Conditions of the Production and Distribution of Literature from the Fall of the Roman Empire to the Close of the Seventeenth Century 334–35 (1896).

[220] *Id.* at 412, 439.

[221] *Famous Early English Printers: William Caxton*, Libr. of Cong., https://guides.loc.gov/english-print/famous-printers [https://perma.cc/68X2-WFCQ].

[222] William F. Patry, Copyright Law and Practice 5–11 (2000); *see* Geoffrey Alan Cranfield, The Press and Society: From Caxton to Northcliffe 1–3 (1978).

[223] *See* Patry, *supra* note 222, at 5.

[224] *See, e.g.*, Henry VIII, *Proclamation Prohibiting Heretical Books; Requiring Printer to Identify Himself, Author of Book, and Date of Publication* (July 8, 1546), reprinted in 1 Tudor Royal Proclamations 30–31(Paul L. Hughes & James F. Larkin eds., 1964) (banning the importation of heretical religious works); *see also* Ronan Deazly, *Commentary on Henrician Proclamation* (1538), Primary Sources on Copyright (1450–1900). https://www.copyrighthistory.org/cam/commentary/uk_1538/uk_1538_com_972007121733 [https://perma.cc/MSX6-H733] (noting and providing background for the Henrician Proclamation of 1539 suppressing the spread of Lutheran doctrine).

[225] Cranfield, *supra* note 222, at 1.

giving them a monopoly over the printing of books from 1557 until 1710, in an effort to further suppress foreign competition and the importation of foreign manufactured books.[226]

The Stationer's Company was empowered to inspect printing operations and seize and destroy offending equipment and publications, in service of the Crown's prerogative (or its own monopoly).[227] It further constrained book production to extract additional monopoly rents.[228]

When the Star Chamber was abolished in 1641, the cap on London printing houses was removed, and by 1660, there were nearly 60 operating within the city.[229] However, the Stationer's Company's complex licensing systems and territorial arrangements caused prices to rise steadily by as much as 40% in 1635, making books unaffordable for most day laborers.[230]

After several centuries of abuse, Parliament enacted the Statute of Anne, the first modern copyright statute, in 1709 as a means of reforming perceived market failure and redressing public outcry over the Company's monopoly abuses.[231] In 1735, the booksellers proposed an amendment that would have extended their copyright monopoly to 1756.[232] The amendment was defeated on the grounds that it would create a perpetual monopoly.[233] Prices began to decline, such that by the late 18th century, the fledgling American printing industry could not compete on price.[234] So it was the political desire to restrain printing, not a need to incentivize

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[226] Patry, *supra* note 222.

[227] *Id.*

[228] *See* Finkelstein, *supra* note 217, at 342 ("The effect of this monopoly had upon prices is illustrated by the fact that the London booksellers sold *Aesop's Fables* at 4*d* a sheet and Ovid's *Epistels* at 8*d*, [while the Cambridge University Press] cost respectively 3*d* and 5*d* a sheet."). Cambridge would later obtain an injunction against the Stationer's Guild for refusing to publish the Cambridge edition of Lily's *Grammer*.

[229] *Id.* at 342.

[230] *Id.* at 343.

[231] Patry, *supra* note 222; Tyler T. Ochoa, *Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. Copyright Soc'y 909, 909 (2002).

[232] Eldred v. Ashcroft, 537 U.S. 186, 232–33 (2003).

[233] *Id.*

[234] 1 A History of the Book in America: The Colonial Book in the Atlantic World 174 (Hugh Amory & David Hall eds., 2000) ("Americans encouraged domestic manufactures as an obvious corollary of nonimportation."); Alexander Hamilton, Report on the Subject of Manufactures (1791) ("The great number of presses disseminated throughout the Union, seem to afford an assurance, that there is no need of being indebted to foreign Countries for the printing of the Books, which are used in the United States. A

art, that characterized the early formation of copyright protection at common law. But as printing came to colonial America, a different concern came to predominate copyright theory.

B. Mechanical Reproduction in the Colonies

The first printing press came to colonial Massachusetts in 1638, when Reverend Jose Glover was expelled from the Church of England as a heretic.[235] Glover afterward contracted with a craftsman, Steven Daye, to bring his press to support the newly founded Harvard University.[236] Reverend Glover died on the Atlantic crossing, but with his widow Elizabeth's help, his machine eventually passed into the hands of Harvard, becoming the first printing press operated in colonial America.[237]

Lawful monopolization followed. The reforms of the Statute of Anne were not extended to the colonies, leaving the colonial government free to restrain the book trade on political and religious grounds.[238] Shortly after printing presses were erected in New York and Philadelphia, the General Court of the Bay Colony (the colonial government authority) permitted no other presses to operate for a period of nearly 40 years.[239] Any hope of a nascent book industry was quashed, with no major investments or changes to the American book trade for the following century.

As a result, the colonial production and distribution of printed works was difficult and proved prohibitively expensive.[240] Insufficient transportation infrastructure and an agrarian-mercantilist economy limited the sale of printed works to major coastal cities.[241] The combination of the General Court's monopoly privileges and high production and labor costs resulted in most domestically consumed books being imported from England and Europe through transatlantic

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duty of ten per Cent instead of five, which is now charged upon the Article, would have a tendency to aid the business internally.").

[235] *See, e.g.*, John A. Harrer, *Reverend Jose Glover and the Beginnings of the Cambridge Press*, 38 Procs. Cambridge Hist. Soc. 87, 89–91 (1960).

[236] *E.g.*, *id.* at 92–93.

[237] *See, e.g.*, *id.*

[238] *See* Patry, *supra* note 222, at 14–15 ("[N]o printing was permitted in Virginia until 1730. . . . Other colonies besides Virginia were also restrictive.").

[239] Harrer, *supra* note 235, at 88–89.

[240] *See, e.g.*, James Gilreath, *American Book Distribution*, 95 Procs. Am. Antiquarian Soc'y 501, 535 (1985).

[241] *See* Cathy N. Davidson, Revolution and the Word: The Rise of the Novel in America 80 (2004).

trade.[242] The Stamp Act of 1765 and Revenue Act of 1767 further increased the cost of parchment and vellum, which both created a barrier to entry in the publication business and brought increased pressures on the domestic manufacturing capacity of books.[243] The Acts also restrained internal domestic commerce amongst the colonists.[244] These high labor and capital costs factors directly influenced what works were printed and how they were disseminated to the public.[245]

In lieu of a free marketplace for literature, a nascent sharing economy for literature and ideas emerged.[246] While bookstores existed, most relied on the sale of other goods for income.[247] Early novels were expensive, and rural readership primarily relied on subscription and direct salesman to bring works to them.[248] This encouraged the development of robust public and private library systems to distribute works.[249] Small towns often established at least one library collection, making books accessible and affordable to an emergent class of readers.[250] Demand for works outpaced supply, such that an alternative economic system was necessary to satisfy consumer demand.

The colonial distribution system for books that emerged was chiefly decentralized. It consisted of informal networks of friends, laborers, agents, peddlers, bookstore owners whose income came only partially from books, and a few institutions and private individuals who imported European books.[251] The most rapid tool for reproduction in this period was localized reprints. Thomas Paine's 1776 pamphlet *Common Sense*, for example, was in such high demand that bookstore owners could not keep it in stock.[252] Many local printers turned to producing their own unauthorized copies as the pamphlet circulated through

[242] *See* Gilreath, *supra* note 240, at 507, 514–15 (discussing the importance and prevalence of imported English books in the colonial book market).
[243] *See id.*
[244] *See id.*
[245] *See* Gilreath, *supra* note 240, at 526 (discussing this dynamic's effects on the printing of *Common Sense*).
[246] *See id.* at 525.
[247] *Id.* at 516.
[248] *Id.* at 528.
[249] *See id.* at 525–26.
[250] Davidson, *supra* note 241, at 88.
[251] Gilreath, *supra* note 240, at 526.
[252] *Id.*

the colonies.[253] And while logic would presume that the Revolution should have severed the English-American transatlantic book trade and quashed the book industry in this period, some historical research suggests the possibility of an *increase* in the exchange of political literature during open hostilities. [254]

After the war, disparities in specialization of labor between England and the United States meant that English producers easily outcompeted efforts at large-scale domestic printing operations.[255] Books printed in England were cheaper to purchase in the fledgling United States than domestic works. Lord Sheffield noted that "all school and common books can be sent cheaper from Britain than they can be printed in America, or sent from Ireland."[256] The 1796 *Present State of Printing and Bookselling in America* noted "[t]he people of North America manufacture their own paper, and in sufficient quantities for home consumption, but the price of labour is still so extremely high, that it seldom answers to print any work there: at least, they have hitherto seldom ventured beyond their own laws, temporary pamphlets, and newspapers, which every State now prints in abundance."[257] Priced out of competition, the nascent domestic American book trade floundered.

In the years preceding the Constitutional Convention, a coalition of domestic publishers, led by lexicographer Noah Webster, for somewhat self-serving reasons, began lobbying state legislatures for copyright laws allegedly to bolster domestic production. All but one state enacted reform prior to the Constitutional Convention, with most modeled after the Statute of Anne. In 1783, the Constitutional Convention concluded "that nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend [sic] to encourage genius."[258]

But the question of copyright protection was not a major priority at the Convention, and no committee meeting notes survive its debate.[259] At least some delegates, including Thomas Jefferson, opposed the idea as furthering monopolies

[253] *Id.*
[254] *Id.* at 529–30.
[255] *See id.* at 530.
[256] *Id.*
[257] *Id.*
[258] PATRY, *supra* note 222, at 19.
[259] *Id.* at 23.

and the aristocracy.[260] Yet, in Federalist Paper No. 43, James Madison made his case for a federal copyright scheme, arguing that the public interest in encouraging the spread of knowledge was in harmony with the private property rights of authors.[261]

The Constitution's Progress Clause was approved with no recorded debate.[262] It grants Congress the power to "promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings."[263] But in the period between the Constitution's ratification in 1783 and 1790, it was unclear how authors acquired a copyright under the Progress Clause. In this period, Congress was petitioned by several authors who believed that Congress had to directly grant a copyright monopoly, as was the prerogative of the English monarchs.

Recognizing these issues, George Washington's State of the Union Address of 1790 called for a federal copyright scheme as a means of advancing education and for improvements in transportation infrastructure to assist in the distribution of knowledge and information throughout the United States.[264] Many of the Founding Fathers saw the spread of information and knowledge as an important democratic bulwark against tyranny.[265] The United States at this time was predominantly an agrarian economy, so the problem of the day was solving the difficulty in distribution of educational works throughout the United States. The roads, transportation system, labor conditions, and slow communications of the late 18th century created an identified form of market failure, one left unresolved as book publishers were either economically unwilling or unable to sufficiently scale production factors pre-industrialization and compete with the English printers.

The Copyright Act of 1790 attempted to address this perceived market failure, with a grant protecting "maps, charts, books . . . and manuscripts"—the tools of

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[260] *Id.*

[261] The Federalist No. 43 (James Madison).

[262] U.S. Const. art. I, § 8, cl. 8.

[263] *Id.*

[264] President George Washington, First Annual Address to Congress (Jan. 8, 1790) ("[T]here is nothing, which can better deserve your patronage, than the promotion of Science and Literature. Knowledge is in every Country the surest basis of public happiness.").

[265] Patry, *supra* note 222, at 28.

education and science.[266] The 1790 Act did not define the term "book," leading to anything not fitting within the scope being classified as a book in applications.[267] This predictably led to non-educational literary works being registered, including hotel registers, form books, circulars, syndicate articles, and compilations of information.[268] Further, the resulting confusion and overly punitive formalities found in the 1790 Act led to most authors seeking protection under state rather than federal law.[269] The 1790 Act was seen as a failure in this regard.

Washington and Alexander Hamilton saw reliance on English production as a threat to the economic development and recently won independence of the United States. Without the appropriate economic incentives for domestic manufacture, they were greatly concerned with English and European producers pricing fledgling American industrial production out of the domestic and global marketplace. The 1790 Act echoed the Federalists' platform of economic protectionism, with its scope of protection limited to domestically manufactured works produced by U.S. residents and citizens.[270] To further protect domestic manufacture of books, Congress increased book tariffs several times between 1794 and 1800, raising the tariff from 5% to 12.5%.[271]

The Copyright Act maintained this domestic protectionism in the 1831, 1909, and 1976 revisions.[272] Copyright's domestic protectionism would last until the United States acceded to the Berne Convention in 1983.[273] As part of its accession, in 1986, Congress repealed the domestic production requirements from Section 601 of the Copyright Act.[274] So, for the better part of the existence of federal copyright protection, the driving concern was protecting *domestic* reproductions of

[266] Copyright Act of 1790 §§ 1, 6 (repealed 1831).
[267] *Id.*
[268] Patry, *supra* note 222, at 30 n.91.
[269] *Id.* at 33–34.
[270] Copyright Act of 1790 § 1 (repealed 1831).
[271] Gilreath, *supra* note 240, at 531.
[272] *See generally id.*
[273] Berne Convention for the Protection of Literary and Artistic Works, Paris Revision, *done on* July 24, 1971, S. Treat Doc. No. 99-27, 828 U.N.T.S. 221.
[274] Eldred v. Ashcroft, 537 U.S. 186, 262 (2003) (Breyer, J., dissenting) (quoting S. Rep. No. 104–315, at 3 (1996)) ("The purpose of the bill is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade."); 144 Cong. Rec. H9951 (statement of Rep. Foley) (noting "the importance of this issue to America's creative community," "[w]hether it is Sony, BMI, Disney," or other companies).

works, not incentivizing authors to create new art. Congress made the public policy determination that suffering some of the deadweight losses caused by monopolistic market structure was the best means by which to foster and develop the domestic manufacturing of works.

C. Industrialization

The early 19th century brought new challenges to American information market structures. Prior to American Industrialization, a trip from New York to Chicago in this period could take 6 weeks' time. Books remained expensive, and the fledgling United States was in significant debt to France for financing its Revolution. Many school teachers had come to rely on libraries and sharing systems to access literature and other education aids. Without sufficient capital reserves or the tax structure to finance education, the federal government saw the copyright monopoly as a means of spurring private investment into the information marketplace.[275] Copyright was seen as a solution to this problem.

During the Antebellum period, two technological developments began pushing down the costs of mechanical reproduction and distribution of works. First, the rapid industrialization of the United States introduced commercial mass (re)production. Second, the railroad and the telegraph drastically reduced the cost of information sharing and the distribution of goods. The advent of the telegraph in the 1830s meant that information could be disseminated between states at rapid speed. The building of rail lines caused the journey time between New York and Chicago to fall from 3 weeks in 1830 to 2 days by 1860.[276] By 1850, nearly 9,000 miles of railway had been laid.[277] Faster information dissemination and distribution of raw materials and consumer goods fed further innovation and market demand, causing the United States to undergo a period of significant increases in productive

[275] *See* Copyright Act of 1780 (emphasis added) ("An Act for the Encouragement of *Learning*, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.") (repealed 1831); *see also* Washington, *supra* note 264 ("Nor am I less persuaded that you will agree with me in opinion that there is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is in every country the surest basis of public happiness. In one in which the measures of government receive their impressions so immediately from the sense of the community as in ours it is proportionably essential.").

[276] Dan Allosso, *Transportation, Land, Industry*, Minn. Libs. Publ'g Project, https://mlpp.pressbooks.pub/ushistory1/chapter/transportation-and-industry/ [https://perma.cc/4NZK-D73T].

[277] *Id.*

capacities and economic growth in the pre-war period.[278] And most importantly, several new technologies born of the late industrial period challenged existing copyright norms.

Several copyright reforms followed in the period of industrialization, including the protection of music compositions as a category separate from books and simplification of the deposit requirements. Starting with the Copyright Act of 1831, deposit copies were required in the district court that had jurisdiction over the author's residence, further facilitating the dissemination of knowledge capital on a decentralized basis.[279] This had the immediate effect of lowering the public's search costs in locating information which in turn further cut distribution costs. By tying the deposit to the grant, Congress had created an incentive for authors of works to make them available to the public at known locations. Later, in 1846, the Smithsonian and the Library of Congress were added as depositees.[280] It would then later shift, temporarily, to the Patent Office.[281]

The Supreme Court's first copyright decision came in the 1834 case *Wheaton v. Peters*, wherein the Court confronted the reproduction of its own decisions.[282] Concerns of a "proper" market structure permeate the case. *Wheaton* involved a claim of copyright infringement of the Court reporter's compilations of decisions and accompanying annotations.[283] The third reporter, Wheaton, had supplemented his income with these reporters.[284] The Wheaton reporters were notoriously expensive, pricing most lawyers (and the public) out of accessing them.[285] His successor, Peters, took the cases in the Wheaton reporters and republished them in an abridged volume.[286] Wheaton sued.[287] In ruling against Wheaton, and out of concern for public harm caused by the monopolization of information, the Court

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[278] *Id.*

[279] John Y. Cole, *Of Copyright, Men, & a National Library*, Libr. of Cong., https://www.loc.gov/collections/early-copyright-materials-of-the-united-states/articles-and-essays/copyright-history/ [https://perma.cc/88B3-74ES].

[280] *Id.*

[281] *Id.*

[282] *See* Wheaton v. Peters, 33 U.S. 591, 667–68 (1834).

[283] *See id.* at 592.

[284] *See id.*

[285] *See id.*

[286] *See id.*

[287] *See id.*

remarked that it "is unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this Court, and that the judges thereof cannot confer on any reporter any such right."[288]

Photography brought similar market structure concerns. Invented as early as 1816 and popularized around the late 1830s, the technology both spurred consumer demand and military applications during the Civil War.[289] During the Civil War, Union and Confederate demand for family portraits and battle scenes resulted in a consumer photography boom.[290] Military leaders recognized the strategic implications of the technology on information warfare, with both sides employing photographers to record enemy emplacements, roads, bridges, and railroads. Photography underwent rapid technological innovation in this period, resulting in lowered production costs for cameras and photographs. The invention of the tintype, which was a metal image, and the ambrotype, printed on glass, allowed for mass production of small photographs for consumers.[291] The massive popularity of photographs during the war, and to some extent, the works of war-photographer Mathew Brady, led Congress to add protection for photographic works to the Copyright Act in 1865.[292] The camera democratized art.[293] The ease of labor in capturing reality meant that anyone with the right equipment could do so. But the question of whether a copyright privilege in a photograph served the underlying goals of the Progress Clause would go unanswered for several decades.

The Copyright Act of 1870 was an attempt to modernize the Act in response to these changes in the domestic marketplace. First, it brought needed reform to

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[288] *See id.* at 668.

[289] See Nadja Hansen, *Featured Publication: Photography and the American Civil War*, Metro. Museum of Art (Apr. 30, 2013), https://www.metmuseum.org/blogs/now-at-the-met/features/2013/photography-and-the-american-civil-war#:~:text=People%20were%20dying%20so%20quickly, democratic%20change%2C%22%20says%20Rosenheim [https://perma.cc/6FLS-KDSM].

[290] *Id.*

[291] See Eric Niiler, *How Civil War Photography Changed War*, NBC News (Apr. 11, 2011, 8:48 A.M.), https://www.nbcnews.com/id/wbna42531908# [https://perma.cc/6MFX-9URW].

[292] Wendi A. Maloney, *Lincoln Authorized 1865 Copyright Legislation*, Copyright Lore (Feb. 2009), https://www.copyright.gov/history/lore/pdfs/200902%20CLore_February2009.pdf [https://perma.cc/L75C-4UDA].

[293] Kathleen Connolly Butler, *Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain through Copyrights in Photographic and Digital Reproductions*, 21 Hastings Commc'ns & Ent. L.J. 55, 59–60 (1998) (citing Trevor Fawcett, *Graphic Versus Photographic in the Nineteenth-Century Reproduction*, Art Hist., June 1986, at 185).

the deposit requirements, with the Library of Congress again serving as the sole depositee.[294] This served the dual purpose of streamlining the registration process and encouraging further development of a centralized storehouse of American culture.[295] The formalities were likewise made less punitive to encourage more authors to register and deposit works with the fledgling Copyright Office. This, coupled with another expansion in the protection of works to include paintings, drawings, chromolithographs, statues and statuaries, and models or designs, reflected the growing industrialization and new consumer marketplace within the United States. As industrial capital accumulated, massive social changes to American life occurred. As printing did several centuries before with literature, the industrial commodification of art and advent of new production technologies drove consumer demand which in turn fermented further technological innovation. The "democratization" of art had aligned the industrial capacity of the nation toward these new consumption preferences.

In 1884, the Supreme Court finally took up the question as to whether photography was copyrightable subject-matter in *Burrow-Giles v. Sarony*.[296] In 1882, photographer Sarony had captured a portrait of Oscar Wilde in his *magnum opus* photo *Oscar Wilde No. 18*.[297] Burrow-Giles Lithographic Company later made unauthorized reproduction lithographs of the work.[298] Sarony sued.[299] On appeal to the Supreme Court, the court rejected Burrow-Giles's arguments that a camera results only in a mere mechanical reproduction of nature.[300] Rather, the Court held that it was the expressive contributions of the human author to the depiction contained in the photograph that vested authorship in the work.[301] The Court recognized, for the first time, that the addition of human originality, in choosing and arranging the composition, lighting, subject-matter, and technical

[294] Cole, *supra* note 279 (quoting Charles Coffin Jewett, Annual Report of the Board of Regents of the Smithsonian Institution (1849)) ("To the public, the importance of having a central depot, where all products of the American mind may be gathered, year by year, and preserved for reference, is very great. The interest with which those in 1950 may consult this Library can only be fully and rightly estimated by the historian and the Bibliographer.").

[295] Cole, *supra* note 279.

[296] *See generally* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

[297] *Id.* at 54

[298] *Id.*

[299] *Id.*

[300] *Id.* at 59-60

[301] *Id.*

skills in capturing an image, to the capturing of raw data about the world, was sufficient under the Copyright Act.[302]

The seminal 1908 Supreme Court *White-Smith Music Publishing Co.* considered whether piano-roll players that performed perforated music copies of copyrighted musical composition infringed on the copyright in music composition.[303] The Supreme Court ruled that they did not, as the Copyright Act requires that the work be capable of human perception.[304] Congress disagreed, leading to the addition of the compulsory license for "mechanical" embodiments of musical works in the 1909 Amendment,[305] and the dispensing of the human perception requirement in the 1976 Amendment.[306] In both instances, Congress acted not to protect economic incentives to authors, but to facilitate specific market structures within the industry, which here amounted to concern over the growing cartel of music publishers and their control over the recording of music.[307]

D. Digital Media and Beyond

A full account of the impact of radio, motion pictures, and phonorecords is beyond the scope of this paper, but it is sufficient to note that they each prompted Congress to, after industry lobbying, rewrite the rules of the marketplace to favor entrenched market participants to further specific industry-related structural goals. By way of example, consumer access to audiotape recorders and record piracy led to the Sound Recording Amendment of 1971[308] and the later Audio Home

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[302] *Id.* at 60-61

[303] *See generally* White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908).

[304] *Id.* at 18.

[305] *See* Howard Abrams, *Copyright's First Compulsory License*, 26 Santa Clara High Tech. L.J. 215, 221 (2009) (citing An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, § 1(e), 35 Stat. 1075 (March 4, 1909, effective July 1, 1909)).

[306] *See* H.R. Rep. No. 94-1476, at 52 (1976).

[307] Abrams, *supra* note 305, at 219 (citing H.R. Rep. No. 60-2222 at 8 (1909), *and* S. Rep. No. 60-1108 at 8 (1909)) ("Congress concluded that '[n]ot only would there be a possibility of a great music trust in this country and abroad, but arrangements are actively being made to bring it about.'").

[308] Register of Copyrights, U.S. Copyright Office, Federal Copyright Protection for Pre-1972 Sound Recordings 11 (Dec. 2011) (citing H.R. Rep. No. 92-487 at 2 (1971)), https://www.copyright.gov/docs/sound/pre-72-report.pdf [https://perma.cc/PDE9-CHS2] ("[R]ecord and tape piracy had climbed to alarming proportions as the use of audiotapes and audiotape recorders became increasingly popular and made it easier to make and distribute unauthorized recordings on a commercial scale.").

Recording Act of 1992.[309] Photocopying technologies played a part in several exemptions defined in the 1976 amendments.[310] The danger of market disruption caused by digital filing sharing was known to Congress in the late 1960s, leading to decades worth of investigation that culminated in the enactment of the DMCA in 2001.[311] Perhaps tellingly, the word "incentive" does not appear until 130 pages into the Copyright Office's seminal 2001 DMCA report; also perhaps telling is that it arises solely in the context of the Copyright Office rejecting arguments that a digital first sale doctrine would further the Copyright Incentive Theory.[312]

While the Copyright Incentive Theory presumes that financial incentives for authors are the primary aim of copyright law, an alternative perspective is that encouraging the commodification and commercialization of artistic works is aligned with national economic policy goals. From this critical view, copyright is less about rewarding individual creators and more about facilitating the development of arts and culture as an industry that can be monetized, marketed, and controlled. Copyright law establishes mechanisms for art and creativity to be traded as commodities and granted commercial value rather than existing as freely-available public goods. Therefore, the political-economic function of copyright may be the commodification of culture over and above providing incentives to creators.

Generative AI tools, with their costless productive capabilities and ability of their outputs to serve as perfect market substitutes, require a different contextualization. If human authorship is to remain the focus of American copyright law, it can no longer do so based solely on previous conceptions of originality and the strength of the incentive rationale. Rather, the current conversation should shift toward strengthening the moral rights of human authors, which establish protections based on the personal dignity and creative identity embodied in their works, independent of the economic incentives involved. Moving forward, moral rights may provide a legal framework better suited to preserving

[309] *See* 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8B.01 (Matthew Bender rev. ed. 2023) (arguing AHRA created *sui generis* entitlements and responsibilities for manufacturers and consumers in the marketplace for digital audio recording systems).

[310] *See* 17 U.S.C. § 108 (creating copyright infringement exemption for public library and archival services in certain noncommercial circumstances).

[311] Digital Millennium Copyright Act ("DMCA") § 104, 17 U.S.C. § 1201 (1998).

[312] U.S. Copyright Off., DMCA Sec. 104 Rep. 88 (2001).

the value of human creativity itself in the age of generative AI. Congress should respond with stronger protections for integrity and attribution beyond the limited ones currently in place.[313]

Conclusion

The issue posed by generative AI is not really whether machines can be authors, but rather, whether the existing system of incentives make sense considering this new technology. Congress has repeatedly addressed this question as new forms of creation have disrupted the marketplace. As generative AI systems produce a near-infinite amount of works in a near-post-scarcity marketplace, abundance, market disruption, and the displacement of human-authored works is all but assured. But the Copyright Incentive Theory has always been a *post hoc* rationalization justifying monopolization, rather than the true basis for copyright law, leaving it ill-equipped to pave a working path going forward. The *real* public debate over generative AI art centers on moral rights in human authored works and whether data scraping those works to generate new art constitutes a mutilation or distortion under the European tradition. There are non-economic interests around attribution, integrity, and human expression that could justify maintaining the existing copyright structure. As costs vanish, a copyright system based on moral rights and intrinsic motivation may better serve the public interest than a system preoccupied with monopolistic incentives and form an area ripe for additional consideration and scholarship.

Rather than engaging in anthropomorphic debates about computer authorship, copyright policy should focus on strengthening moral rights for human authors. If Congress believes that human art deserves more protection than machine outputs, that there is something unique about human intentionality in creating new expression, then it should say so. This requires rethinking standards around derivative works, transformative fair use, and moral rights. If we accept that copyright still serves the public's interest in this new marketplace, then the coming artistic singularity calls for an evolved copyright doctrine that incentivizes generative AI's immense expressive potential for public enrichment, while preserving the integrity of the human works it builds upon. Stronger moral rights

[313] *See generally* Visual Artists Rights Act ("VARA"), Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (1990) (codified in part in 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506) (1994).

protections from generative AI data-scraping tools, requiring better attribution and better protection from algorithmic mutilation, is a start. The other, more radical abolitionist alternative is moving beyond copyright and its incentives as we approach the artistic singularity.

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BEYOND FREE MARKETS AND CONSUMER AUTONOMY: RETHINKING CONSUMER FINANCIAL PROTECTION IN THE AGE OF ARTIFICIAL INTELLIGENCE

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The rampant growth of artificial intelligence (AI) has reshaped the landscape of credit underwriting and distribution in consumer financial markets. Despite expanding consumers' access to credit, the unbridled use of AI by creditors has widened credit inequality along racial, gender, and class dimensions. Existing regulatory paradigms of consumer financial protection fail to meaningfully protect consumers against potential AI discrimination and exploitation. At its core, the failure of the existing legal regime lies in its fetishization of free markets and consumer autonomy—the two ideological pillars of neoliberalism. Judges and lawmakers who subscribe to neoliberal ideals have consistently attributed credit market defects to individual choices, rather than systemic and inherited social inequalities. Today, this neoliberal ethos continues to inform mainstream legal responses to the threats posed by AI.

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This article proposes an alternative. It argues that thinking of AI governance in purely individualist, dignitarian terms obscures the real source of algorithmic harm. Contrary to neoliberal assumptions, AI-inflicted harms in credit markets—e.g., algorithmic discrimination and exploitation—are not the result of irresponsible creditor conduct or opaque markets. Rather, they are caused by unjust relations of data production, circulation, and retainment that reflect and reproduce systemic social inequalities. Understanding algorithmic harm as both individually and socially constituted can help lawmakers move away from the outdated neoliberal paradigms that idolize individual responsibility. It also opens new avenues for legal reform. To reshape unjust data relations, this article proposes a propertarian approach to AI governance that involves: (1) reimagining the nature of data ownership, (2) creating a collective intellectual property right in data, and (3) building a collective data governance infrastructure anchored in the open digital commons.

INTRODUCTION

For decades, our legal system has embraced neoliberalism as the dominant regulatory ethos for consumer financial protection.[1] Its twin ideals—free markets and consumer autonomy—serve as the guiding principles governing the supply and underwriting of credit.[2] For markets to be free, constraints on informational flow must be removed, price distortions must be controlled,[3] and governments should not regulate absent market failure.[4] For consumers to be autonomous, markets must be transparent enough to enable unhindered consumer decision-making.[5] Viewed holistically, these two pillars of neoliberalism undergird the prevailing ideology of consumer protection: the freer the markets, the more autonomous the consumers.

The ideal of free markets finds legal expression in consumer credit reporting and disclosure laws. Such laws aim to facilitate the efficient and transparent flow

[1] *See generally* Timothy P. R. Weaver, *Market Privilege: The Place of Neoliberalism in American Political Development*, 35 STUD. AM. POL. DEV. 104 (2021) (describing neoliberalism as the guiding principle that has been increasingly reflected in U.S. policy ideas and institutional innovations).

[2] Credit underwriting is the process by which the creditor decides whether an applicant is creditworthy and should receive a loan through risk-based assessment. For further explanations, see discussion *infra* Part B n.47–48.

[3] *See* Taylor C. Boas & Jordan Gans-Morse, *Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan*, 44 STUD. COMP. INT'L DEV. 137, 143 (describing three sets of economic policies that scholars characterize as neoliberal: those that "eliminat[e] price controls" and "deregulat[e] markets;" those that "reduce the role of the state in the economy;" and those that "contribute to fiscal austerity and macroeconomic stabilization.").

[4] *See* Robert H. Lande, *Market Power Without a Large Market Share: The Role of Imperfect Information and Other "Consumer Protection" Market Failures*, (Am. Antitrust Inst., Working Paper No. 07-06, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103613 [https://perma.cc/4SN6-4HV9].

[5] *See, e.g.*, Quentin Andre et al., *Consumer Choice and Autonomy in the Age of Artificial Intelligence and Big Data*, 5 CUSTOMER NEEDS AND SOLS. 28, 37 (2018); Donna J. Hill & Maryon F. King, *Preserving Consumer Autonomy in an Interactive Informational Environment Toward Development of a Consumer Decision Aid Model*, 16 ADVANCES IN CONSUMER RSCH. 144 (1989); Klaus Wertenbroch et al., *Autonomy in Consumer Choice*, 31 MKTG. LETTERS 429, 439 (2020).

of market information. The Truth in Lending Act (TILA)[6] and the Fair Credit Reporting Act (FCRA)[7] require creditors to disclose lending terms, as well as material risks and consequences therefrom. With the enactment of these laws, Congress endorses the view that disclosure reveals the true cost of lending, which can level the playing field for creditors, and enable consumers to compare similar or substitutable products.[8]

The ideal of consumer autonomy is manifested by fair lending laws which aim to protect consumer choice and dignity in credit transactions.[9] Born out of the 1970s civil rights movement, the Equal Credit Opportunity Act (ECOA)[10] and Fair Housing Act (FHA)[11] have applied colorblind principles[12] of non-discrimination and race-and-gender-neutrality to the underwriting of consumer credit.[13] These statutes reflect the congressional view that disparate treatment[14] in credit undermines consumers' exercise of individual free choice and agency.[15]

Together, these consumer financial protection laws, which embody the twin ideals of free markets and consumer autonomy, reinforce the neoliberal ideology of individual responsibility.[16] Rather than treating credit inequality as a socially-

[6] 15 U.S.C. §§ 1601–1667f (2022).

[7] 15 U.S.C. §§ 1681–1681x (2022).

[8] *See* Anne Fleming, *The Long History of "Truth in Lending"*, 30 J. POL'Y HIST. 236, 237 (2018).

[9] *See* Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1420 (2020).

[10] *See* 15 U.S.C. §§ 1691–1691f (2022).

[11] *See* 42 U.S.C. §§ 3601–19, 3631 (2022).

[12] *See generally* Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1600 (2020) (characterizing the Supreme Court's approach to race and equal protection as both "colorblind" and "individualist").

[13] *See* 15 U.S.C. § 1691a (2022); 42 U.S.C. §§ 3601, 3604 (2022).

[14] Both the ECOA and FHA prohibit disparate treatment based on protected characteristics (*e.g.*, race, sex, marital status, age, alienage). But, under current case law, only the FHA prohibits disparate impact. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 546 (2015).

[15] *See* Stephen M. Rich, *Equal Opportunity, Diversity, and Other Fables in Antidiscrimination Law*, 93 TEX. L. REV. 437, 444, 454 (2015) (reviewing JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY (2014)) (arguing that enforcement of the disparate treatment doctrine embraces traditional equal opportunity ideals).

[16] *See* LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 1 (2009) (footnote omitted) (internal quotations omitted) ("Neoliberalism, [or] an ideological project and governmental practice mandating the submission to the free market and the celebration of individual responsibility in all realms.").

constructed systemic problem, our consumer financial protection laws deem inequality as outcomes of individual choice.[17] Absent from the regulatory toolkit is the language to describe systemic injustices, redress collective harm, or install broad social infrastructures. Over the past five decades, this ideal of individual responsibility has coalesced into a neoliberal consensus that crowded out alternative visions for our consumer financial protection regime.

However, this neoliberal consensus is now disrupted by the rise of artificial intelligence (AI) in consumer finance.[18] Increasingly, credit unions, banks, and lenders use AI to underwrite consumer credit.[19] Because AI does not need transparent market information or human actions in making credit decisions, it renders the current disclosure-based consumer protection regime[20] ineffective. Advanced machine learning[21] techniques such as deep learning (DL) can now scrape and process unimaginable volumes of data in the blink of an eye.[22] These algorithms can continually adapt and tune their parameters to reflect new informational in-

[17] *See, e.g.*, SUSANNE SOEDERBERG, DEBTFARE STATES AND THE POVERTY INDUSTRY: MONEY, DISCIPLINE AND THE SURPLUS POPULATION 84–85 (2014) ("Consumer protection essentially forms the bedrock of the neoliberal move away from the collective and rights-based social and economic protection of workers toward monetised and individualised relations, as well as market-driven forms of citizenship whereby the state simply guarantees the formal equality of exchange.").

[18] *See generally* Salomé Viljoen, *Ferment Is Abroad: Techlash, Legal Institutions, and the Limits of Lawfulness*, L. & POL. ECON. PROJECT (Apr. 20, 2021), https://lpeproject.org/blog/ferment-is-abroad-techlash-legal-institutions-and-the-limits-of-lawfulness/ [https://perma.cc/57QW-BR7E] ("Over the past several years, enthusiasm for Silicon Valley's California Ideology as a source of hope and vigor for the Western capitalist imaginary has begun to fade.").

[19] *See, e.g.*, Yizhu Wang, *Banks, Credit Unions Testing AI Models for Underwriting in Credit Cycle*, S&P GLOB. MKT. INTEL. (Oct. 10, 2023), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/banks-credit-unions-testing-ai-models-for-underwriting-in-credit-cycle-77559590 [https://perma.cc/D7BJ-4U54] (describing increasing use of AI by banks and credit unions for credit underwriting).

[20] SOEDERBERG, *supra* note 17, at 84 (describing the importance of disclosure for consumer protection in the U.S. credit industry).

[21] Machine learning is a subset of AI that can "learn from data and improve its accuracy over time without being programmed to do so." Janine S. Hiller, *Fairness in the Eyes of the Beholder: AI; Fairness; and Alternative Credit Scoring*, 123 W. VA. L. REV. 907, 910 (2021) (quoting *Machine Learning*, IBM (alteration in original) (July 15, 2020), https://www.ibm.com/topics/machine-learning [https://perma.cc/UQ8C-94VR]).

[22] *See* Roger Brown, *All That AI is ML But Not All That is AI is ML*, MEDIUM (Dec. 24, 2020), https://medium.com/nerd-for-tech/-95d38af2f9ea [https://perma.cc/L3AA-HYAJ].

take with minimal or no human supervision.[23] Due to the algorithms' black-box properties, even original programmers cannot understand some of AI's predictions.[24] Moreover, AI generates predictions about consumer creditworthiness even without credit history or formalized financial data. Instead, AI analyzes "fringe data"[25]—*e.g.*, online subscriptions, club memberships, browser history, location, and social media—information that may be irrelevant to determinations of creditworthiness.[26] This process can be entirely unsupervised and incomprehensible, undermining the fairness of credit provision.[27]

[23] Unsupervised learning discovers hidden patterns or data groups without the need of human intervention or supervision. *What is Unsupervised Learning?* IBM, https://www.ibm.com/topics/unsupervised-learning [https://perma.cc/3JJC-83KD].

[24] *See* Florian Perteneder, *Understanding Black-Box ML Models with Explainable AI*, DYNATRACE ENG'G (Apr. 29, 2022), https://engineering.dynatrace.com/blog/understanding-black-box-ml-models-with-explainable-ai/ [https://perma.cc/PL7E-SU6N] ("[C]omplex models, such as Deep Neural Networks with thousands or even millions of parameters (weights), are considered black boxes because the model's behavior cannot be comprehended, even when one is able to see its structure and weights.").

[25] "Fringe data," also known as "alternative data," refers to unconventional consumer information that may be correlated with a consumer's financial capacity, but its relevance is largely questionable. "Conventional data" refers to payment history, bank account balances, cash-flow data, and other formal credit information that directly concerns an individual's financial capacity. The increasing use of fringe data by lenders raises accountability concerns. *See generally Examining the Use of Alternative Data in Underwriting and Credit Scoring to Expand Access to Credit: Hearing Before the H. Comm. On Fin Servs.*, 116th Cong. 7 (2019) (statement of Aaron Rieke, Managing Director, Upturn) ("Expansive data sets about people's social connections, the kinds of websites they visit, where they shop, and how they talk do not have the simple, intuitive connection to each individual's ability to repay a loan. These can yield blunt stereotypes that might be predictive, but for the wrong reasons.").

[26] The credit reporting system is plagued by computer-generated inaccuracies, irrelevant and questionable information. See Brief for Center for Digital Democracy as Amici Curiae Supporting Respondents at 5–14, Spokeo, Inc. v. Robins, 578 U.S. 330 (2015) (No. 13-1339), 2015 WL 5302538. Data brokers have access not only to public information, but also private datapoints about consumers. They purchase personal data from companies and platforms that consumers do business with, combine the data with other information about the consumer, and sell repackaged data to credit underwriters and lenders. *See id.* at 10. For more information on the data brokerage industry, see FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY (2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf [https://perma.cc/NQA5-SNXX].

[27] *See, e.g.*, Robert Bartlett et al., *Consumer-Lending Discrimination in the FinTech Era*, 143 J. FIN. ECON. 30, 31 (2021).

A. Normative and Legal Implications

This article examines how AI disrupts the normative and legal underpinnings of neoliberalism embedded in our consumer financial protection regime.

From a normative perspective, AI problematizes neoliberal ideals of free markets and consumer autonomy. With regards to the free market ideal, AI challenges the notion that prices can ever be transparent or neutral. In digital environments where AI could use scraped data to manipulate consumer behavior and tailor-recommend products at inflated prices,[28] prices do not reflect the objective market value that consumers (as market agents) ascribe to their preferences.[29] With regard to the consumer autonomy ideal, AI defies the prevailing understanding that more information is always better for consumers. Through manipulating personal data and inundating consumers with information, AI can easily distract consumers from their true product preferences.[30] Under the psychological mech-

[28] *See generally* SHOSHANNA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 11—12 (2019) (arguing that contemporary advances in digital information technologies have ushered an era of "surveillance capitalism" which operates by transforming human experiences into behavioral data and enabling companies to not only predict but also shape consumer behavior at scale). AI perfects surveillance capitalism by making it easier for companies to shape consumer behavior and expectations through "social engineering." *See* Stu Sjouwerman, *How AI Is Changing Social Engineering Forever*, FORBES (Mar. 26, 2023), https://www.forbes.com/sites/forbestechcouncil/2023/05/26/how-ai-is-changing-social-engineering-forever/?sh=cadfcb8321b0 [https://perma.cc/6974-64NC] ("Social engineering is the art of manipulating, influence or deceiving users to gain control over a computer system."). For example, AI can enable advanced forms of social engineering attacks, through using large language models to conduct phishing and using generative AI to make deepfakes more realistic. *Id.*

[29] *See, e.g.*, Robert Bartlett et al., *Consumer-Lending Discrimination in the FinTech Era* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25943, 2019), https://www.nber.org/system/files/working_papers/w25943/w25943.pdf [https://perma.cc/35TM-4QJ6] (empirically discussing rent-extraction in algorithmic lending); *see also* Evgeny Morozov, *Digital Socialism? The Calculation Debate in the Age of Big Data*, 116/117 NEW LEFT REV. 33, 35 (2019) (normatively discussing the implications of AI-powered rent-extraction for the free market pricing system in digital consumer markets) ("The [argument] that Big Data clogs the operation of the price system [has] also been made: some observers go as far as to claim that the price signals of today's data-saturated markets, where venture capitalists, sovereign-wealth funds and deep-pocketed tech platforms subsidize services to the point where no one really knows what they cost, resemble those of the Soviet system in the years before its final breakdown.").

[30] *See generally* BARRY SCHWARTZ, THE PARADOX OF CHOICE: WHY MORE IS LESS (2004); David M. Grether & Louis L. Wilde, *Consumer Choice and Information: New Experimental Evidence*, 1 INFO. ECON. & POL'Y 115 (1983).

anism of confirmation bias,[31] overwhelmed consumers can easily agree to terms against their best interests.[32] Thus, widespread, unrestrained adoption of AI solutions in the consumer financial market can undermine both free choice and market transparency.

From a legal perspective, AI exposes the blind spot of individualist consumer protection regimes; its commitment to formal equality conceals systemic inequalities. Existing disclosure and fair lending laws embrace the assumptions of market neutrality and formal equality of economic opportunities without recognizing the substantive, systemic inequalities in credit provisions.[33] Consequently, they adopt individual-based solutions to credit inequality, which are inherently ill-fit for systemic problems. Both the ECOA[34] and TILA[35] look exclusively to creditors' individualized conduct when the laws should instead look to the parties' market relations.

Essentially, neoliberalism's emphasis on formal equality and individualism obscures the source of algorithmic harm: *unjust market relations*. AI aggregates

[31] *See generally* Lorenz Goette et al., *Information Overload and Confirmation Bias* (Cambridge Working Papers in Econ., Paper No. 2020/06, 2019).

[32] *See, e.g.*, Hao Zhang et al., *Consumer Reactions to AI Design: Exploring Consumer Willingness to Pay for AI-Designed Products*, 39 PSYCH. & MKTG. 2171, 2183 (2022); Ilker Koksal, *Artificial Intelligence May Know You Better Than You Know Yourself*, FORBES (Feb. 27, 2018), https://www.forbes.com/sites/ilkerkoksal/2018/02/27/artificial-intelligence-may-know-you-better-than-you-know-yourself/?sh=5714a2b4058a [https://perma.cc/BA3A-BRNR].

[33] *See generally* Kate Sablosky Elengold, *Consumer Remedies for Civil Rights*, 99 B.U. L. REV. 587 (2019).

[34] Liability for a disparate impact violation under the ECOA hinges on whether the creditor has reasonably (objective standard) sought out less discriminatory alternatives to pursue legitimate business interests notwithstanding any harms inflicted on consumers. 12 C.F.R. § 202 (2023); FED. DEPOSIT INS. CORP., CONSUMER COMPLIANCE EXAMINATION MANUAL IV-1.1 (2023), https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/compliance-examination-manual.pdf [https://perma.cc/9UPS-EA4V].

[35] *See* SOEDERBERG, *supra* note 17, at 84 ("Based on economic assumptions of rational individualism, TILA was not designed to protect borrowers in terms of the price of the loan (*e.g.*, interest rates and fees), but instead to ensure that they were given a 'choice' (freedom) among lenders."). TILA relies on disclosure as a primary method to protect consumers. Specifically, TILA requires creditors to disclose all the specifics of a given loan to protect consumers. *See id.* Moreover, good faith compliance (subjective standard) shields creditors from civil liability under TILA. CFPB, LAWS AND REGULATIONS: TRUTH IN LENDING ACT 5 (2015), https://files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf [https://perma.cc/8MYE-7NJP].

data of specific consumers in unaccountable ways and derives knowledge about general consumer groups from this aggregated data (*i.e.*, knowledge discovery); this affects both consumers within direct transactional relations with creditors and nonparties.[36] Whether intentional or not, creditors' widespread use of AI for credit underwriting may reinforce unjust market relations between creditors and all consumers. This occurs because creditors, as owners and users of AI systems, control the channels of consumer data production, circulation, and retainment.

B. Key Concepts and Definitions

Before delving into the details, it is necessary to first clarify some key concepts being invoked throughout this article:

(i) *Artificial Intelligence*: When this article uses the term AI, it focuses on a subset of machine learning,[37] or deep learning (DL), that is currently being deployed by FinTech lenders to assess and underwrite consumer credit.[38] DL uses a layered decision-making structure called artificial neural networks, which simulates the neural networks of a biological brain.[39] Like other machine learning techniques, DL algorithms operate by harvesting training data, extracting features from datasets, learning from these features, and "apply[ing] what they learned to larger datasets to determine or predict something about reality."[40] The key difference is that, while earlier iterations of machine learning required human instructions to extract features from data inputs, DL recognizes patterns automatically.[41] What this means is that a DL algorithm can engage in its own feature extraction, continuously learn from past mistakes, and self-adjust future interactions with con-

[36] *See* Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 628 (2021) (explaining how creditors can use data to shape interactions with all those "shar[ing] population features").

[37] Machine learning is a way of training an algorithm. Whereas conventional knowledge-based algorithms are built on decision trees and programming instructions controlling how the algorithm should process data, machine learning algorithms are given a large set of data with minimal instructions. Human intervention is limited to selecting data inputs for training and labeling the data outputs. Ways to do this include decision-tree training, clustering, reinforcement training, and Bayesian networks. *See* Ignacio N. Cofone, *Algorithmic Bias Is an Information Problem*, 70 HASTINGS L.J. 1389, 1395 (2019).

[38] *See generally* Yinan Liu & Talia Gillis, *Machine Learning in the Underwriting of Consumer Loans* 8-9 (Harvard L. Sch., Case Study CSP057, 2020).

[39] Cofone, *supra* note 37 at 1395.

[40] *Id.*

[41] *See id.*

sumer data inputs each time it makes a prediction.[42] After a few iterations, the DL model matures its decision logic by eliminating noise data that is contradictory or irrelevant.[43] Although FinTech lenders and creditors also use other AI technologies for credit underwriting, their use of DL models currently raises regulatory concern due to their opaqueness and self-learning capabilities.[44] Regulators' primary concern is that DL models often use concepts that produce unpredictable outcomes.[45]

(ii) *Algorithmic Harm*: This article identifies two sources of algorithmic harm: (1) algorithmic decisional harm, which refers to the harm that consumers incur when algorithms exploit consumers (through price discrimination)[46] by taking advantage of their market-induced insecurities or cognitive flaws through the use of biased information that the algorithm has garnered about individual consumers or consumer groups,[47] and (2) algorithmic informational harm, which refers to the harm that consumers suffer due to how information about them (whether consumer-owned or within their reasonable expectations of privacy) is collected, processed, and engineered to construct archetypes of consumer preferences for market usage.[48] Whereas the former category describes harms associated with problematic outputs, the latter describes harms associated with problematic inputs.

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[42] *See* Brown, *supra* note 22.

[43] *See* Jason Brownlee, *Why Optimization is Important in Machine Learning*, Mach. Learning Mastery (Oct. 12, 2021), https://machinelearningmastery.com/why-optimization-is-important-in-machine-learning/#:~:text=Function%20optimization%20is%20the%20reason,in%20a%20predictive%20modeling%20project. [https://perma.cc/64N6-R3NN].

[44] The Consumer Financial Protection Bureau is currently contemplating regulatory action against users of DL algorithms. *See CFPB Acts to Protect the Public from Black-Box Credit Models Using Complex Algorithms*, CFPB (May 26, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-acts-to-protect-the-public-from-black-box-credit-models-using-complex-algorithms/ [https://perma.cc/RB9X-RWTQ].

[45] *See, e.g.*, Waddah Saeed & Christian Omlin, *Explainable AI (XAI): A Systematic Meta-Survey of Current Challenges and Future Opportunities*, 263 KNOWLEDGE-BASED SYS., Mar. 2023, at 3 ("Black-box AI systems are being utilized in many areas of our daily lives, which could result[] in unacceptable decisions, expecially those that may lead to legal effects. Thus, it poses a new challenge for the legislation.").

[46] *See* discussion *infra* Part I.

[47] *See generally* Oren Bar-Gill, Cass R. Sunstein & Inbal Talgam-Cohen, *Algorithmic Harm in Consumer Markets* 19–23 (Harvard L. Sch., Discussion Paper No. 1091, 2023).

[48] *See* Viljoen, *supra* note 36, at 586.

(iii) *Knowledge Discovery*: This refers to the process by which data (*e.g.*, digital footprint, market information, online records) regarding any consumer group or individual is discovered—that is, through scraping, mining, and aggregating.[49] Data discovered via this process is then tuned and optimized to generate behavioral insights (*i.e.*, knowledge) about consumers who are subjects of algorithmic decision-making. Machine learning is a technique to conduct knowledge discovery. By way of illustration, machine learning generates predictions through the following repeating steps: (1) data gathering and cleansing; (2) splitting the data into a training and a testing dataset; (3) training the predictive model with training dataset based on the algorithm's instructions; (4) validating the model with the testing dataset.[50]

(iv) *Consent Manufacturing*: This refers to processes of information control that manipulate consumer desire and influence consumers to make market decisions against their interests. In AI-mediated credit markets, consent-manufacturing takes two forms: (1) creation of personalized information silos that control expectations of consumers who engage in a credit transaction with an AI-informed creditor; and (2) production of generalized knowledge about group consumption behaviors designed to manipulate prospective consumers and nonparties to the credit transaction.[51]

(v) *Credit Underwriting*: This refers to the practice of underwriting consumer credit through risk-based assessment of consumer creditworthiness.[52] Typically,

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[49] *Cf.* Colin Shearer, *The CRISP-DM Model: The New Blueprint for Data Mining*, 5 J. DATA WAREHOUSING 13 (2000) (describing one method of knowledge discovery).

[50] *See, e.g.*, Tony Yiu, *Understanding Random Forest: How the Algorithm Works and Why it Is So Effective*, TOWARDS DATA SCI. (Jun. 12, 2019), https://towardsdatascience.com/understanding-random-forest-58381e0602d2 [https://perma.cc/G6Y2-BUCS]; *see also* Paul Wanyanga, *Credit Scoring using Random Forest with Cross Validation*, MEDIUM (Feb. 5, 2021), https://medium.com/analytics-vidhya/credit-scoring-using-random-forest-with-cross-validation-1a70c45c1f31/ [https://perma.cc/SZX3-33EJ].

[51] *See* discussion *infra* Part I.

[52] *See* FDIC, RISK MANAGEMENT EXAMINATION MANUAL FOR CREDIT CARD ACTIVITIES 40 (2007), https://www.fdic.gov/regulations/examinations/credit_card/pdf_version/ch7.pdf [https://perma.cc/KB8S-U7SE]. If the creditor accepts the consumer's application for a loan, then the creditor calculates an estimated price range for the risk-return tradeoff that would render the credit extension profitable; NORMAN E. D'AMOURS, NAT'L CREDIT UNION ADMIN., RISK-BASED LENDING (1999), https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/risk-based-lending [https://perma.cc/D2YW-N7CJ].

creditors base their decisions to extend or deny credit to a consumer on the following considerations: (1) the probability of default or delinquency (*i.e.*, consumer credit risk); (2) the opportunity cost of underwriting (*i.e.*, expected return); (3) the possibility of loan recovery for the type of financial product offered, factoring in the creditor's asset portfolio (*i.e.*, risk adjustment).[53] If the creditor accepts the consumer's application for a loan, then the creditor calculates an estimated price range for the risk-return tradeoff that would render the credit extension profitable.

Traditionally, creditors rely on the credit reports issued by credit bureaus (*e.g.*, Equifax, Experian, and TransUnion) to conduct risk-based lending.[54] Over the past three decades, credit scores and automated scoring systems have become the dominant method for underwriting consumer credit.[55] Regulators have criticized credit reports and credit scores as systematically disadvantageous to consumers with thin credit histories or lack of prior engagement with the banking system.[56] In the last five years, creditors have increasingly shifted to AI to assess and underwrite consumer credit.[57] The rise of AI credit underwriting coincided with the emerging practice of using alternative "fringe data" to assess consumer

[53] *See generally* FDIC, *supra* note 52, at 40.

[54] *See, e.g.*, Lindsay Konsko & Bev O'Shea, *Credit Score vs. Credit Report: What's the Difference?* NERDWALLET, https://www.nerdwallet.com/article/finance/credit-score-vs-credit-report-whats-difference [https://perma.cc/2E8W-B667] (last updated Nov. 7, 2023) ("When you apply for a credit card, apartment rental, mortgage or car loan, two things help would-be lenders assess the likelihood that you'll pay as agreed: your credit scores and your credit reports.").

[55] *See What Are Credit Scoring and Automated Underwriting?*, FED. RSRV. BANK OF ST. LOUIS (Jan. 1, 1998), https://www.stlouisfed.org/publications/bridges/winter-1998/what-are-credit-scoring-and-automated-underwriting [https://perma.cc/QFS4-UYVM] (explaining how automated scoring is "poised to sweep through" credit underwriting, particularly to small businesses); *see also How the World of Credit Scoring Has Changed Over the Past Decade*, VANTAGESCORE (Jun. 24, 2020), https://www.vantagescore.com/newsletter/how-the-world-of-credit-scoring-has-changed-over-the-past-decade/ [https://perma.cc/7XVP-FC54].

[56] *See, e.g.*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT TO CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT S-1 (2007), https://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf [https://perma.cc/D3YD-STD8].

[57] *See* Julapa Jagtiani & Catherine Lemieux, *The Roles of Alternative Data and Machine Learning in Fintech Lending: Evidence from the LendingClub Consumer Platform* 1 (Fed. Rsrv. Bank of Phila., Working Paper No. 18-15/R, 2019) ("The use of alternative data sources, big data and machine learning (ML) technology, and other complex artificial intelligence (AI) algorithms could also reduce the cost of making credit decisions . . . ").

creditworthiness, which does not require formalized credit information used by conventional credit reporting and scoring.[58] Bankers and FinTech lenders tout the use of AI as the panacea to enhance credit access for the "unbanked" and the "underbanked" consumers.[59] Its usage is most concentrated in the underwriting of unsecured personal loans and credit cards.[60] From 2015 to 2019, FinTech lenders nearly "doubled their share" in the unsecured personal loan market and "now account for 49% of originated loans."[61] Auto-lending[62] and small business lending[63] are also areas where machine learning algorithms are used for credit underwriting.

C. Analytical Roadmap

The remainder of this article proceeds as follows. Part I investigates two questions that lie at the heart of this article: How are AI technologies being introduced in ways that intensify systemic credit inequalities? To the extent that AI is being used to exploit consumers through the extraction and commodification of consumer data, where is the locus of algorithmic harm in these spaces?[64] To

[58] *See generally* Aite Group, *Alternative Data Across the Loan Life Cycle: How Fintech and Other Lenders Use It and Why*, EXPERIAN 7 (2018), https://www.experian.com/assets/consumer-information/reports/Experian_Aite_AltDataReport_Final_120418.pdf [https://perma.cc/KQ4V-DZNF].

[59] *See, e.g.*, *The Impact of Artificial Intelligence on Financial Inclusion*, YDATA (Nov. 23, 2022), https://ydata.ai/resources/the-impact-of-artificial-intelligence-on-financial-inclusion [https://perma.cc/6DFH-C8F8] ("The use of AI can significantly assist the unbanked population to receive quality and unbiased financial services."); *Financial Inclusion in Banking Through Artificial Intelligence*, PWC (Jan. 7, 2020), https://www.pwc.com/us/en/industries/financial-services/library/financial-inclusion-through-artificial-intelligence.html [https://perma.cc/4WDP-5SAU] ("AI [can] help provide affordable credit without sacrificing profitability.").

[60] *See* FINREGLAB, THE USE OF MACHINE LEARNING FOR CREDIT UNDERWRITING: MARKET & DATA SCIENCE CONTEXT 25 (2021), https://finreglab.org/wp-content/uploads/2021/09/The-Use-of-ML-for-Credit-Underwriting-Market-and-Data-Science-Context_09-16-2021.pdf [https://perma.cc/A29H-WX5F] ("Credit cards and unsecured personal loans (including point-of-sale loans) are the consumer finance asset classes in which the use of machine learning models to make credit decisions is most advanced.")

[61] *Id.*

[62] *See generally* Becky Yerak, *AI Helps Auto-Loan Company Handle Industry's Trickiest Turn*, WALL ST. J. (Jan. 3, 2019), https://www.wsj.com/articles/ai-helps-auto-loan-company-handle-industrys-trickiest-turn-11546516801 [https://perma.cc/PE9M-JLA3].

[63] *See generally* Trevor Dryer, *How Machine Learning Is Quietly Transforming Small Business Lending*, FORBES (Nov. 1, 2018), https://www.forbes.com/sites/forbesfinancecouncil/2018/11/01/how-machine-learning-is-quietly-transforming-small-business-lending/?sh=2b29155a6acc [https://perma.cc/6K46-PXTY].

[64] In this article, the term "locus of algorithmic harm" refers to the individuals affected by AI and the ways such harm materializes in the daily economic lives of consumers. To identify the locus of algorithmic

answer these questions, Part I articulates a theory of price engineering and consent manufacturing to explain why and how AI technologies have been used to perpetuate unjust market conditions for credit access.

Part II explains why the contemporary consumer financial protection regime, informed by the neoliberal ideals of free markets and consumer autonomy, fails to address the risks of algorithmic harm. The principal reason for failure is that the existing fair lending and disclosure laws overly fixate on protecting individual market freedom with minimal regard to systemic and relational inequalities. As this Part aims to demonstrate, the neoliberal idolization of consumer free choice in the credit industry traces its roots to federal credit legislation that began in the 1970s.

Part III criticizes two dominant legal proposals on the table: algorithmic input scrutiny and regulatory technology. Despite correctly identifying the source of algorithmic harm, such proposals do not interrogate the flawed assumptions of free markets and consumer autonomy. Their solutions tend not to venture beyond the classic neoliberal arguments for data transparency and consumer education.[65] The incompleteness of these proposals often leads to wrongheaded solutions that ultimately reinforce unjust market relations.

Part IV proposes alternative pathways to build AI accountability. It lays out steps to reshape the presently unjust market relations of data production, circulation, and retainment through (1) reimagining the nature of data ownership, (2) creating a collective intellectual property right in data, and (3) building a collective data governance infrastructure anchored in the open digital commons.

harm, this article explores the process of algorithmic exploitation, the pathways of algorithmic harm, and effect of such harm on consumers.

[65] *See generally* Bar-Gill, *supra* note 47, at 33–52 (outlining proposed reforms).

I
CURRENT LANDSCAPE OF ALGORITHMIC EXPLOITATION

AI is transforming the field of consumer credit. Since the mid-2010s, AI has become exponentially more accessible, sophisticated, and commercializable.[66] A 2018 Fannie Mae report found that 27% of mortgage originators used machine learning and artificial intelligence in their origination processes while 58% of mortgage originators expected to adopt the technology within two years.[67] In a 2020 lender survey, approximately 88% of U.S. lenders reported that they planned to invest in AI applications for credit risk assessment.[68] In the U.K., 72% of financial services firms use machine learning or some variation of AI in their businesses.[69] With the release of advanced DL technologies in 2023—including Generative AI and large language models that utilize artificial neural networks—AI has become more deeply integrated into the consumer underwriting industry.[70] Within this decade, it is exceedingly likely that AI credit underwriting will become the new market imperative.

The rapid adoption of AI in the credit market has spawned a range of responses. On one end of the spectrum, FinTech and banks have painted a rosy image. They argue that AI can help creditors revitalize so-called credit deserts by reaching the unbanked and underbanked.[71] For them, AI's ability to amass fringe

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[66] *See generally* Makada Henry-Nickie, *How Artificial Intelligence Affects Financial Consumers*, BROOKINGS INST. (Jan. 31, 2019), https://www.brookings.edu/articles/how-artificial-intelligence-affects-financial-consumers/ [https://perma.cc/U6UW-ELEV].

[67] *Mortgage Lender Sentiment Survey: How Will Artificial Intelligence Shape Mortgage Lending?* FANNIE MAE 10 (2018), https://www.fanniemae.com/media/20256/display [https://perma.cc/H4UV-SHA3].

[68] *See* FINREGLAB, THE USE OF MACHINE LEARNING FOR CREDIT UNDERWRITING: MARKET & DATA SCIENCE CONTEXT, *supra* note 60, at 22–23.

[69] *See* Liz Lumley, *Large Language Models Advance on Financial Services*, THE BANKER (Sep. 3, 2023 11:03 AM) https://www.thebanker.com/Banking-strategies/Investment-banking/Large-language-models-advance-on-financial-services [https://perma.cc/X2VV-QBF5] (citing *Machine Learning in UK Financial Services*, BANK OF ENG. (Oct. 11, 2022) https://www.bankofengland.co.uk/report/2022/machine-learning-in-uk-financial-services [https://perma.cc/Y2NH-8YDU]).

[70] *See, e.g.*, Miriam Fernandez, *AI in Banking: AI Will Be an Incremental Game Changer*, S&P GLOB. (Oct. 31, 2023), https://www.spglobal.com/en/research-insights/featured/special-editorial/ai-in-banking-ai-will-be-an-incremental-game-changer [https://perma.cc/V9H2-U9P3]

[71] *E.g.*, Arvind Nimbalker, *Enterprise Finance and AI: Bridging the Financing Gap and Reaching the Credit Invisibles*, NASDAQ (Feb. 4, 2022), https://www.nasdaq.com/articles/enterprise-finance-and-ai%3A-bridging-the-financing-gap-and-reaching-the-credit-invisibles [https://perma.cc/P896-URZU].

data and gain insights about consumers' market behavior presents a valuable business opportunity: creditors will be able to lend to consumers who were previously denied credit due to the lack of formalized credit information.[72] In the meantime, markets will work on their own without government regulation. On the opposite end of the spectrum, regulators and consumer advocates have expressed concern that the unbridled use of AI can encroach data privacy and erode due process.[73] As creditors delegate credit decisions to AI, the credit-underwriting process can become less transparent, which will make consumer litigation under the fair lending laws more difficult.[74]

The reality, however, is that both responses evade the root problem. FinTech and banks are wrong to assume that free markets will eliminate credit inequalities. Regulators and consumer advocates are right to worry about AI, but they have misdiagnosed the problem as the erosion of consumer autonomy and free choice. As this Part seeks to illustrate, the true source of algorithmic harm of AI credit-underwriting is unjust relations of data production, circulation, and control that dictate the outcome of AI's knowledge discovery processes. It is harmful, not because it is more discriminatory or intrusive than credit decisions made by human loan officers, but because AI can direct creditors' market power towards more exploitative domains of credit consumption through engineering price-signals and manufacturing consumer consent.[75]

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[72] *E.g.*, *Socially Responsible Banking: A Digital Path to Financial Inclusion*, PwC, https://www.pwc.com/us/en/industries/financial-services/library/financial-inclusion-through-artificial-intelligence.html [https://perma.cc/QKN9-UZAA].

[73] PAM DIXON & ROBERT GELLMAN, WORLD PRIV. F., THE SCORING OF AMERICA: HOW SECRET CONSUMER SCORES THREATEN YOUR PRIVACY AND YOUR FUTURE 10 (2014), https://www.worldprivacyforum.org/wp-content/uploads/2014/04/WPF_Scoring_of_America_April2014_fs.pdf [https://perma.cc/F35J-WZ3A] ("[T]hose who create unregulated scores have no legal obligation to provide Fair Information Practices or due process to consumers."); *cf. CFPB Acts to Protect the Public from Black-Box Credit Models Using Complex Algorithms*, *supra* note 44, at 6.

[74] *See* Patrice Alexander Ficklin, Tom Pahl & Paul Watkins, *Innovation Spotlight: Providing Adverse Action Notices When Using AI/ML Models*, CFPB BLOG (Jul. 7, 2020), https://www.consumerfinance.gov/about-us/blog/innovation-spotlight-providing-adverse-action-notices-when-using-ai-ml-models/ [https://perma.cc/Q4S5-H2D6].

[75] This does not imply that engineered prices and manufactured consent are phenomena specific to AI-mediated markets. Rather, my argument here is much narrower: the degree of price-manufacturing and consent-manufacturing is stronger in AI-mediated markets than in pre-AI markets. In the pre-AI market society, price-engineering and consent-manufacturing occurs mostly through mass culture, marketing, and

A. How Does AI-Based Credit Underwriting Harm Consumers?

1. Algorithmic Decisional Harm

How does a lender's use of advanced credit-underwriting algorithms generate risks of consumer exploitation? To thoroughly understand the current state of algorithmic exploitation, consider three scenarios:

Scenario A_1: Suppose a creditor is seeking to expand its business into a new community. The creditor purchases from data brokers a right to access a private database containing vast volumes of alternative data regarding what people in the target community consume, purchase, desire, and browse online. This private database sources its data from a wide range of intermediaries that collect personal data from mobile apps, websites, tracking devices, and social media—and it happens to include data about me collected from my daily iPhone usage. To make sense of the information gathered from this private database, the creditor uses an advanced DL algorithm to summarize its patterns and generate predictions. With this data, the algorithm reveals that my family currently suffers from a short-term liquidity crisis because I have lost my manufacturing job. It also learns, from reading my search history, that I need quick cash to pay medical expenses for my uninsured family member. Based on this information, the algorithm can micro-target me with predatory advertisements and recommend a loan that could allow me to defer interest payments for the first month (but I will have to pay a higher compounding interest after the first month according to the terms of agreement). I accept the terms because I do not have alternatives.

Scenario A_2: Suppose that, after one month, I am lucky enough to find a new job and my financial situation has improved. I am no longer in need of short-term loans, but I do not yet have enough cash to pay off the entire principal and interest accrued from my previous debt. Again, with the aid of a DL algorithm, the creditor can recommend a new package that allows me to further defer the interest,

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other methods of manipulating consumer demand. The mechanisms that companies and states use to artificially manipulate demand to match supply are well studied by social theorists. *See generally* EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (1988).

but under the condition that I borrow more. I end up accepting a combined loan package that is much more costly than others who are similarly situated.

Scenario A_3: Now, suppose further that another individual from my community who has similar income levels, family obligations, savings, and consumption levels is looking for new sources of credit. Like me, she has low credit scores and struggled to obtain loans from large banks. Using the information harvested from me, the AI-informed lender can engage in the same pattern of microtargeting against her and trap her into a cycle of indebtedness.

What distinguishes these three scenarios? *Scenario A_1* exemplifies what economists identify as first-degree price discrimination (FDPD). FDPD occurs when businesses charge the maximum possible price for each unit of goods or services consumed by the consumer.[76] *Scenario A_2* exemplifies what economists call second-degree price discrimination (SDPD). SDPD occurs when businesses charge different prices for different quantities consumed.[77] Finally, *Scenario A_3* exemplifies third-degree price discrimination (TDPD). TDPD occurs when businesses charge different prices to different consumer groups.[78] These three forms of price discrimination differ from each other in terms of the relationship and direction of exploitation between sellers and buyers in a market transaction.

Conventionally, FDPD, SDPD, and TDPD occur on separate domains. Standard economics textbooks generally characterize price discrimination as symptoms of market failure, caused by either the lack of competition or lack of informational transparency.[79] FDPD (also known as *perfect* price discrimination) occurs due to informational asymmetries between creditors and consumers on a direct and discrete basis, which commonly manifests in the form of "take-it-or-leave-it" situations.[80] SDPD (also known as *nonlinear* price discrimination) occurs due to

[76] *See* Alexandra Twin, *What Is Price Discrimination, and How Does It Work?*, INVESTOPEDIA, https://www.investopedia.com/terms/p/price_discrimination.asp#:~:text=In%20pure%20price%20discrimination%2C%20the,each%20group%20a%20different%20price [https://perma.cc/5237-XFEC] (last updated Jun. 13, 2022).

[77] *See generally id.*

[78] *See generally id.*

[79] *E.g.*, Hal R. Varian, *Price Discrimination*, *in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 597 (Richard Schmalensee & Robert Willig eds., 1989).

[80] *E.g.*, *id.* at 603–04.

the absence of consumer bargaining power and the inability to exit an exploitative business relationship with the creditor.[81] TDPD (also known as *market-wide* price discrimination) occurs due to monopolies over a coveted resource or informational failures across similarly situated consumers who would have shared the same market preferences absent the monopoly.[82] By definition, the three domains of price discrimination must remain separate because each domain correlates with a failure in a different market relationship.

However, in the age of AI, the three domains of price discrimination are no longer separate. Rather, these domains build on each other and intensify their exploitative effects. The AI-informed creditor's microtargeting in *Scenario* A_1 paved the foundations for further exploitation that occurred in *Scenario* A_2. Using the same information extracted from the consumer, the creditor in *Scenario* A_3 can now subject another consumer that is not within the privity of contract with the initial consumer to exploitative lending terms. The creditor's use of AI for credit-underwriting allows each form of price discrimination to overlap; advanced AI models can use data garnered from one consumer to make predictions about other members of the consumer group based on classifications from the knowledge discovery process. Moreover, with the assistance of AI, creditors can more accurately target vulnerable consumers through scraping, processing, and analyzing mass volumes of consumer data obtained from data aggregators. AI drastically lowers the cost for creditors to engage in these three levels of price discrimination.

2. Algorithmic Informational Harm

In addition to causing decisional harms through price discrimination, AI-based credit underwriting can cause informational harms depending on how the AI model intakes data. Typically, consumers suffer two types of informational harm—(1) individual informational harm, which refers to "harm[s] that a data subject may incur from how information about [individuals] is collected, processed, or used,"[83] and (2) social informational harm, which refers to the "harms that third-party individuals may incur when information about a data subject is col-

[81] *E.g.*, *id.* at 611–13.
[82] *E.g.*, *id.* at 617–19.
[83] Viljoen, *supra* note 36, at 586.

lected, processed, or used."[84] To understand the two forms of informational harm, consider two scenarios:

Scenario B_1: Suppose a FinTech lender uses an advanced DL algorithm to underwrite consumer credit and evaluate creditworthiness. The target borrower whom the lender seeks to evaluate does not have a FICO credit score. She also lacks any other formal credit history that is indicative of creditworthiness. In fact, the borrower belongs to an underrepresented minority group whose members historically had limited prior engagement with the formal banking system (i.e., credit invisible consumers). Undeterred by the lack of available credit information, the lender purchases a right to access a nonpublic database that sources data from people's mobile apps, online subscriptions, browser history, social media, and other "fringe data." The database includes the borrower's sensitive personal medical information and records of hospital visits. The lender then instructs its DL algorithm to scrape data from the nonpublic database and trains the algorithm to make predictions about the borrower's likelihood of default. Since the frequency of medical visits and the borrower's condition is positively correlated with indebtedness, the algorithm gave the borrower a low hypothetical credit score and computed a rate of lending return based on that information. Without knowing this data, the FinTech lender used the algorithm's results and offered the borrower a costly short-term loan with unfavorable rates based on the assumption that she is at a high risk of default. Here, the borrower suffered *individual informational harm* because her sensitive medical data was being used for a different, unrelated purpose that resulted in her getting a low hypothetical credit score.

Scenario B_2: Suppose the same facts as above, except that the algorithm also scraped data from other people who are similarly situated as the initial borrower. After analyzing the profiles of 1,000 individuals, the algorithm finds out that a particular minority group disproportionately suffers from the same medical conditions as the initial borrower. In fact, people from the same cultural heritage who share the same dieting habits are 50% more likely to develop the medical condition than the population average. Defining this pattern as relevant information, the algorithm factors that disparity into its learning process. When the next

[84] *Id.*

borrower comes to the same lender and applies for a loan, the algorithm automatically computes a hypothetical credit score that takes the medical condition into consideration. Even though the algorithm did not make a prediction based on race, ethnicity, or religious classifications, the result has a disproportionate adverse impact on borrowers from the same group. Here, the new borrower suffered *social informational harm* because data harvested from a different individual was repackaged into new datapoints that were used against her.

While both harms can be caused by AI information-processing systems, the two differ in terms of the directionality of informational control which generate the harms. Individual harm is caused by situating consumers within highly monitored and engineered informational systems where owners/users of AI (creditors) exert vertical control over the circulation of data and the social relations of data production.[85] Social harm is produced when owners/users of AI export individual harm to similarly-situated consumers outside the vertical information flow, thereby "amplify[ing] social processes of oppression along horizontal data relations."[86]

Existing data privacy laws address some aspects of individual informational harm. Generally, individual informational harm is accounted for in laws governing: (1) consent-less data collection,[87] (2) denial of informational access,[88] (3) consent-less disclosure of personal data (*i.e.*, data breaches),[89] and (4) use

[85] *Id.* at 607–08.

[86] *Id.* at 641. For further discussion of the pathways of vertical and horizontal information control, see *infra* Part I.B.3.

[87] Consent-less data collection is conceptualized as a harm to autonomy and dignity by denying the person whose information is collected the right to informational self-determination. *See generally* ALAN F. WESTIN, PRIVACY AND FREEDOM: LOCATING THE VALUE IN PRIVACY 15 (1967).

[88] When people are denied access to information about themselves, informational self-determination is also harmed. *See* Viljoen, *supra* note 36, at 596; *cf.* Shyamkrishna Balganesh, *Privative Copyright*, 73 VAND. L. REV. 1, 8—20 (2020) (explaining how a fundamental tenant of copyright is creators' right to determine whether and how to publish).

[89] Unauthorized disclosure may cause immediate harm (*e.g.*, reputational harm) that is redressable under existing tort law. In other circumstances, unauthorized disclosure may result in identity theft or stalking. State statutes also directly address data breaches. *See, e.g.*, N.Y. GEN. BUS. LAW §§ 899-aa to -bb (McKinney 2022). For federal level data protection laws, see Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d-2 (2021) (outlining standards for information transactions and data elements regarding health information).

of inaccurate information in credit reporting.[90] But, under existing law, individual informational harm is redressable only if such harm constitutes a violation of some aspect of individual autonomy or dignity[91]—*e.g.*, right to access, right to identification, right to be informed, right to withdraw consent, right to accurate information, and right to be forgotten.[92] Under existing statutory and doctrinal frameworks, individual informational harms outside the domain of intrusions raise no cause of action.

For social information harms, redresses in existing legal regimes are entirely absent from the legal lexicon. No law in the U.S. has accepted a theory of data governance beyond the protection of individual autonomy or dignity. Even the European Union's General Data Protection Regulation (GDPR)—supposedly the "strongest data privacy and security law in the world"[93]—fails to account for social informational harms resulting from unjust effects of data production, circulation, and retainment.[94] In strengthening consumers' control over the terms of data extraction and use, dignitarian data-governance regimes such as the GDPR seek to rebalance the power disparities between data-collectors (owners/users of AI) and data-subjects (consumers) within the vertical relations of informational control.[95] But these regimes ultimately "fail to apprehend the structural conditions

[90] *See* Fair Credit Reporting Act (FCRA) of 1970, 15 U.S.C. §§ 1681–1681x (2022).

[91] The strongest data privacy law to date, the European Union's General Data Protection Regulation, 2016 O.J. (L 119), derives its theory of privacy and data protection from the Kantian dignitarian conceptions of data as expression of the self, "subject to deontological requirements of human dignity." Viljoen, *supra* note 36, at 623 n.132.

[92] The GDPR includes "the right to be forgotten"—*i.e.*, the right to request erasure of personal data from the Internet—as one of the eight fundamental data privacy rights. 2016 O.J. (L 119) 12–13; *see also* ONETRUST, COMPLETE GUIDE TO GENERAL DATA PROTECTION REGULATION (GDPR) COMPLIANCE (Apr. 16, 2021), https://www.onetrust.com/blog/gdpr-compliance/ [https://perma.cc/L42Y-ZMWG] (explaining the key features of the GDPR). The U.S. has not implemented the right to be forgotten. Some legal experts opine that the right to be forgotten is unlikely to be implemented in the U.S. due to First Amendment free expression constraints. *See, e.g.*, Danielle Bernstein, *Why the "Right to be Forgotten" Won't Make it to the United States*, MICH. TECH. L. REV. (2020), https://mttlr.org/2020/02/why-the-right-to-be-forgotten-wont-make-it-to-the-united-states/ [https://perma.cc/JUJ3-RZQU].

[93] *The General Data Protection Regulation*, EUR. COUNCIL, https://www.consilium.europa.eu/en/policies/data-protection/data-protection-regulation/ [https://perma.cc/KW9S-WU5B].

[94] *See* Viljoen, *supra* note 36, at 629 & n.150.

[95] *See id.* at 625–26, 626 n.140.

driving the behavior they aim to address."[96] As demonstrated in this section, even the most progressive dignitarian data governance systems to date are incomplete in their attempts to redress social informational harm.

B. How Is AI Changing the Credit Market for the Worse?

1. The Nature and Impact of Price/Consent Defects

This section examines the nature and impact of price engineering and consent manufacturing on consumers. It explains how consumers respond to price/consent defects from a socio-behavioral perspective and how this article's characterization of consumer behavior departs from the neoliberal presumptions.

Within the classical neoliberal imaginary, consumer preferences are exogenous to market mechanisms.[97] When prices are rigged—usually because of excessive social or governmental meddling (*i.e.*, central planning)—consumers will refuse to transact on the market because the underlying goods and services do not match their range of price preferences.[98] In the same vein, neoliberals imagine consent defects to be the result of consumers' knowledge deficiency or inability to adequately communicate their (exogenous) preferences—*i.e.*, inability to exercise their best interests—given the resources they own.[99]

From the neoliberal perspective, the problems of price-engineering and consent-manufacturing are results of imperfect markets and irrational market agents. Their solution, of course, is to restore perfect markets and rational

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[96] *Id.* at 629.

[97] *See* Karel Šrédl, Alexandr Soukup & Lucie Severová, *Models of Consumer's Choice*, 16 E+M EKONOMIE A MANAGEMENT 4, 9 (2013).

[98] *See generally* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005) ("Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.").

[99] Within the neoliberal imaginary, market price communicates objective information regarding the value of resources transacted because they are unsullied by the distortive deadweight losses generated by undue governmental or social influence. Market prices operate as signals for economic opportunity since they allow market participants to trade on their differences in preferences, forecasts, and knowledge about resource use. In this regard, a free market disconnected from governmental or social influence is necessarily a just market. *See, e.g.*, JASON BRENNAN, WHY NOT CAPITALISM? 90–92 (2014).

agents.[100] These problems fall squarely within the remedial zones of disclosure and fair lending. Once these institutions are in place, consumers will be able to vindicate their rights through private litigation.

But this characterization of consumer behavior is inaccurate. Consumer preferences are not exogenous to the market; they are shaped by market power and reflective of socialized choices.[101] What consumers choose to purchase are reflections of how they would like to perceive themselves, how they would like to situate themselves in communities and social networks where they have standing, and what markets tell them about *how* consumption would help them achieve their goals.[102] Broadly speaking, consumer preferences involve the values and tastes that shape people's market activities—*i.e.*, aspects of economic decision-making that the neoliberal assumptions of exogeneity and rational choice fail to explain.

What this means is that consumer preferences are not concrete, itemized, and preexisting desires that consumers carry to the market. Instead, consumer preferences are fluid, broad, and formed within the market's allocative processes through consumers' constant shopping activities or engagement with other market actors.[103] Thus, neoliberals misunderstand the implications of price-engineering and consent-manufacturing.[104] While neoliberals strive to minimize price-engineering

[100] Academics constructed the ideal of consumer rational choice in the late 1970s as part of the intellectual movement to justify and spread neoliberal economics. *See generally* David M. Grether & Charles R. Plott, *Economic Theory of Choice and the Preference Reversal Phenomenon*, 69 AM. ECON. REV. 623, 623 (1979).

[101] Standard law-and-economics models tend to assume that consumer preferences are a given and exogenously determined (*i.e.*, not shaped through state intervention or market mechanisms). *See, e.g.*, Ariel Porat, *Changing People's Preferences by the State and the Law* 13 (U. Chi. Pub. L. Working Paper, Paper No. 722, 2019).

[102] *See* Michael W.M. Roos, *Willingness to Consume and Ability to Consume*, 66 J. ECON. BEHAV. & ORG. 387, 388 (2008) ("[C]onsumers' buying behavior is not completely determined by objective conditions such as their income (ability to buy), but also depends on subjective factors such as attitudes and moods (willingness to buy).").

[103] *Cf.* Porat, *supra* note 101, at 220 ("[P]references often involve views and moral stances that might be based on accurate or false evidence or beliefs. Thus, a person might prefer sweet to non-sweet food based on the mistaken perception that the former is healthier than the latter.")

[104] Additionally, advances in behavioral economics and sociology have shown that consumers are in fact *homo socialis*, rather than *homo economicus*. *See* Yochai Benkler, *Power and Productivity: Institutions, Ideology, and Technology in Political Economy*, *in* A POLITICAL ECONOMY OF JUSTICE 27, 35 (Danielle Allen, Yochai Benkler, Leah Downey, Rebecca Henderson & Josh Simons eds., 2022) ("*Homo economi-*

and consent-manufacturing because they corrupt the neoliberal ideals of free markets and consumer autonomy (and therefore make deregulation more difficult to achieve), this article argues that price-engineering and consent-manufacturing justify a shift away from individualist solutions towards greater public regulation of the private markets.

Once we understand that consumer choices are socialized and embedded, it is not hard to see why the current system—built on the discourse of individual rights and the legal infrastructure of private litigation—fails to fulfill its promises of economic justice.[105] No matter how exploited the consumers are or how widespread the exploitative practice, consumers whose preferences are formed by price/consent defects will not file a case to begin with. From a critical perspective, the legal and technical protocols originally designed to protect consumers are in fact hurdles obstructing consumers from achieving meaningful credit equality. The following paragraphs explore how the business applications of AI in credit underwriting are conducive to price-engineering and consent-manufacturing.

2. Price Engineering in AI-Mediated Credit Markets

There are several common misconceptions about what AI does to price-signals in credit markets. The first—and perhaps most popular—misconception relates to the nature of AI decision-making. According to the mainstream argument advanced by the first generation of algorithmic enthusiasts (and endorsed by FinTech and banks), AI improves the accuracy of credit risk predictions because it (1) is better at absorbing, processing, and analyzing large volumes of information than human decision-makers; and (2) acts upon such information without human biases. This translates into more accurate pricing of consumer credit risks and more optimal allocation of financial resources. The advantage of AI, the argument goes, is that it substitutes for biased human judgment.[106] It concludes that AI's

cus is replaced by *homo socialis*, whose motivations are diverse and socialized and whose decisions are situational and reasonable, not formally rational.").

[105] For further discussion on how the current consumer financial protection regime is driven by the discourse of individual rights and private litigation, see *infra* Part II.A.2.

[106] *See, e.g.*, Fawn Fitter & Steven Hunt, *How AI Can End Bias*, SAP, https://www.sap.com/insights/viewpoints/how-ai-can-end-bias.html [https://perma.cc/2P6U-HLR7] ("Harmful human bias—both intentional and unconscious—can be avoided with the help of artificial intelligence, but only if we teach it to play fair

"suppression of some aspect of the self, the countering of subjectivity" leads to more desirable market outcomes.[107]

But the mainstream argument suffers from a critical flaw: unlike what enthusiasts depict, AI makes decisions by replicating, rather than displacing, human bias. Recall that AI decisions are made through (1) scraping available individual/market-level information about their subjects, (2) repackaging scattered data into behavioral archetypes, (3) generating predictions about human behavior based on these constructed archetypes, and (4) adjusting predictions to reflect new informational intake.[108] This process inevitably recycles past human prejudice and erroneous judgements into AI's present and future predictions.[109] For instance, data about consumers' education level, incarceration history, and court records—*i.e.*, outcomes of past societal disparities resulting from racial-class subjugation—are typically picked up by AI in the scraping process and repackaged into behavioral archetypes about the consumer's behavior.[110] Even pure economic data—*e.g.*, consumer income, household indebtedness, and credit history—may reflect racial-class disparities, since minorities are more frequently targeted by predatory creditors.[111] When these specific individual-level data are absent, AI fills in the blank using behavioral archetypes of other consumers from the same constructed group.[112] Thus, credit pricing by AI is anything but value-neutral.

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and constantly question the results."); *see also* Mirko Bagaric, Dan Hunter & Nigel Stobbs, *Erasing the Bias Against Using Artificial Intelligence to Predict Future Criminality: Algorithms are Colorblind and Never Tire*, 88 U. CIN. L. REV. 1037, 1039–40 (2020) (arguing that AI remains beneficial for reducing human bias in criminal sentencing, and that the current backlash against the use of AI in criminal justice is motivated people's illogical and innate distrust of decisions made by computers).

[107] LORRAINE DASTON & PETER GALISON, OBJECTIVITY 36 (2007).

[108] *See, e.g.*, Yiu, *supra* note 50.

[109] *See, e.g.*, RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 3 (2019) ("[R]ather than challenging or overcoming the cycles of inequity, technical fixes too often reinforce and even deepen the status quo.").

[110] *See id.*

[111] *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 66–69 (2008); Cassandra Jones Havard, *On the Take: The Black Box of Credit Scoring and Mortgage Discrimination*, 20 B.U. PUB. INT. L. J. 241, 260–71 (2011).

[112] *See* Laura Abrardi, Carlo Cambini & Laura Rondi, A*rtificial Intelligence, Firms, and Consumer Behavior: A Survey*, 36 J. ECON. SURV. 969, 978–79 (2022).

The second common misconception is that AI lowers the cost of lending and increases credit access. Advocates for de-regulating AI argue that the market adoption of AI has made the underwriting process more equitable and inclusive.[113] They attempted to marshal empirical support, for example, from a National Bureau of Economic Research report indicating that "FinTech algorithms discriminate 40% less than face-to-face lenders"[114] when it comes to mortgage prices.[115] Another study, conducted by the Consumer Financial Protection Bureau (CFPB), indicates that creditors using AI approve 23–29% more loan applicants than creditors who purely rely on human judgment for their credit decisions.[116] The same study also shows that AI lending lowers the annual average interest rates by 15–17% for approved loans.[117]

However, if we pay attention to other metrics, it becomes unclear whether the current uses of AI in lending meaningfully improve consumers' access to equal credit. Using administrative data of 10 million U.S. mortgages originated between 2009 and 2016, Fuster et al. found that, while AI has indeed increased aggregate credit access and average loan acceptance rates, it also widened cross-group disparity: "[W]hile a large fraction of borrowers who belong to the majority group . . . experience lower estimated default propensities under the machine learning technology . . . these benefits do not accrue to some minority race and ethnic

[113] *See, e.g.*, *How Businesses Are Using AI and Data to Enable Financial Inclusion*, U.S. CHAMBER OF COM. (Apr. 20, 2022), https://www.uschamber.com/on-demand/technology/how-businesses-are-using-ai-and-data-to-enable-financial-inclusion [https://perma.cc/6R3F-SBVR]; Derek Hosford, *AI Can Provide a Solution to the Problem of Credit Invisibility*, AM. CONSUMER INST. CTR. FOR CITIZEN RSCH. (Jun. 10, 2021), https://www.theamericanconsumer.org/2021/06/ai-can-provide-a-solution-to-the-problem-of-credit-invisibility/ [https://perma.cc/UHU3-JWVQ].

[114] Robert Bartlett, Adair Morse, Richard Stanton & Nancy Wallace, *Consumer–Lending Discrimination in the FinTech Era* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25943, 2019).

[115] For mortgage loans originated on fintech platforms using algorithmic solutions, Latinx and African American loan applicants on average pay 5.3 basis points more in interest for purchases and 2.0 basis points for refinancing. In comparison, Latinx and African Americans pay 7.9 and 3.6 basis points more in interest for home purchase and refinance mortgages respectively because of human bias. *See id.*

[116] Patrice Fickin & Paul Watkins, *An Update on Credit Access and the Bureau's First No-Action Letter*, CFPB. (Aug. 6, 2019), https://www.consumerfinance.gov/about-us/blog/update-credit-access-and-no-action-letter/ [https://perma.cc/VF76-HPSQ].

[117] *Id.*

groups . . . to the same degree."[118] Even within racial minority groups, disparities in lending are discovered. Those who benefit from AI are disproportionately White-Hispanic and Asian. Amongst those who lose are non-White Hispanics.[119]

Thus, focusing on loan acceptance rates as the measurement for credit access obscures more than it illuminates. While AI does approve more loans than human loan officers, the data does not tell us about the quality and substance of the loans being approved. A more plausible explanation for the positive correlation between AI adoption and credit access is that AI helps creditors identify previously invisible profit-making opportunities. Since AI allows creditors to assess credit risks of consumers without the use of formalized credit information, it also enables them to reach the unbanked and underbanked communities.[120] But, to compensate for the high risks of lending, creditors need to adjust the prices to match the risks if they hope to make a profit.[121] To do this, creditors typically reduce the upfront prices of lending (to make them more accessible by the low-income) but increase prices on the backend—through deferred interest payments, buy-now-pay-later

[118] Andreas Fuster, Paul Goldsmith-Pinkham, Tarun Ramadorai & Ansgar Walther, *Predictably Unequal? The Effects of Machine Learning on Credit Markets*, 77 J. FIN. 5, 8 (2022) (using data collected under the Home Mortgage Disclosure Act).

[119] *Id.* at 31–32.

[120] Since AI processes alternative data and does not require the use of formal credit information to determine a prospective borrower's creditworthiness, FinTech companies have used AI to reach consumers who would have been rejected by formal banking institutions for lacking credit history. *See The Path to a Fairer Credit Economy: Special Report: Three Ways AI/ML Can Increase Economic Inclusion in America*, ZEST AI 4-6 (Dec. 16, 2020), https://assets-global.website-files.com/6179287a90a6ea0e76461eba/61d56f97f550f26afbcd1647_Fairness%20White%20Paper.pdf [https://perma.cc/UPK4-VTMR]

[121] *See generally* Julia Kagan & Khadija Khartit, *Risk-Based Pricing: What It Means, How It Works*, INVESTOPEDIA, https://www.investopedia.com/terms/r/riskbased-pricing.asp [https://perma.cc/KR26-MUV4] (last updated Dec. 1, 2020) ("Risk-based pricing methodologies allow lenders to use credit profile characteristics to charge borrowers interest rates that vary by credit quality. . . . This means that higher-risk borrowers who seem less likely to repay their loans in full and on time will be charged higher rates of interest while lower risk borrowers who seem to have a greater capacity to make payments will be charged lower rates of interest.").

schemes,[122] balloon payments,[123] or negatively-amortizing interest rates.[124] With the use of more sophisticated AI credit models, such as continuously-learning DL algorithms, creditors can more easily reap profits from low-income borrowers and extract rents by obscuring the actual costs of consumer financial products. Increasing credit access in this way will only widen the wealth gap and systemic credit inequalities. What the mainstream proposition omits, therefore, is the flipside of credit cheapness: low quality.

The third common misconception is that more data leads to more accurate algorithmic predictions. This claim builds on the techno-chauvinist assumption that greater informational intake necessarily produces more rational decisions.[125] By implication, if an AI ever makes an "irrational" decision, such as discriminating against minority consumers in the credit underwriting process, then the problem must be inadequate or insufficient data inputs.[126]

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[122] "Buy-now-pay-later" (BNPL) refers to payment options that offer consumers the ability to receive their items or services before paying them in full. In most cases, the total cost of the consumer purchase is divided into installments that are billed to the creditor's credit account. What makes BNPL schemes predatory is timing: if borrowers miss payments or lack the money to pay their balance in full, they will be hit with punitive late fees and high-interest rates. The BNPL feature tends to incentivize borrowers to overspend, so that they are more likely to miss payments or fail to pay their balances in full. *See generally Bow Now, Pay Later' Services: Predatory or Progressive?* OFCOLOR, https://www.ofcolor.com/blog/buy-now-pay-later-services-predatory-or-progressive [https://perma.cc/2JAU-XHPQ].

[123] "Balloon payment" refers to loans with lower monthly payments with a large payment due at the end of the loan term. Many of these payments are predatory because they are "hidden" in contract and often catch borrowers by surprise. *See generally Balloon Payments: Predatory Lending: The Danger of Balloon Payments*, FASTER CAP., https://fastercapital.com/content/Balloon-paymentsPredatory-LendingThe-Danger-of-Balloon-Payments.html [https://perma.cc/N6A2-PWW5] (last updated Oct. 2, 2023).

[124] "Negative Amortization" occurs when the principal amount of the loan increases because the loan repayments do not cover the total amount of interest costs of the period, causing the total indebtedness to increase even though the borrower has repaid every term. *See generally Negative Amortization*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/commercial-lending/negative-amortization/ [https://perma.cc/2MSU-8DZC].

[125] For further critiques of "Techno-Chauvinism," or as they are more commonly called, "Techno-Solutionism," see generally MEREDITH BROUSSARD, ARTIFICIAL UNINTELLIGENCE: HOW COMPUTERS MISUNDERSTAND THE WORLD (2018); EVGENY MOROZOV, TO SAVE EVERYTHING: CLICK HERE: THE FOLLY OF TECHNOLOGICAL SOLUTIONISM (2014).

[126] Increasingly, legal scholars and data scientists characterize algorithmic discrimination as a "data problem," but disagreement exists on whether poor data or insufficient data creates discriminatory AI outputs. *Compare* Cofone, *supra* note 37, at 1402 ("An algorithm can only be as good as the data that is fed. If an algorithm is mining in a section of the dataset that, for any reason, is unrepresentative of the popu-

But the reality is that more data can reinforce algorithmic biases. Even though AI's information-retaining capacity and computing power are vastly superior to humans', AI makes decisions by replicating the human decision-making structure. Contrary to the public imagination, AI doesn't make use of every piece of data gathered.[127] When AI receives new data in raw, scattered form, its first task is categorizing them into existing archetypes.[128] Since AI is trained using data from the observable human environment, archetypes constructed by AI inevitably reflect the same biases that exist in the human environment.[129]

Contrary to the techno-chauvinist assumption, AI decisions tend to emulate pre-existing staple decisions—*i.e.*, norms that can be summarized into statistical patterns.[130] These staple decisions then form the basis of AI's self-learning process—*e.g.*, how it tunes its parameters to reflect new information, what weight it gives to each factor, and which data it determines to be distractive or noisy.[131] By design, AI marginalizes any "splinter data" that cannot be mapped onto a pre-existing norm.[132] This means that AI, like humans, can exhibit confirmation biases when fed too much information.

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lation, it will produce a non-representative output."), *with* Catherine Tucker, *Algorithmic Exclusion: The Fragility of Algorithms to Sparse and Missing Data*, BROOKINGS: CTR. ON REGUL. & MKTS. 3 (Jan. 18, 2023), https://www.brookings.edu/wp-content/uploads/2023/02/Algorithmic-exclusion-FINAL.pdf [https://perma.cc/W78S-7MRJ] ("Algorithmic exclusion occurs when algorithms are unable to even make predictions because they lack the data to [do] so.").

[127] H. James Wilson, Paul R. Daugherty & Chase Davenport, *The Future of AI Will be About Less Data, Not More*, HARV. BUS. REV. (Jan. 14, 2019), https://hbr.org/2019/01/the-future-of-ai-will-be-about-less-data-not-more [https://perma.cc/87GD-U6NB].

[128] *See* Sidath Asiri, *An Introduction to Classification in Machine Learning*, BUILT-IN (Nov. 15, 2022), https://builtin.com/machine-learning/classification-machine-learning [https://perma.cc/S9YD-CYVD].

[129] *See* Reva Schwartz, Apostol Vassilev, Kristen Greene, Lori Perine, Andrew Burt & Patrick Hall, *Towards a Standard for Identifying and Managing Bias in Artificial Intelligence* 6–9 (Nat'l Inst. Standards & Tech, Special Publication No. 1270, 2022), https://tsapps.nist.gov/publication/get_pdf.cfm?pub_id=934464 [https://perma.cc/F4CP-PV6Z].

[130] *See* Jamie Wareham, *Why Artificial Intelligence is Set Up to Fail LGBTQ People*, FORBES (Mar. 21, 2021), https://www.forbes.com/sites/jamiewareham/2021/03/21/why-artificial-intelligence-will-always-fail-lgbtq-people/?sh=4c6e3946301e [https://perma.cc/32ML-4VYV] ("AIs build decision-making models by looking at existing or 'staple' decisions. Norms that AI then try to emulate.").

[131] *See* Shivani Gupta & Atul Gupta, *Dealing with Noise Problem in Machine Learning Data-Sets: A Systematic Review*, 161 PROCEDIA COMP. SCI. 466, 471 (2019).

[132] *See* Wareham, *supra* note 130 ("The problem is that what we build is the norm, the typical. By design, AI excludes and pushes to the margins anything that doesn't have a robust example.").

Nevertheless, the fallacy of "more-data-means-better-outcomes" runs deep in the credit industry. The idolization of informational quantity has largely fueled the movement within the credit industry to expand the use of alternative "fringe" data. This wave began with FinTech's push for "big data" analytics in the personal loan and small-business credit underwriting space. In 2012, a Los Angeles-headquartered start-up, ZestFinance (now "Zest AI"), became the first company to combine "machine learning style techniques and data analysis with traditional credit scoring."[133] ZestFinance's marketing strategy emphasized AI as a solution to the persistent problem of credit invisibility in low-income communities.[134] It framed its approach as using "all data as credit data."[135] By 2022, alternative data usage had become widespread.[136]

Piercing through the rosy image painted by ZestFinance, the reality is that proxy discrimination is ingrained in each step of AI's analysis.[137] ZestFinance's AI model takes into consideration data that "appear to have little connection with

[133] Leena Rao, *ZestFinance Debuts New Data Underwriting Model to Ensure Lower Consumer Loan Default Rates*, TECH CRUNCH (Nov. 19, 2012), https://techcrunch.com/2012/11/19/zestfinance-debuts-new-data-underwriting-model-to-ensure-lower-consumer-loan-default-rates/ [https://perma.cc/4R8D-H22F]. *See also ZestFinance Introduces Machine Learning Platform to Underwrite Millennials and Other Consumers with Limited Credit History*, BUS. WIRE (Feb. 14, 2017), https://www.businesswire.com/news/home/20170214005357/en/ZestFinance-Introduces-Machine-Learning-Platform-to-Underwrite-Millennials-and-Other-Consumers-with-Limited-Credit-History [https://perma.cc/J5M3-KBKG] (describing ZestFinance's 2017 incorporation of alternative data into its machine learning model to offer credit underwriting services to consumers with limited credit history).

[134] *See* ZestFinance, LINKEDIN, https://www.linkedin.com/company/zestfinance/ [https://perma.cc/R3ZS-KYLJ] ("The world's most innovative lenders rely on ZestFinance to do more profitable lending through machine learning. Our Zest Automated Machine Learning (ZAML) software is the only solution for explainable AI in credit, and we automate risk management so our customers can focus on lending safely to more people.").

[135] Quentin Hardy, *Just the Facts. Yes, All of Them*, N.Y. TIMES, Mar. 24, 2012, at BU1 (quoting ZestFinance CEO Douglas Merrill).

[136] *See* Laura Burrows, *2022 State of Alterative Credit Data Report*, EXPERIAN (Jul. 12, 2022) https://www.experian.com/blogs/insights/2022-state-of-alternative-credit-data-report/ [https://perma.cc/9MDE-DWVG] (footnote omitted) ("[M]any businesses are proactively turning to alterative credit data—or 'expanded FCRA-regulated data'—to expand their lending portfolio…").

[137] *See, e.g.*, Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1273 (2020) ("[P]roxy discrimination by AIs is virtually inevitable whenever the law seeks to prohibit use of characteristics whose predictive power cannot be measured more directly by facially neutral data…").

creditworthiness."[138] For example, the AI model measures "how responsible a loan applicant is" by analyzing the speed she "scrolls through an online terms-and-conditions disclosure."[139] The number of social media connections a person has, the frequency that she deactivates an account, and the number of connections she unfriends are also used as proxies to measure risk-taking tendencies.[140] The model also considers spending habits in the context of the loan applicant's geographic location.[141] For example, "paying half of one's income [on rent] in an expensive city like San Francisco might be a sign of conventional spending, while paying the same amount in cheaper Fresno could indicate profligacy."[142] These proxies were not inserted by their human programmers—they were generated automatically via algorithmic knowledge discovery processes that merely seek to model and replicate human decision-making.[143]

In a nutshell, all three common misconceptions stem from a misunderstanding of how AI works in credit markets. These misconceptions are rooted in the belief that AI is fundamentally different from human intelligence and exogenous to the human environment. Yet, as the foregoing paragraphs demonstrate, these assertions cannot be further from the truth. In making predictions about human behavior and acting upon them, AI embeds, repackages, and reifies the very inequalities found in the human world. But AI also goes one step further: AI amplifies these biases by building on each other's biases.[144] Once an AI model computes a result and wraps it in the form of packaged data, such data then enters the stream of market data that is constantly being scraped and analyzed by other AI

[138] Mikella Hurley & Julius Adebayo, *Credit Scoring in the Era of Big Data*, 18 YALE J.L. & TECH. 148, 164 (2016).

[139] *Id.* (citing Quentin Hardy, *Big Data for the Poor*, N.Y. TIMES (Jul. 5, 2012), https://archive.nytimes.com/bits.blogs.nytimes.com/2012/07/05/big-data-for-the-poor/ [https://perma.cc/KDW5-B79P]).

[140] *See id.* at 164–65.

[141] *Id.*

[142] Hardy, *supra* note 139.

[143] *See, e.g.*, Michael Carl Tschantz, *What Is Proxy Discrimination?*, ASS'N OF COMPUTING MACH. DIGIT. LIBR. (Jun. 2022), https://dl.acm.org/doi/fullHtml/10.1145/3531146.3533242 [https://perma.cc/MX5Q-YP9N].

[144] *See* Laura Douglas, *AI Is Not Just Learning Our Biases; It Is Amplifying Them*, MEDIUM (Dec. 5, 2017), https://medium.com/@laurahelendouglas/ai-is-not-just-learning-our-biases-it-is-amplifying-them-4d0dee75931d [https://perma.cc/5XN3-WJY4].

models.[145] In this digital ecosystem where data is incessantly rinsed and remade, price-signals reflect the aggregate biases of the market rather than the inherent value of goods and services being transacted.

3. Consent Manufacturing as Information Control

Consent manufacturing is not new. It is part and parcel of the market's disciplinary power to manipulate consumers into buying what they do not need. It is also integral to the state's propaganda power to mobilize citizens into acting against their self-interests and serving the elite consensus.[146] Its origins and manifestations are well documented in Edward Herman and Noam Chomsky's seminal work, *Manufacturing Consent*. Since its coinage, the term consent-manufacturing has been amply applied to studies of social media, the internet of things, and other engineered information environments.[147]

Like mass communications technologies, AI ushered in an era of unprecedented suppression of the *self* via creating a chronic "reliance on market forces, internalized assumptions, and self-censorship, and without overt coercion."[148] This interweaving web of suppressive forces is reinforced by both the culture of ne-

[145] *See* Julie E. Cohen, *The Biopolitical Public Domain: The Legal Construction of the Surveillance Economy*, 31 PHIL. & TECH. 213, 222 (2017) (describing personal data as both raw and readily available for commercialization through "new data mining" systems).

[146] *See generally* HERMAN & CHOMSKY, *supra* note 75, at 302 ("[T]he U.S. media do not function in the manner of the propaganda system of the totalitarian state. Rather, they permit—indeed, encourage—spirited debate, criticism, and dissent, as long as these remain faithfully within the system of presuppositions and principles that constitute an elite consensus, a system so powerful to be internalized largely without awareness.").

[147] *See, e.g.*, Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Clickwrap: A Political Economic Mechanism for Manufacturing Consent on Social Media*, 4 SOC. MEDIA + SOC'Y, July 2018, at 3 (referencing the use of consent-manufacturing in clickwraps to keep "individuals in a 'buying mood'" (quoting HERMAN & CHOMSKY, *supra* note 75, at 17)).

[148] HERMAN & CHOMSKY, *supra* note 75, at 306

oliberal individualism[149] and the material conditions of market dependency.[150] It exists in all informational systems operating under capitalist logic, whether undergirded by old or new technologies.[151] Here, what distinguishes AI's suppression from that of mass communications is the form of control and the impact it has on the lives of those subject to the suppression.

In the credit market, AI manufactures consumer consent through two distinctive yet mutually-reinforcing pathways: (1) creation of personalized information silos designed to control and reset expectations of consumers within the immediate zone of the credit transaction; and (2) production of generalized knowledge about group consumption behaviors designed to manipulate prospective consumers and those who are nonparties to the credit transaction.[152] Whereas the first pathway concerns the control over vertical data flows between consumers and creditors, the second concerns the control of horizontal data flows between consumer peers by creditors.[153]

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[149] Individualism causes self-alienation through the breakdown of communities. *See generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (arguing that the decline of social cohesion, networks, and communities endangers civic engagement and the functioning of representative democracy); George Monbiot, *Neoliberalism Is Creating Loneliness. That's What's Wrenching Society Apart*, THE GUARDIAN (Oct. 12, 2016), https://www.theguardian.com/commentisfree/2016/oct/12/neoliberalism-creating-loneliness-wrenching-society-apart [https://perma.cc/8SRJ-BLJK] (arguing that the social expectations of "self-interest and extreme individualism" in Western societies are causing unprecedented social isolation, depression, fear, the perception of threat, and mental illnesses).

[150] Market dependency reinforces self-suppression by compelling people to resort to exploitative markets to satisfy their basic needs of survival and subsistence. *See generally* Michael D. Sousa, *Consumer Bankruptcy in the Neoliberal State*, 39 EMORY BANKR. DEVS. J. 199, 204–05 (quoting KEVIN T. LEICHT & SCOTT. T. FITZGERALD, POSTINDUSTRIAL PEASANTS: THE ILLUSION OF MIDDLE-CLASS PROSPERITY 11 (2007)) ("As a result of what neoliberalism has wrought for most Americans—stagnant incomes, rising taxes, job instability, privatization, a weakened welfare state, globalization, the pocketing of productivity gains by the corporate elite, and a surplus of readily-available credit—Americans have been characterized as 'post-industrial peasants': people who are 'so in debt that those to whom they owe money (and the employers and economic elites who provide the investment and consumption capital for the system) control them.'").

[151] *Cf.* MICHAEL BURAWOY, MANUFACTURING CONSENT: CHANGES IN THE LABOR PROCESS UNDER MONOPOLY CAPITALISM (1979) (focusing on consent manufacturing in industrial labor relations and how emerging technological, political, and ideological systems changed factory life).

[152] *See, e.g.*, Salomé Viljoen, *Data Relations*, LOGIC(S) (May 17, 2021), https://logicmag.io/distribution/data-relations/ [https://perma.cc/W2UT-UAA6].

[153] For further discussion about the concept of vertical versus horizontal data relations, see Viljoen, *supra* note 36, at 607–08, 610–13.

In the first pathway, AI creates a system of *self-hallucination* through harvesting consumer data to learn about the consumers' behavioral proclivities while simultaneously reshaping consumer expectations by pressing their cognitive weak spots. Within this system, consumers are ceaselessly inundated with information nudging them to choose credit products that are more exploitative and profitable for the creditor. The classic example is data aggregation in payday lending. Payday loans notoriously attract low-income, low-savings, and socially desperate consumers because they do not require credit scores or other formal credit history from the loan applicant.[154] Such loans tend to have high backend costs (albeit with low entry prices) that can trap borrowers into persistent indebtedness.[155] With the use of AI, payday lenders can more accurately seek out situationally precarious consumers and those who have tendencies to reborrow at high costs with very little information about any individual consumer.[156] In the process of learning about the consumers' needs, inclinations, and predispositions, the AI mixes and matches price terms in ways that consumers will most likely accept. AI can also design the optimal payday loan structure that attracts consumers who do not need or would not have otherwise applied for the loan.[157] Here, the role of AI is to augment the power of creditors over consumers—via giving creditors the control over vertical flows of data between the creditor and the consumer.

[154] CFPB, PAYDAY LOANS, AUTO TITLE LOANS, AND HIGH-COST INSTALLMENT LOANS: HIGHLIGHTS FROM CFPB RESEARCH 2 (2016), https://files.consumerfinance.gov/f/documents/Payday_Loans_Highlights_From_CFPB_Research.pdf [https://perma.cc/Y4P2-JSGY].

[155] *See id.* at 1. On average, payday lenders charge $15-30 interest for every $100 borrowed. CONSUMER FED'N OF AM., How Payday Loans Work, https://paydayloaninfo.org/how-payday-loans-work/ [https://perma.cc/WSB2-6QRU] ("For two-week loans, these finance charges can result in interest rates from 390-780% APR. Shorter term loans have even higher APRs.") Once a borrower misses one payment, it is very typical for such payments to compound and result in revolving debt. *Id.*

[156] *See generally* James Ledbetter, *Are Fintechs Going Predatory?* TECHNOMONY (Apr. 23, 2021), https://techonomy.com/fintechs-going-predatory/ [https://perma.cc/6E94-7EQE] (describing how FinTech companies in the payday lending business use "rent-a-bank" partnerships to circumvent state usury laws and use AI to micro-target and identify prospective consumers who are most likely to borrow payday loans).

[157] *See The Future of Short-Term Lending: How AI Is Shaping Payday Loans*, GETMONEY (Oct. 30, 2023), https://getmoney.com/blog/the-future-of-short-term-lending-how-ai-is-shaping-payday-loans/ [https://perma.cc/SF79-G4XN] ("AI algorithms can customize loan terms to individual borrowers based on their financial histories . . . ").

In the second pathway, AI creates an ecosystem of *peer-hallucination* via aggregation of data from a particular consumer group and using it to shape the expectations of prospective consumers who are not a party to the credit transaction. This ecosystem undercuts consumer power on two parallel dimensions.

First, as between consumers, AI creates a horizontal system of norm-convergence whereby consumers in the same affiliated groups and their proximate social networks are exposed to the same expectations. For instance, when consumer A_0 applies for a loan underwritten by AI, those within the same group-consumers A_1 and A_2—will be exposed to similar expectations as A_0 when they apply for a loan.[158] If A_0's consumer expectations are skewed by processes of self-hallucination, A_1 and A_2 will most likely experience the same effect. This is because the nature of AI—and especially for DL algorithms—is that it "can be used to know things about [A_1] that [A_1] does not know [about herself], by referring back to [A_1] from [A_0]."[159] And, to the extent that certain aspects of group A_n intersect with group B_n, "data from A_n can be used to train models that 'know' things about B_n, a population that may not be in any vertical relation with the system's owner."[160]

Second, as between creditors, AI generates data flows between users of AI engaged in the same underwriting practice. It creates a two-tiered digital environment: on the one hand, creditors can share information they collect about the consumers in a networked environment constructed by AI. On the other hand, consumers who are subjects of data scraping are isolated and kept mostly in the dark about what information they generate. Like in the payday lending industry, the "data of those who have applied for a loan can be shared among lenders for retargeting."[161] Payday lenders can use horizontal behavioral insights about the consumer to target entire communities and trap repeat borrowers into unending

[158] Here, I refer to "groups" as behavioral archetypes that are summarized and categorized by AI in the knowledge discovery process. They may or may not correspond with group classifications that exist in the observable natural world, such as race, sex, gender, or religion.

[159] Viljoen, *supra* note 36, at 611.

[160] *Id.*

[161] Ciarán Daly, *Addressing the Implications of AI for Individuals Seeking Payday Loans*, AI BUS. (May 23, 2019), https://aibusiness.com/verticals/addressing-the-implications-of-ai-for-individuals-seeking-payday-loans [https://perma.cc/894J-V75H].

cycles of indebtedness. Here, the role of AI is to sever direct horizontal ties between consumers while granting creditors visibility and control over the horizontal flow of consumer data.

Through the interplay of self/peer-hallucinating forms of consent-manufacturing, AI creates a digital environment where consumers are turned into data-producing machines—churning out new data each time they participate in the digital economy. Within this constructed environment, consumers are incessantly generating new marketable data through their routine engagement with the credit system. Data extracted from consumers' everyday life are split apart, atomized, and reassembled into market price-signals; the price-signals are then re-consumed by consumers and turned into new data—a cycle of digital cannibalization.[162] In this system, consumers become part of the products that they ultimately consume.

II
NEOLIBERAL ROOTS OF CONSUMER FINANCIAL PROTECTION

This Part unearths the history of how the neoliberal ideals of free markets and consumer autonomy became entangled with the current normative paradigm of consumer financial protection. In doing so, this Part shows that neoliberal ideals are not timeless tenets of economic justice. Rather, they are products of congressional politics that served one particular historical purpose—to legitimate the federal government's divestiture from public welfare and incorporate minorities into the free-market capitalist status quo. As such, this Part delegitimizes the dominant normative justification for delegating public solutions to credit inequality to the private markets.

Since the late-1960s, Congress has enacted a series of consumer financial protection laws[163]—*e.g.*, FHA, ECOA, TILA, FCRA—to bolster consumer au-

[162] *See* JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM, 71–72 (2019) ("The techniques operate on 'raw' personal data to produce 'refined' data doubles and use the data doubles to generate preemptive nudges that, when well executed, operate as self-fulfilling prophecies, eliciting patterns of behavior, content consumption, and content sharing already judged most likely to occur.").

[163] See SOEDERBERG, *supra* note 17, at 84 ("A main regulatory feature of consumer protection in the United States is the Consumer Credit Protection Act of 1968 (hereafter: the 1968 Act). This Act is an umbrella consumer protection law that includes the Equal Credit Opportunity Act, the Fair Credit Billing

tonomy and facilitate competitive, transparent, and equitable markets for credit provision.[164] Enacted at the height of the civil rights movement, these laws used credit access as a means to solve race-based economic inequality and placate social unrest.[165] Yet, as the federal government gradually aligned itself with neoliberalism beginning in the mid-to-late 1970s, the civil rights notion of equal credit access merged with the individualist, laissez-faire ideology that saw market freedom as a panacea to poverty.[166] This merger became a bipartisan consensus that guided almost all significant federal regulatory responses to credit inequality, giv-

Act, the Fair Credit Reporting Act and the Truth in Lending Act (or, TILA) that was originally part of the Consumer Credit Protection Act. It should be underlined that since the passing of the 1968 Act, there has been no comprehensive or overarching consumer protection legislation in the U.S. Instead, the emphasis has been on a series of separate laws that target specific business practices, industries, and consumer products.").

[164] *See* Jamie Duitz, *Battling Discriminatory Lending: Taking a Multidimensional Approach Through Litigation, Mediation, and Legislation*, 20 J. AFFORDABLE HOUS. & CMTY. DEV. L. 101, 111 (2010) (arguing that the fair lending laws prohibit all lending practices that result in unequal access to credit, including facially neutral lending practices that result in disparate impact); Francesca Lina Procaccini, *Stemming the Rising Risk of Credit Inequality: The Fair and Faithful Interpretation of the Equal Credit Opportunity Act's Disparate Impact Prohibition*, 9 HARV. L. & POL'Y REV. S43, S58 (2015) (arguing that Congress's intent in legislating the ECOA was to ensure non-discriminatory provision of credit); Winnie F. Taylor, *The ECOA and Disparate Impact Theory: A Historical Perspective*, 26 J. L. & POL'Y 575, 631 (2018) (arguing that Congress intended for the ECOA to remove both intentional and unintentional barriers to credit equality).

[165] By the 1960s, pervasive race-based economic inequality has become a central catalyst for civil unrest and uprisings. In 1967, President Lyndon B. Johnson established the National Advisory Commission on Civil Disorders (Kerner Commission) to inquire into the reasons of social unrest and help Congress to craft legislative solutions. The Kerner Commission concluded that disparities in the pricing of goods, the dearth of mainstream consumer loans, and the pervasiveness of high-price loans resulted in "the conclusion among [African Americans] that they [were] exploited by white society." Atkinson, *supra* note 9, at 1420–22 (quoting NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 139–40 (1967)). The civil unrests in the 1960s captured the attention of Congress, sparking a new sense of urgency to develop a comprehensive federal-level response to the problem of inequality-fueled civil instability. This historical moment laid the foundations of consumer financial protection laws. *See id.* at 1425.

[166] *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM *passim* (1962) (arguing that political and economic freedoms are linked, promoting laissez faire and individual choice over government intervention); David Dollar & Aart Kraay, *Growth is Good for the Poor*, 7 J. ECON. GROWTH 195, 218–19 (2002) (arguing that policies and institutions enhancing the strength of private property rights, establishing the rule of law, and promoting financialization are conducive to global poverty reduction); THE WORLD BANK, GLOBALIZATION, GROWTH AND POVERTY 13, 19 (2002) (arguing that neoliberal growth paradigms focusing on protecting robust private property rights and freedom of contract is conducive to global poverty reduction).

ing rise to the belief that credit inequality can largely be resolved by maintaining efficient markets and race-and-gender-neutrality.[167]

As the following sections aim to demonstrate, our existing consumer financial protection regime, informed by neoliberal individualism, is ill-equipped to address the novel threats of algorithmic harm because it overly fixates on the protection of private rights. Despite Congress's intention to eradicate systemic credit inequality, these laws have had limited impact in protecting consumers. The failures of the contemporary consumer financial protection regime trace their origins to historical path-dependencies set in the 1970s.

A. How Neoliberalism Became Entrenched in Credit Regulation

1. The Pre-Neoliberal History of Congressional Credit Legislation

Before the late-1960s, credit was in congressionally uncharted waters, and instead governed by a fractured regime of state laws, industry norms, and banking customs.[168] State law only regulated loan size and usury limits,[169] but left "the decision as to whom credit should be granted" to creditors.[170] The dominant practice among creditors in the 1960s was to consider the "three C's of credit:" the character, capacity, and capital of the credit applicant.[171] A popular credit underwriting manual in 1961 instructed creditors to label divorcees, indigenous peoples, and those living in "untidy homes" or "rundown neighborhood[s]" as having high credit risks.[172] The Federal Trade Commission (FTC)'s 1970 study of ma-

[167] *See, e.g.*, Tayyab Mahmud, *Debt and Discipline: Neoliberal Political Economy and the Working Classes*, 101 KY. L.J. 1, 46 (2013) ("With the neoliberal call for individuals to secure their freedom, autonomy and security through financial market and not the state, practices of investment, calculation and speculation became signs of initiative, self-management, and enterprise.").

[168] *See* ANNE FLEMING, CITY OF DEBTORS: A CENTURY OF FRINGE FINANCE 214 (2018) ("Congress had largely ceded authority over the regulation of consumer credit to the states—until 1968, when it passed the Truth in Lending Act.").

[169] *See* BARBARA CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 16 (1965). Usury laws, effective in nearly every state, specified the maximum interest rate which may be charged legally. States also had laws patterned after the Uniform Small Loan Act to govern loans not exceeding a statutorily prescribed amount. *Id.*

[170] James A. Burns, Jr., *An Empirical Analysis of the Equal Credit Opportunity Act*, 13 U. MICH. J. L. REFORM 102, 108 (1979).

[171] *Id.*

[172] MORRIS R. NEIFELD, NEIFELD'S MANUAL ON CONSUMER CREDIT 512 (1961).

jor lending companies found collecting racial information a standard practice.[173] In essence, credit underwriting in this era was done informally as a "relationship business" anchored in social networks, which enabled animus and bias to escape government detection.[174]

When Congress initially contemplated federal credit reporting and fair lending legislation in 1968, it confronted a vibrant yet unequal landscape of credit provision. For the white American working class, credit had become cheap and abundant. On the demand side, the stagnation of wages and inflation in the 1970s drove up the cost of living, turning debt-based consumption into a market imperative;[175] credit became necessary for anyone hoping to purchase essential goods and services.[176] Consequently, banks had to increase their credit supply. By the mid-decade, credit had "ceased to be a luxury item."[177] These institutional changes in credit provision made borrowing an essential component of the everyday consumer experience in white working-class America.

But this expansion of credit was also unequal: the 1970s marked the emergence of a credit apartheid that segregated the American consumer population. The rise of banking made borrowing easy for the suburban white middle class, but not for African Americans who made up a large portion of the urban poor.[178] For

[173] *See* Louis Hyman, *Ending Discrimination, Legitimating Debt: The Political Economy of Race, Gender, and Credit Access in the 1960s and 1970s*, 12 ENTER. & SOC'Y 200, 224 (2011).

[174] MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 196 (2017) ("The most successful bankers were those at the center of a community's social structure—who had relationships with businesses and potential leaders.").

[175] For general background about inflation in the 1970s, see Alan S. Blinder, *The Anatomy of Double-Digit Inflation in the 1970s*, *in* INFLATION: CAUSES & EFFECTS 261 (Robert E. Hall ed., 1982). For further information about the rise of debt-based consumption in the U.S. that began in the 1970s, see Justin Sean Myers, *Neoliberalism, Debt and Class Power*, *in* CLASS: THE ANTHOLOGY 337, 344 (Stanley Aronowitz & Michael J. Roberts eds., 2018) ("[T]he massive financialization of daily life since the 1970s—home, education, medical care, clothing, food, car—signaled the movement of credit from the background to the foreground, from a supplement of wage-income to the primary mechanism maintaining accumulation.").

[176] *See* S. REP. NO. 94-589, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 405 ("Virtually all home purchases are made on credit. About two-thirds of consumer automobile purchases are on an installment basis. Large department stores report that 50% or more of their sales are on revolving or closed-end credit plans. Upward of 15% of all consumers disposable income is devoted to credit obligations other than home mortgages.").

[177] *Id.*

[178] Hyman, *supra* note 173, at 201–02.

them, credit was scarce and unavailable.[179] Congress found the unequal access to credit to be among the leading causes for social unrest amongst the urban poor.[180] In a hearing before the Senate Committee on Banking and Currency, the FTC testified that credit unavailability was the cause of economic desperation of the urban poor.[181] By the mid-70s, credit inequality had become an urgent issue of social stability that Congress could not afford to ignore.

Responding to gaping credit inequality and unrest, Congress enacted the first comprehensive fair lending law: the ECOA.[182] The ECOA saw the use of any racial or gender information in credit underwriting as an infringement on the individual's exercise of free choice and economic opportunity.[183] Race-and-gender neutrality and individualism were the bedrocks of fair lending protection. The House Committee on Banking, Currency, and Housing, quoting the U.S. Commission on Civil Rights, explained:

> It would be difficult to exaggerate the role of credit in our society. Credit is involved in [an] endless variety of transactions reaching from the medical delivery of the newborn to the rituals associated with the burial of the dead. The availability of credit often determines an individual's effective range of social choice and influences such basic life matters as

[179] *See id.* at 201 ("Ghetto retailers kept their accounts in leather-bound ledgers and collected payments door-to-door, rather than mainframes that billed automatically like suburban retailers. Credit cards were nonexistent.")

[180] *See id.* at 204; Atkinson, *supra* note 9, at 1421 ("The Kerner Commission focused in significant part on economic barriers to equality, including access to credit, as causes of race-related domestic unrest.").

[181] *See* Hyman, *supra* note 173, at 206–07 (citing *Consumer Credit and the Poor: Before the Subcomm. on Fin. Insts. of the S. Comm. on Banking & Currency*, 90th Cong. 5–6 (1968) (statement of Paul Rand Dixon, Chairman, Federal Trade Commission) https://books.google.com/books?id=agyhbuf4u0IC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=snippet&q=each%20member%20of%20our&f=false [https://perma.cc/XY5N-XJHG]).

[182] Equal Credit Opportunity Act, Pub. L. No. 93-495, 89 Stat. 1521 (1974) (to be codified at 15 U.S.C. §§ 1691–1691e). When Congress initially passed ECOA in October 1974, it only forbade lending discrimination on the basis of sex and marital status. Racial discrimination was at the center of congressional debate, but Congress did not prohibit racial discrimination in lending until the 1976 amendment of the ECOA, for reasons beyond the scope of this paper. *See* Hyman, *supra* note 173, at 225–26.

[183] *See* Lesley Fair, *Fighting Discrimination in the Credit Marketplace*, FTC BUS. BLOG (Mar. 26, 2021), https://www.ftc.gov/business-guidance/blog/2021/03/fighting-discrimination-credit-marketplace [https://perma.cc/27Z4-MS7T] ("Equal access to credit based on non-discriminatory criteria is an essential component of economic opportunity and a fair marketplace."); *see also* Taylor, *supra* note 164, at 628.

> selection of occupation and housing. Indeed, the availability of credit has a profound impact on an *individual's ability* to exercise the *substantive civil rights* guaranteed by the Constitution.[184]

This notion—that unrestrained credit access undergirds consumer autonomy—embodied the consensus that Congress reached after a decade-long ordeal to grapple with entrenched credit inequality.[185]

Despite Congress's good intentions, the passage of ECOA produced unintended consequences. Specifically, Congress's reimagining of credit as a vehicle for individual social choice legitimized the federal government's later divestiture from social welfare, which began with the government's delegation of poverty reduction to private credit-underwriting institutions in the early 70s.[186] Credit was reframed as the "private-sector alternative to the welfare state."[187] Moreover, recasting credit access as a precondition for the meaningful exercise of civil rights redirected the focus of credit access from redressing systemic racial-gender inequalities to incorporating minorities into the free-market status quo.[188] As the next section will illustrate in further detail, these congressional endeavors paved the groundwork for the modern neoliberal consumer protection regime.

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[184] Taylor, *supra* note 164, at 631 (emphases added) (quoting H.R. REP. NO. 94-210, at 3 (1975)).

[185] *E.g.*, Gerald Ford, Statement on Signing the Equal Credit Opportunity Act Amendments of 1976 (Mar. 23, 1976), https://www.presidency.ucsb.edu/documents/statement-signing-the-equal-credit-opportunity-act-amendments-1976 [https://perma.cc/3LZ3-JSJV] ("This administration is committed to the goal of equal opportunity in all aspects of our society. In financial transactions, no person should be denied an equal opportunity to obtain credit for reasons unrelated to his or her creditworthiness.").

[186] Gunnar Trumbull, *Credit Access and Social Welfare: The Rise of Consumer Lending in the United States and France*, 40 POL. & SOC'Y 9, 20 (2012) ("[P]olicymakers and the general public gradually came to see private credit as a legitimate tool for social justice.").

[187] *Id.* at 28.

[188] The rhetoric of individualism and consumer autonomy presents a legislative shift away from earlier Keynesian welfare state policies, such as President Johnson's "Great Society" program. Whether intentional or not, the intersection between individualism and debt-based consumption was instrumental in the creation of the U.S. neoliberal "debtfare" state. *See* SOEDERBERG, *supra* note 17, at 50 (citations omitted) ("First, neoliberal state forms emerged from the demise of previous state forms, such as Keynesian welfare states in the global North . . . to deal effectively with the underlying tension and crises in capital over-accumulation and the subsequent social fallouts, such as labor unrests [and] civil rights movement . . . Second, in response to these struggles and tensions, the rhetorical and regulatory features of the neoliberal state forms include: a withdrawal or abstention by the state in economic matters; the shifting into the private sector (or, the contracting out) of public services and the commodification of public goods . . . ").

2. Displacement of Public Regulation by Private Enforcement

The rise of individualism and neutrality had profoundly impacted legislative responses to credit inequality since the mid-70s—they directed the focus of credit legislation to expanding the scope of creditor liability and access to banking services. For instance, subsequent amendments to ECOA almost exclusively revolved around adding new categories to the list of protected characteristics, bolstering consumers' procedural rights, and adjusting the creditors' disclosure obligations. The 1976 amendment added race, age, color, religion, national origin, and the collection of public assistance income to the original categories of sex and marital status as criteria prohibited from consideration in the credit underwriting process.[189] The 1988 amendment imposed additional disclosure obligations on creditors to (1) give formal written notice to applicants of business credit about reasons of credit denial and (2) retain records for business credit applications for at least a year.[190] The 1991 amendment heightened creditors' disclosure obligations regarding residential mortgage lending.[191] The 2003 revision to Regulation B, which implements ECOA, imposed an "adverse action" notice[192] requirement on creditors to deliver written explanations to consumers when they make any credit decisions adversely affecting consumers' rights under ECOA.[193] Similarly, amendments to FHA in 1974, 1988, and 1996 mostly centered on heightening

[189] Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94–239, § 701, 90 Stat. 251, 251 (1976) (to be codified at 15 U.S.C. § 1691).

[190] Women's Business Ownership Act of 1988, sec. 301, § 703(a), Pub. L. No. 100-533, 102 Stat. 2689, 2693 (codified at 15 U.S.C. § 1691b).

[191] Federal Deposit Insurance Corporation Improvement Act of 1991, sec. 223, § 706(g), Pub. L. No. 102–242, 105 Stat. 2236, 2306 (to be codified at 15 U.S.C. § 1691e) (mandating that creditors provide, upon applicant's request, a copy of the appraisal report on residential real property offered as security for a loan).

[192] Regulation B defines "adverse action" as: "(1) a refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms), and the applicant uses or expressly accepts the credit offered; (2) a termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts; or (3) a refusal to increase the amount of credit available to an applicant who has made an application for an increase." 12 C.F.R. § 1002.2(c)(1) (2023).

[193] James A. Huizinga & Krista B. LaBelle, *Amendments to Regulation B and the Official Staff Commentary*, 59 BUS. LAW. 1137, 1138 (2004).

creditors' disclosure obligations and consumers' procedural rights—changes that largely mirrored amendments to ECOA.[194]

One reason for the growing legislative emphasis on disclosure and formal equality is that Congress increasingly pushed for private litigation as the principal means to vindicate consumers' rights under the fair lending laws.[195] When ECOA was originally legislated in 1974, Congress employed a dual enforcement model—allocating rulemaking power to the Federal Reserve Board (FRB) while delegating the power to bring enforcement actions to the FTC.[196] But, beginning with the 1976 amendment, Congress gradually replaced the dual enforcement model with one that was centered on civil lawsuits.[197] Subsequent amendments raised the punitive damage ceiling but further constrained the agencies' substantive rulemaking power. While agencies were granted discretion to implement procedural safeguards protecting consumers' right to know and creditors' duty to inform, their authority to craft rules identifying and prohibiting new harmful lending practices shrunk dramatically from 1976 to the 2000s.[198] Together,

[194] *E.g.*, Michael H. Schill & Samantha Friedman, *The Fair Housing Amendments Act of 1988: The First Decade*, 4 CITYSCAPE: J. POL'Y DEV. & RES. 57, 59 (1999).

[195] *See* , *e.g.*, Walter Gorman, *Enforcement of the Equal Credit Opportunity Act*, 37 BUS. LAW. 1335, 1336 (1982).

[196] *See, e.g.*, John H. Matheson, *The Equal Credit Opportunity Act: A Functional Failure*, 21 HARV. J. ON LEGIS. 371, 375–77. Eleven other federal agencies shared limited authority with the Federal Trade Commission on matters relating to enforcement action. *Id.* at 375 n.19.

[197] *E.g.*, John R. Walter, *The Fair Lending Laws and Their Enforcement*, 81 ECON. Q. 61, 68 (1995). The 1976 amendment to the ECOA initially retained the dual enforcement model. It authorized the U.S. Attorney General to institute civil proceedings in two circumstances. First, federal agencies responsible for enforcement of ECOA could refer matters to the Attorney General for litigation. Second, the Attorney General could independently commence civil proceedings to prohibit or remedy ECOA violations on behalf of a class or private individuals. Matheson, *supra* note 196, at 376.

[198] For instance, since 1938 the FTC has had the power pursuant to § 5 of the Federal Trade Commission Act (FTCA) to regulate "unfair and deceptive acts and practices." 15 U.S.C. § 45 (2022). In 1980, in response to considerable controversy during the Carter Administration regarding the use of its authority to regulate unfair practices, the Commission issued a policy statement to clarify its rulemaking power. *See* Michael L. Denger, *The Unfairness Standard and FTC Rulemaking: The Controversy Over the Scope of the Commission's Authority*, 49 ANTITRUST L.J. 53, 54—56 (1980) (describing the congressional controversy over the FTC's expansive "unfairness" power under the FTCA). The FTC's 1980 Policy Statement set up a standard restraining its own power to create rules and prohibit practices that are "unfair" under the FTCA. *See* FTC, POLICY STATEMENT ON UNFAIRNESS (Dec. 17, 1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness [https://perma.cc/KL27-HNW9] (defining actionable "unfair" violations

these legislative changes were designed to elevate private enforcement and relegate public enforcement to a secondary role.

However, despite the dominance of the individual rights model, empirics on private enforcement show that consumer welfare did not meaningfully improve in the decades that followed the ECOA's enactment. Although Congress intended for private lawsuits to be the cornerstone of enforcement, the fair lending laws spawned surprisingly little litigation. For a statute promising to eradicate credit discrimination, the ECOA invited fewer than 50 cases in the decade after its enactment[199]—fewer than the number of cases brought under the TILA per month during a similar period[200]—and far fewer than the number of employment discrimination cases filed per week under Title VII.[201] This individualist regime had exacerbated credit inequality since it also amputated agencies' substantive rulemaking power.

Ironically, an individual rights model centering on private enforcement ended up hurting individual consumers. The most critical failures of this regime are twofold.

First, the legislative emphasis on disclosure and formal equality marginalized questions about bargaining power disparity—*i.e.*, the most central causes of transactional inequality in credit markets. This problem permeates most federal consumer financial protection laws. Under the TILA, for instance, a creditor's good faith compliance with proper underwriting procedures and standardized disclosure forms immunizes her from liability.[202] Under the ECOA, a creditor is deemed compliant with her notice obligations as long as she clearly explains rea-

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as conduct that "substantially" injures consumers, that is not outweighed by "any offsetting consumer or competitive benefits," and advances Congress' public policy goals). Congress later amended the FTCA to incorporate the specific standard articulated by the FTC's 1980 Policy Statement. Federal Trade Act Amendments of 1994, sec. 9, § 5, Pub. L. No. 103–312, 108 Stat. 1691, 1695 (to be codified at 15 U.S.C. § 45(n)).

[199] Matheson, *supra* note 196, at 377.

[200] *Id.* at 377 n.29 (identifying more than 14,000 lawsuits brought under TILA since its enactment in 1968).

[201] *Id.* at 377 n.30 (identifying over 8,000 employment discrimination cases filed in the federal courts in 1983).

[202] CFPB, LAWS AND REGULATIONS: TRUTH IN LENDING ACT 5 (2015), https://files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf [https://perma.cc/8MYE-7NJP].

sons for denying the consumer's credit application and demonstrates that race or gender play no part in the creditor's decision-making.[203] Under the existing individual rights regime, a consumer's consent—even constructive consent upon sufficient disclosure—to a loan makes her responsible for the underlying consequences (including wage garnishment and collateral-repossession following an event of default).[204] It matters not that she is desperate, materially deprived, lacks a viable alternative, or fell prey to exploitative terms.[205]

Second, a private-enforcement regime shifts the cost of compliance from creditors and regulators to consumers. Whoever contests the fairness of a transaction bears the legal costs and evidentiary/pleading burdens. Additionally, unsuccessful credit applicants are reluctant to assert their rights against creditors, large or small, out of fear of the institutions, of reprisal, and of the risks associated with alienating creditors.[206] Therefore, the irony of private enforcement is that the poorest and most precarious consumers—*e.g.*, minorities, women, immigrants, and other status-subordinated people who are most in need of protection—are typically the ones who are barred from asserting their interests in the current legal regime.[207]

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[203] *See, e.g.*, Sarah Ammermann, *Adverse Action Notice Requirements Under the ECOA and the FCRA*, CONSUMER COMPLIANCE OUTLOOK (2013), https://www.consumercomplianceoutlook.org/2013/second-quarter/adverse-action-notice-requirements-under-ecoa-fcra/#footnotes [https://perma.cc/8NJN-569U] ("Adverse action notice [requirements] are designed to help consumers and businesses by providing transparency to the credit underwriting process and protecting against potential credit discrimination by requiring creditors to explain the reasons adverse action was taken."); *see also* Regulation B, 12 C.F.R. § 1002.16(c) (2023) (allowing creditors to correct inadvertent errors in the disclosure process).

[204] An important feature of the U.S. neoliberal consumer financial protection regime is its concealment of transactional inequality under the guise of consumer consent. *See* SOEDERBERG, *supra* note 17, at 4 ("The social power of money, reinforced by the debtfare state's rhetorical and regulatory framings, assists in distorting the exploitative, unequal and disciplinary nature of the loan. Here the loan is seen as a voluntary exchange of equivalents between two consenting parties, where class-based power and exploitation are less visible and less politicised than in a wage-labor/employer relation.").

[205] *See id.*

[206] Matheson, *supra* note 196, at 380.

[207] The impact of private enforcement in widening income disparities and barring the poor from legal redress has been well-studied by legal scholars. *See generally* Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1489–90 (2022) ("[R]ecent adaptations of private enforcement tend to exhibit less democratic promise. First, they often either do not respond to or threaten to exacerbate existing power imbalances. . . . Second, the suits involve enforcers bringing less direct, affected expertise to less dynamic regulatory environments. . . . Finally, these suits have the potential to undermine democratic

B. Contemporary Neoliberal Legal Response to Credit Inequality

At its core, the contemporary neoliberal legal paradigm can be characterized as a series of commitments to the individual rights model, implemented by statutes protecting the autonomy of markets and delegating public functions to private enforcement.[208] Today, these commitments have coalesced into a consistent regulatory methodology, consisting of two components: (1) elevating cost-benefit analysis above other modes of policy inquiry;[209] and (2) conditioning substantive regulation upon a finding of "market failure."[210] No matter what type of credit is being regulated, how it injures consumers, or where the locus of harm lies, regulators would follow these two methods drawn straight out of the neoliberal handbook. The following paragraphs explain the logic of each method and their legal manifestations.

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deliberation in a variety of ways—including by posing citizen against citizen and fraying the social fabric and by further subordinating people who have faced historical and enduring forms of oppression."); Eloise Pasachoff, *Special Education, Poverty, and Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1416 (2011) ("If beneficiaries with fewer financial resources consistently bring fewer claims than their wealthier counterparts, relying heavily on private enforcement may mean that the former group will not receive their fair share of the distribution."); Scott Ilgenfritz, *The Failure of Private Actions as an ECOA Enforcement Tool: A Call for Active Governmental Enforcement and Statutory Reforms*, 36 FLA. L. REV. 447, 450 (1984) ("The relative ineffectiveness of private action as the chief method of enforcement undercuts the successful implementation of the [ECOA's] policies.").

[208] *See, e.g.*, David Singh Grewal & Jedediah Purdy, 77 L. & CONTEMP. PROBS. 1, 17 (2014) (internal citations omitted) (arguing that the neoliberal conception of justice revolves around "the idea that the pursuit of individual preferences through spreading decisions is sufficient as an account of personal liberty and of the structural relation of that liberty to a scheme of good-enough government"); *see also* Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1814 (2020) ("Inclusion in the market's private ordering thus became a central aim of many accounts of individual rights and their purposes, including the rights of individuals subordinated in racialized and gendered hierarchies. Arguments about market freedom thus paralleled liberal arguments about self-realization[. . . .]").

[209] *See generally* Cass R. Sunstein, *The Cost-Benefit State* 4 (Coase-Sandor Inst. for L. & Econ., Working Paper No. 39, 1996) (defending cost-benefit analysis as "a way of diminishing interest-group pressures on regulation").

[210] *See generally* Richard Posner, *Law and Economics Is Moral*, 24 VAL. U. L. REV. 163, 166-67 (1990) (arguing for a regulatory commitment to free markets and limited government because "the minimum state defined by the economic analysis of market failure is the state that works best to achieve the common goals of most people in the world.")

1. Elevating Cost-Benefit Analysis Above Other Inquiries

Cost-benefit analysis concerns how regulators should exercise their discretion in crafting rules to address social and economic harms in markets.[211]

Neoliberals prefer cost-benefit analysis to other modes of regulatory inquiry because they see it as value-neutral and derived from the unbiased analysis of market data—*i.e.*, data produced by optimal and self-correcting market processes that are dis-embedded from extrinsic social or governmental influences.[212] While the proliferation of cost-benefit analysis in policy-making and judicial review has no doubt revolutionized the administrative process by eliminating arbitrary agency actions, it has also substantially restrained the federal bureaucracy's power to enforce established congressional public policies.[213]

What is critical about the neoliberal transformation is that it elevated cost-benefit analysis to the exclusion of other modes of policy inquiry—by promising

[211] *See generally* Robert Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 N.Y.U. L. REV. 1983, 1995–99 (2013).

[212] *See id.* at 2010–22. As a mode of policy inquiry deriving regulatory insight from the intake of open market data, cost-benefit analysis promises to rationalize policymaking, reduce regulatory bias, and enhance administrative accountability. *See id.*

[213] Doctrinally, the debate over cost-benefit analysis has revolved around whether judicial review of agency action can and should require cost-benefit analysis as part of the court's review. Most debate on cost-benefit analysis in the judicial review setting centers on what the scope of agency power is under their enabling statutes and how courts should review them under the arbitrary and capricious standard of section 706(2)(A) of the Administrative Procedure Act. *See generally* Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 666—67, 671—72 (1998) (describing the rise of a second "Chicago School" that emphasizes optimizing regulations through cost-benefit analysis); *See also* Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52—54, 97 (2007) (arguing that the Supreme Court's expertise-forcing project, as represented by its decision in *MA v. EPA*, reveals a growing judicial embrace of cost-benefit analysis as a solution to the problem of politicization of expertise in the administrative agencies); *cf.* Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 690 (2016) (arguing that the prevailing sentiment of "expertise-forcing" through cost-benefit analyses—*i.e.*, the depoliticization of agency decision-making and removal of presidential political influences—fails to keep the executive branch in check). For recent cases interpreting the arbitrary and capricious standard of judicial review as requiring a cost-benefit analysis, see, e.g., Business Roundtable v. SEC, 647 F.3d 1144, 1149–52 (D.C. Cir. 2011).

to be dis-embedded, value-neutral, and untainted by political influence.[214] Policies premised on the radical redistribution of wealth and reconfiguration of market power are dismissed as advancing a subversive ideological agenda.[215] The elevation of cost-benefit analysis also made the presumption of free and neutral markets uncontestable in the lawmaking and policymaking forums.[216]

But, despite its façade of neutrality, cost-benefit analysis is value-laden and ideologically-driven. For one, numbers and statistics are highly susceptible to manipulation.[217] What goes into the baseline, denominators, and benchmarks of empirical comparison are conscious political choices about who can and cannot be counted as subjects of policy inquiry. Yet, framing these conscious choices as neutral reflections of market conditions obscures the power relations that dictate what goes into the analysis.[218]

In the field of consumer credit, the hegemony of cost-benefit analysis is most saliently manifested in two legal standards codified in the core consumer financial protection statutes: (1) legal thresholds of recovery conditioned upon the balancing of interests between consumers and creditors that are inherently conflictual in the credit-underwriting process; and (2) judicial tests requiring agencies to show

[214] *See, e.g.*, THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE 188–89 (1995) (describing how cost-benefit analysis became the standard for policy evaluation across all topics and industries).

[215] *Cf. id.* at 153 (arguing that public decisions made through conducting cost-benefit analysis would "reduce opportunities for purely political choices").

[216] *See* Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1811–12 (2020) (footnotes omitted) ("'Interest-group capture' became an axiomatic problem of the regulatory state, leading influential academics to argue that the only appropriate response was a move to market-mediated technocracy, in the form of cost-benefit analysis. The administrative state was remade along the way, with cost-benefit analysis used to block any regulation that did not meet a market-denominated test of value from the Reagan Administration onward.").

[217] *See* Bent Flyvbjerg & Dirk W. Bester, *The Cost Benefit Fallacy: Why Cost-Benefit Analysis is Broken and How to Fix It*, 12 J. COST-BENEFIT ANALYSIS 395, 403–06 (2021).

[218] *See* Todd Philips & Sam Berger, *Reckoning with Conservatives' Bad Faith Cost-Benefit Analysis*, CTR. FOR AM. PROGRESS (Aug. 14, 2020) https://www.americanprogress.org/article/reckoning-conservatives-bad-faith-cost-benefit-analysis/ [https://perma.cc/YN89-GLXC] (arguing that the conservatives have selectively used cost-benefit analysis to hide the true costs of de-regulation by ensuring that the social costs of deregulatory policies are excluded from the analysis).

that the benefits of regulatory intervention outweigh the costs of disrupting the private ordering in markets.

The first—the balancing of consumer and creditor interests—is embedded in the very definition of discrimination in the credit inequality statutes.[219] Under the classic definition of discrimination as *disparate treatment*, consumers seeking recovery are required to show that creditors undertook adverse credit actions against the consumers because of their protected characteristics (*e.g.*, race, gender).[220] Even under the more progressive definition of discrimination as *disparate impact*, plaintiffs cannot raise a cause of action if the creditors can demonstrate that the challenged practice is (1) "necessary to achieve one or more of the substantive, legitimate, nondiscriminatory goals" of the creditor; and (2) "those [legitimate] interests could not be served by another practice that has a less discriminatory effect."[221]

The second—the balancing of regulatory benefits and market costs—finds legal expression in statutory provisions governing the scope of federal agencies' substantive rulemaking power. The Dodd-Frank Act restrains the CFPB's enforcement power to identify and prohibit "unfair" credit practices by conditioning regulatory action upon a finding of (1) substantial consumer injury; (2) such injury is not reasonably avoidable by consumers; and (3) the regulatory benefits are not outweighed by the costs to the market.[222] Similarly, the FTC's "unfairness" power to govern credit provisions is also constrained by a three-prong countervailing benefits test that requires the Commission to balance any regulatory gains from agency action against the potential business losses of creditors.[223]

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[219] *See, e.g.*, Burns, *supra* note 170, at 107—10 (citing S. REP. NO. 93-278, at 19 (1973)) (explaining how, to balance competing interests, the ECOA drafters omitted a definition of discrimination fearing that it might "unnecessarily limit or expand liability").

[220] *See* FED. RSRV. BD., FAIR LENDING REGULATIONS AND STATUTES: OVERVIEW, CONSUMER COMPLIANCE HANDBOOK (2017) https://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_over.pdf [https://perma.cc/649C-NLFB].

[221] *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 527 (2015) (articulating the elements of a prima facie disparate impact claim under the FHA).

[222] Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5531(c)(1) (2022).

[223] Federal Trade Commission Act, 15 U.S.C. § 45(n) (2022).

Like any legal tests anchored in cost-benefit analysis, these statutorily mandated countervailing benefits tests are not value-neutral. By tying the hands of federal agencies through the cost-benefit inquiry, Congress opened a narrow legal forum for organized business interests to impede or push back against progressive agency actions. In the fields of payday lending[224] and mortgage lending,[225] creditors have successfully defeated several of the agencies' proposed rules to regulate

[224] In 2017, the CFPB issued a payday lending rule imposing a set of underwriting requirements on short-term payday loans ("2017 Rule"). *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 12 C.F.R. § 1041.02–.10, 1041.12, 1041.113 (2019). The 2017 Rule met persistent opposition by the banking industry both during its notice-and-comment stage and after promulgation. Creditors argued, among other criticisms, that the 2017 Rule had unsound empirical foundations and exaggerated the substantiality of consumer harm. 82 Fed. Reg. 54472, 54706 (published Nov. 17, 2017) (to be codified as amended at 12 C.F.R. pt. 1041). In 2019, after Trump appointee Mick Mulvaney became the CFPB Acting Director, the CFPB announced its intent to reconsider the 2017 Rule. *See* CFPB, *Consumer Financial Protection Bureau Release Notices of Proposed Rulemaking on Payday Lending*, CFPB NEWSROOM (Feb. 6, 2019), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-releases-notices-proposed-rulemaking-payday-lending/ [https://perma.cc/GZG3-CCLE]. That reconsideration resulted in the repeal of the 2017 Rule ("2020 Rule"). *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 Fed. Reg. 44382 (Jul. 22, 2020) (to be codified as amended at 12 C.F.R. pt. 1041). In its rationale for repealing the 2017 Rule, the 2020 Rule stated that "the 2017 Final Rule erroneously minimized the value of temporary reprieve," and "underestimated the identified practice's benefit to consumers." *Id.* at 44412–13. With regards to re-borrowers, the 2020 Rule concludes that "there are substantial countervailing benefits from [payday lending] such as income-smoothing and avoiding a greater harm, which the 2017 Final Rule discounted." *Id.* at 44412. The 2020 Rule stated that the "2017 Final Rule would constrain rapid innovation in the market." *Id.* at 44414. Based on these reconsiderations, the 2020 Rule concluded that the CFPB had erroneously conducted the countervailing benefits test in the 2017 Rule and that the Rule should not have been passed in the first place. *See id.* at 44408.

[225] A mortgage lender's compliance with the ability-to-repay (ATR) obligation may be "presume[d]" if the mortgage is a "qualified mortgage" (QM). Dodd–Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 1639c (2022). Specially, a QM must be fully amortizing, provides a term not longer than 30 years, has upfront costs, and the lender must "verify the income and financial resources" of borrowers and consider "all applicable taxes, insurances, and assessments" in making the loan. 15 U.S.C. § 1639c(b)(2)(A)(iii)-(v) (2022). But the statute does not clarify the meaning of these words. To offer interpretive clarity and further flesh out the QM presumption, the CFPB issued a qualified mortgage rule in 2013 ("2013 QM Rule"). The 2013 QM Rule included within the QM definition a debt-to-income ratio and other measures of ATR. 12 C.F.R. § 1026.43 (2016). But the Rule met pushback by mortgage lenders on the grounds that the numerical threshold lacked empirical basis. *See* 78 Fed. Reg. 6408, 6529 (published Jan. 30, 2013) (to be codified as amended 12 C.F.R. pt. 1026). In 2020, the CFPB undertook new rulemaking and added both a QM safe harbor and a QM rebuttable presumption based on floating Average Prime Offer Rates—that is, a specified threshold index pushed weekly reflecting the average APR offered borrowers of the best credit risk category. *See* 85 Fed. Reg. 86309, 86317 (Mar. 1, 2021) (to be codified as amended at 12 C.F.R. pt. 1026).

"unfair" credit practices by exaggerating the market costs and diminishing the regulatory gains via manipulating the parameters of comparison. In judicial review of agency action, the banking industry has persuaded federal courts to overrule newly promulgated rules on the grounds that such agency actions exceeded their statutory authority by failing the cost-benefit analysis test.[226] From the lens of neoliberal politics, thus, the elevation of cost-benefit analysis over other modes of policy inquiry created a route for organized business interests to propel deregulatory agendas and impede consumer protection programs. It also led to the "judicialization" of policymaking—*i.e.*, the removal of important policy decisions on distributive trade-offs from domains "subject to open deliberation to arenas insulated from such deliberation through legal protocols and layers of protective rules about who may access the knowledge."[227]

2. Conditioning Intervention Upon a Finding of Market Failure

Whereas cost-benefit analysis relates to the exercise of regulatory discretion, theories of market intervention concern the goal of consumer financial protection.

Over the past five decades, neoliberalism has transformed the goal of consumer protection from directly preventing consumer harm to removing constraints on consumers' free choice to satisfy their preferences through markets.[228] For neoliberals, the regulator's job is simple: (1) to help consumers communicate their preferences in the market through the production of neutral price-signals, and (2) to ensure markets fulfill their intended functions of satisfying consumer preferences. If companies mess with the market's price-signals, the argument goes, there will be a chain of harmful externalities that ripple through the dynamic and complex ecosystem of market agents who respond to the signal (*e.g.*, creating

[226] Chamber of Commerce of U.S. v. CFPB, No. 6:22-cv-00381, 2023 WL 5835951, at *12 (E.D. Tex. 2023) ([T]he court holds that the CFPB's adoption of that position in the March 2022 manual update is beyond the agency's constitutional authority based on an Appropriations Clause violation and beyond the agency's statutory authority to regulate 'unfair' acts or practices under the Dodd-Frank Act.").

[227] GRETA KRIPPNER, CAPITALIZING ON CRISIS: THE POLITICAL ORIGIN OF THE RISE OF FINANCE 145 (2012) (describing a core feature of neoliberalism's "depoliticization of the economy").

[228] *See, e.g.*, Robert B. Reich, *Toward a New Consumer Protection*, 128 U. PA. L. REV. 1, 20 (1979) (arguing that regulators should view the preservation of consumer free choice as the objective of consumer protection).

arbitrage, inefficiencies, or deadweight losses).[229] Thus, regulators should only intervene where market failures prevent markets from fulfilling their natural mandate. In doing so, regulators should only intervene to the degree necessary to rectify these failures.[230] Under the market failure test, agencies that pursue aims beyond these two goals are not only abusing their discretion but also doing their jobs incorrectly.

Although the market failure test purports to constrain arbitrary and paternalistic agency actions, it ends up fetishizing an idealized notion of consumer choice. This ideology is most visible in two sets of rules which dictate when a federal agency can intervene to remediate harmful practices in consumer financial markets: (1) interpretative rules confining the agencies' rulemaking power to merely correcting market failures; and (2) judicial doctrines invalidating agency actions that "misidentified" market failures.

One of the clearest examples of such fetishization is the FTC's 1980 *Policy Statement on Unfairness* (hereafter the "Policy Statement").[231] A response to congressional worries of FTC's "overregulation," the Policy Statement established a three-prong standard[232] to limit the FTC's exercise of rulemaking power to prohibit "unfair" market practices under section 5 of the Federal Trade Commission Act (FTCA).[233] In explaining the rationale for issuing the Policy Statement, the FTC stated:

> Normally, we expect the *marketplace to be self-correcting*, and we rely on *consumer choice*—the ability of individual consumers to make their

[229] *See, e.g.*, Joseph Stiglitz, *Government Failure vs. Market Failure: Principles of Regulation*, *in* GOVERNMENTS AND MARKETS: TOWARD A NEW THEORY OF REGULATION 13, 22–25 (Edward J. Balleisen & David A. Moss eds., 2010).

[230] *See, e.g.*, Daniel Castro & Alan McQuinn, *How and When Regulators Should Intervene*, INFO. TECH. & INNOVATION FOUND., Feb. 2015, at 2.

[231] *See* FTC, POLICY STATEMENT ON UNFAIRNESS, *supra* note 198.

[232] The three prongs are: (1) whether the practice causes consumers to incur substantial injury; (2) whether consumers can reasonably avoid such injury; and (3) whether regulating the practice creates more benefits than costs to the market. *Id.* Before the FTC's 1980 Policy Statement, the dominant factors for applying prohibition against "unfair" market practices were: (1) whether the practice injures consumers; (2) whether it violates established public policy; (3) whether it is unethical or unscrupulous. FTC v. Sperry & Hutchinson, 405 U.S. 233, 244–45 (1972).

[233] 15 U.S.C. § 45(n) (2022).

> own private purchasing decisions without regulatory intervention—to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory. However, it has long been recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary. Most of the Commission's unfairness matters are brought under these circumstances. They are brought, not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the *free exercise of consumer decision-making*.[234]

Adopted amidst the height of a neoliberal takeover of Congress and the courts, the Policy Statement reflected a deep suspicion towards regulatory paternalism and an idolization of consumer free choice.[235] These sentiments were also amply echoed by the prevalent legal scholarship of the time. For instance, the then-FTC Director of Policy Planning and later-U.S. Secretary of Labor, Robert Reich, wrote that a paternalistic approach to consumer protection is "fundamentally incompatible with the liberal assumption that each person is the best judge of his or her own needs."[236] "A consumer-protection rationale focusing on the likelihood that consumers within particular markets will misestimate physical or economic risks attendant upon their purchases," Reich explained, "can provide a strong basis for government intervention, untainted by paternalism."[237] This growing suspicion towards regulatory paternalism, both in and outside of the administrative state, converged with the prevailing neoliberal paradigm of free-market fundamentalism that was advocated by the Chicago School of law and economics.[238]

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[234] FTC, POLICY STATEMENT ON UNFAIRNESS, *supra* note 198.

[235] *E.g.*, Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 970 (D.C. Cir. 1985) ("In its Policy Statement, subscribed to by all five Commissioners, the FTC responded to the criticism levelled at the Commission's implementation of its unfairness authority by delineating a concrete framework for the future application of that authority.").

[236] Reich, *supra* note 228, at 14.

[237] *Id.* at 20.

[238] *See, e.g.*, Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 436 (2021) ("[I]nfluence organizations funded research, messaging, and lobbying outfits to promote the idea that markets are self-correcting so long as regulators do not get in the way of the 'free choices' of consumers. This infrastructure

In the early 2000s, the FTC's modern theory of "market failure" emerged. In the 2003 annual Marketing and Public Policy Conference, the then-Director of the FTC's Bureau of Consumer Protection J. Howard Beales delivered a public speech, stating that "[t]he primary purpose of the Commission's modern unfairness authority continues to be to protect consumer sovereignty by attacking practices that impede consumers' ability to make informed choices."[239] Central to the FTC's new unfairness standard is the notion that free markets operate in the consumer's best interests, making regulatory intervention appropriate only when there is a clearly identifiable "substantial consumer injury caused by [a] market failure."[240] Beales' understanding reflects the neoliberal consensus that became widely shared by both academics and regulators by the 2000s: *i.e.*, that the government should not disrupt the market's private ordering absent the occurrence of a market failure. Throughout the FTC's exercise of "unfairness" rulemaking powers, business associations and financial institutions frequently invoked the "market failure" notion to challenge the validity of FTC rules in court.[241]

Crucially, courts do not possess the full knowledge and expertise to determine questions of economic policy. But, by enabling courts to act as regulators

primarily articulated the value of market ordering—the idea of one true 'science' of the market—in the language of the Chicago School's version of neoclassical welfare economics. This discourse was also prompted as the only rational and nonpaternalistic form of policy analysis.").

[239] J. Howard Beales, Director, Bureau of Consumer Prot., The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection (May 30, 2033), https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection [https://perma.cc/86HD-JJ6R].

[240] *Id.*

[241] *See, e.g.*, Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 985–88 (D.C. Cir. 1985) (upholding the FTC's Credit Practices Rule on the grounds that the Rule did not exceed the FTC's "unfairness" powers). *American Financial Services v. FTC* influentially delineated the bounds of the FTC's unfairness power. While the majority applied the FTC's policy statement to uphold the challenged regulation, *Am. Fin. Servs. Ass'n*, 767 F.2d at 972, the dissent advocated for a version of the market-failure test. *Id.* at 993 (Tamm, J., dissenting) ("If the Commission has identified with sufficient clarity the impediment that blocks the market's natural allocation, it *may* be appropriate for the Commission to intervene."). Judge Tamm emphasized that "the principal limitation placed upon Commission authority is that it cannot, consistent with the Policy Statement, intervene merely because it believes the market is not producing the 'best deal' for consumers." *Id.* at 992 (quoting majority opinion). Thus, in reviewing agency action, the court's "first task" is to "ensure that the [agency's] intervention is a genuine response to a market failure 'which prevents free consumer choice from effectuating a self-correcting market.'" *Id.* at 993 (quoting majority opinion). To perform this task adequately, the reviewing court should "insist that the [agency] sufficiently understand and explain the dynamics of the marketplace." *Id.*

and overturn agencies' decision-making, the "market failure" test transferred vital questions of economic trade-offs in consumer protection from fields of open democratic deliberation to enclosed legal institutions—a domain gate-kept by a class of legal professionals and allied business elites.[242] As such, questions of market failure evolved into resource contests over who can hire the most sophisticated expert witness. Oftentimes, litigation over the evidential sufficiency of market failure became legal battles between the agencies and the organized business interests. The voices of consumers and their advocates were either watered-down or absent.

In sum, neoliberalism has reshaped both the goal and the substance of consumer financial protection. Whatever consumer financial protection used to be, it is now principally concerned with the protection of free markets and consumer autonomy. In this neoliberal transformation, each branch of the federal government played complementary roles: Congress laid down the legal foundations by creating an individual rights model of credit regulation; the agencies tied their own hands by adopting the cost-benefit analysis and market failure test; the courts disciplined the agencies for venturing beyond the unspoken neoliberal norm via judicial review. Collectively, this system created a neoliberal consensus whereby all problems arising from the credit markets—whether results of individual conduct or social processes—were approached as if they were outcomes of individual choice. This system represents the institutional equilibrium that our lawmakers, judges, and regulators have found to entrench and stabilize business interests amidst the changing credit distribution landscape from the 1970s to the 2000s.

III
BEYOND NEOLIBERALISM: CRITIQUE OF CURRENT PROPOSALS

This section focuses on the ways in which some of the most prevalent proposals for legal reform of credit underwriting on the table have ignored the *relational* aspects of algorithmic harm. With some variations, most proposals advocate for: (1) enabling regulatory inspection of algorithmic inputs used in AI credit models by means of mandatory disclosure, or (2) delegating regulatory burden to private

[242] *See* KRIPPNER, *supra* note 227, at 145.

markets through fostering technological entrepreneurship investing in the development of "RegTech" solutions.[243]

What these proposals have in common is treating algorithmic harm as outcomes of discrete individual acts, or practices of individual creditors, divorced from the context and social relations through which such harms are produced. While each proposal addresses a particular dimension of algorithmic injustice, none of them challenge the flawed assumptions of individual responsibility—a model of credit governance that has been deeply entrenched in the current regulatory consciousness since the 1970s. Existing proposals are, by and large, progenies of the neoliberal consensus. Most proposals continue to draw extensively from the neoliberal rulebook—that is, to restore perfect markets and rational market agents through disclosure and removal of choice constraints. These proposals see public regulation only as a compliment, rather than a supplement, to the market's private ordering. But, as the following paragraphs will show, such efforts tend to miss the target because they fail to recognize that a significant portion of algorithmic harm is generated by unjust relations between creditors and consumers in AI-mediated markets.

A. The Futility of Algorithmic Input Scrutiny

The dominant approach to AI governance in consumer credit is to enhance regulatory visibility of how algorithmic inputs—*i.e.*, raw consumer data—are processed by AI models in the credit underwriting processes. To implement this approach, proponents of input scrutiny argue that regulators should demand creditors and data aggregators disclose AI training data, computational formulas, and software source codes to federal agencies by means of regulatory fiat.[244] Data transparency would help regulators better identify discriminatory practices, patterns, and hold creditors accountable under existing fair lending laws. In this regard, input scrutiny shares the same goals of most existing disclosure mandates: (1) en-

[243] The term "RegTech" (*i.e.*, regulatory technology) refers to a class of software applications or algorithmic innovations for managing regulatory compliance. *See generally* Jake Frankenfield, *RegTech: Definition, Who Uses It and Why, and Example Companies*, INVESTOPEDIA, https://www.investopedia.com/terms/r/regtech.asp [https://perma.cc/L576-LJCS] (last updated Aug. 27, 2020).

[244] *See, e.g.*, *CFPB Acts to Protect the Public from Black-Box Credit Models Using Complex Algorithms*, *supra* note 44.

hancing price transparency;[245] (2) facilitating informed consumer choice by creating the infrastructure for fair market competition and cost comparison;[246] and (3) nudging consumer choice towards welfare-optimizing financial products.[247] From the proponents' point of view, the AI-mediated credit market is sufficiently opaque and unfair that even the most devout neoliberals should find the present conditions to be a "market failure," justifying regulatory intervention.

The algorithmic input scrutiny proposal presents two obvious advantages. First, this approach can easily fit into the existing notice-and-consent frameworks of fair lending. For instance, under Regulation B (implementing the ECOA), creditors taking an adverse action against a loan applicant are required to deliver to the applicant a notification in writing containing "a statement of specific reasons" for the adverse action "within 30 days" after taking such action.[248] If this notice requirement is not followed, the creditor is deemed to have violated ECOA (a strict liability regime). If implemented, the input scrutiny mandate may phase out the use of "black-box" AI models in lending decision-making.[249] Creditors seeking

[245] *See generally* Jermy Prenio & Jeffery Yong, *Humans Keeping AI in Check—Emerging Regulatory Expectations in the Financial Sector* 14–15 (Bank for Int'l Settlements, FSI Insights on Policy Implementation No. 35, 2021), https://www.bis.org/fsi/publ/insights35.htm [https://perma.cc/A8RE-QGUW]. *But see* Andrew Burt, *The AI Transparency Paradox*, HARV. BUS. REV. (Dec. 13, 2019), https://hbr.org/2019/12/the-ai-transparency-paradox [https://perma.cc/63HZ-JB97] ("[I]t is becoming clear that disclosures about AI pose their own risks: Explanations can be hacked, releasing additional information may make AI more vulnerable to attacks, and disclosures can make companies more susceptible to lawsuits or regulatory action.").

[246] *See generally* Angela A. Hung, Min Cong & Jeremy Burke, *Effective Disclosures in Financial Decisionmaking* 1 (Rand Corp., Research Paper No. RR-1270-DOL, 2015); Jeanne M. Hogarth & Ellen A. Merry, *Designing Disclosures to Inform Consumer Financial Decisionmaking: Lessons Learned from Consumer Testing*, FED. RSRV. BULL. (Oct. 21, 2011), https://www.federalreserve.gov/pubs/bulletin/2011/articles/designingdisclosures/default.htm [https://perma.cc/52TM-ZAA2].

[247] *See generally* RICHARD THALER & CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008); Cynthia Weiyi Cai, *Nudging the Financial Market? A Review of the Nudge Theory*, 60 ACCT. & FIN. 3341, 3357–60 (2020).

[248] *See* 12 C.F.R. § 1002.9 (2023).

[249] *See* Sunil Ramlochan, *The Black Box Problem: Opaque Inner Workings of Large Language Models*, PROMPT ENG'G INST. (Oct. 23, 2023), https://promptengineering.org/the-black-box-problem-opaque-inner-workings-of-large-language-models/ [https://perma.cc/5H37-A79P] (describing transparent "glass-box" model architectures and transparency in model training processes as potential solutions to the "black-box" problem of advanced AI technologies such as LLMs); *See also* LAURA BLATTNER, P-R STARK & JANN SPIESS, MACHINE LEARNING EXPLAINABILITY & FAIRNESS: INSIGHTS FROM CONSUMER LENDING

to comply with ECOA's adverse action notice requirements will be incentivized to adopt "white-box"[250] AI models to underwrite consumer credit.[251]

Second, enhancing algorithmic input aligns with the current regulatory agenda to push for more individualist, dignitarian data privacy reforms. In March 2023, the CFPB promulgated a final rule[252] to compel creditors to share with consumers any data they have collected about them.[253] Any potential input scrutiny rulemaking can build on the existing legal infrastructure of financial data sharing.

Despite its alignment with existing regulatory agendas, the input scrutiny approach fails to meaningfully account for either informational or decisional harms stemming from unjust data relations. Its push for dignitarian reform distracts us from the real source of algorithmic harm, which lies in creditors' informational control over horizontal and vertical data flows. If the material underpinnings of unjust data relations remain unchanged, it is questionable whether more data transparency could lead to meaningful consumer choice and autonomy.

The input scrutiny approach also fails to address the problem of AI proxy discrimination. Without race or gender inputs, the AI model can still engage in price discrimination because it draws indirect and unsupervised inferences based

6 (2022), https://finreglab.org/wp-content/uploads/2022/04/FinRegLab_Stanford_ML-Explainability-and-Fairness_Insights-from-Consumer-Lending-April-2022.pdf [https://perma.cc/RD8B-KC8P] (describing the black-box nature of AI machine learning models as the reason for growing regulatory demand for AI model transparency and data input scrutiny).

[250] In general, AI solutions classified into "white-box" and "black-box" models. White-box solutions are "transparent as to how they reach a certain conclusion, with users able to view and understand which factors influenced an algorithm's decisions and how the algorithm behaves." Maitreya Natu, *The Move to Unsupervised Learning: Where We Are Today*, THE NEW STACK (Mar. 3, 2023), https://thenewstack.io/the-move-to-unsupervised-learning-where-we-are-today/ [https://perma.cc/KRM7-ZBKS]. Decision trees and linear-regression-based models are examples of white-box solutions. *Id.* In contrast, black-box solutions are "far less transparent in letting users know about how a certain outcome is reached." *Id.* Examples of black-box solutions include deep neural networks and boosting algorithms. *Id.*

[251] *See* Florian Perteneder, *Understanding Black-Box ML Models with Explainable AI*, DYNATRACE ENG'G (Apr. 29, 2022), https://engineering.dynatrace.com/blog/understanding-black-box-ml-models-with-explainable-ai/ [https://perma.cc/6SEM-8KP5].

[252] 88 Fed. Reg. 35150 (May 31, 2023) (to be codified at 12 C.F.R. pt. 1002); *see also CFPB Finalizes Rule to Create a New Data Set on Small Business Lending in America*, CFPB (Mar. 30, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-to-create-a-new-data-set-on-small-business-lending-in-america/ [https://perma.cc/SAP2-ABG2].

[253] 88 Fed. Reg. 35150, 35459–60 (May 31, 2023) (to be codified at 12 C.F.R. pt. 1002).

on engineered data and sources that reflect preexisting socioeconomic inequalities, which are embedded in the data used to train the algorithm.[254] This occurs because AI makes decisions by replicating and reinforcing human bias.[255] The AppleCard, for instance, recently drew intense criticism when a male applicant complained that he received a line of credit 20 times higher than that offered to his spouse, even though the two filed joint tax returns, lived in the same community, and owned the same property.[256] Goldman Sachs, the issuer of AppleCard, responded to the complaint by stating that it could not discriminate against her because its algorithm "doesn't even use gender as an input."[257] Goldman's response belies the reality that gender-blind algorithms can still be biased against women if they draw statistical inference from inputs that happen to correlate with gender, such as purchase history and credit utilization.[258] Even though the New York State Department of Financial Services subsequently investigated Goldman's credit card practices, it concluded that Goldman did not violate its fair lending obligations under ECOA because it "did not consider prohibited characteristics."[259] The AppleCard case challenges the notion that removing suspect algorithmic inputs indicat-

[254] *See, e.g.*, Talia B. Gillis, *The Input Fallacy*, 106 MINN. L. REV. 1175, 1228 (2022) ("[F]ormal exclusion of a protected characteristic may be meaningless with respect to the ability of an algorithm to actually use the characteristics. Even if an algorithm does not seek to recover the information—that is, even if it never tries to derive race or marital status—such characteristics are available to it because they are so embedded in the rest of the data.").

[255] *See, e.g.*, Prince & Schwarcz, *supra* note 137, at 1270–72.

[256] *See* James Vincent, *Apple's Credit Card is Being Investigated for Discriminating Against Women*, THE VERGE (Nov. 11, 2019), https://www.theverge.com/2019/11/11/20958953/apple-credit-card-gender-discrimination-algorithms-black-box-investigation [https://perma.cc/R7KY-H49D].

[257] Will Knight, *The Apple Card Didn't 'See' Gender—and That's the Problem*, WIRED (Nov. 19, 2019), https://wired.com/story/the-apple-card-didnt-see-genderand-thats-the-problem/ [https://web.archive.org/web/20191119174621/https://wired.com/story/the-apple-card-didnt-see-genderand-thats-the-problem/]

[258] *See generally* Prince & Schwarcz, *supra* note 137, at 1275 ("[U]nintentional proxy discrimination by AIs cannot be avoided merely by depriving the AI of information on individuals' membership in legally suspect classes or obvious proxies for such group membership. . . . AIs can and will use training data to derive less intuitive proxies for directly predictive characteristics when they are deprived of direct data on these characteristics due to legal prohibitions.").

[259] NEW YORK STATE DEPT. OF FIN. SERV., REPORT ON APPLE CARD INVESTIGATION 2, 6 (2021) ("[T]he Department's exhaustive review of documentation and data provided by the Bank and Apple, along with numerous interviews of consumers who complained of possible discrimination, did not produce evidence of deliberate or disparate impact discrimination but showed deficiencies in customer service and transparency.").

ing consumers' protected characteristics can eliminate AI bias. More importantly, the failure of algorithmic input scrutiny to eliminate AI bias calls into question the effectiveness of the colorblind approach of the ECOA and FHA to equal credit access protection.[260]

B. The Illusory Promises of "RegTech"

The emergence of "RegTech"[261]—*i.e.*, information technologies used by financial institutions to address the challenges posed by FinTech and ensure regulatory compliance—presents an alternative to the top-down regulatory initiatives discussed earlier. In general, RegTech encompasses a wide range of technological solutions, including those used to detect and prevent financial fraud, safeguard consumer data protection, optimize asset-liability management, monitor anti-money laundering, and automate tax/financial reporting.[262]

At its core, RegTech promises to safeguard equal credit access protection by tapping the strength of competitive financial markets to self-correct, adapt, and innovate.[263] Proponents of RegTech argue that, by investing in informational technologies regulating AI, the market can solve its own problems through entrepreneurship and innovation—*i.e.*, "pure" market processes untainted by regulatory paternalism. Proponents also envision RegTech to be the perfect solution to balance free markets against market-generated injustices, a pathway for financial institutions to redeem themselves. In the era of congressional gridlock and legislative inaction, RegTech presents an attractive "third way" that echoes with

[260] In response to the failures of traditional fair-lending frameworks to address the risk of AI bias, some legal scholars have proposed "algorithmic affirmative action." *See generally* Peter N. Salib, *Big Data Affirmative Action*, 117 NW. U. L. REV. 821, 821 (2022) ("[U]nlike old-fashioned affirmative action, Big Data Affirmative Action would be automated, algorithmic, and precise.").

[261] *See generally* Ben Charoenwong, Zachary Kowaleski, Alan P. Kwan & Andrew Sutherland, *RegTech: What It Is and Why It Matters*, U. OF OXFORD BUS. L. BLOG (Feb. 23, 2022), https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/02/regtech-what-it-and-why-it-matters [perma.cc/3WUN-NC28].

[262] *See, e.g.*, *Technology Based Innovations for Regulatory Compliance ("RegTech") in the Securities Industry*, FINRA (Sep. 10, 2018), https://www.finra.org/sites/default/files/2018_RegTech_Report.pdf [https://perma.cc/6SVN-AQG4].

[263] *See, e.g.*, Francois-Kim Hugé, Carlo Duprel & Giulia Pescatore, *The Promise of RegTech*, INSIDE MAG. (June 27, 2017), https://www.gaco.gi/images/pdf/2017-june/lu-the-promise-regtech-27032017.pdf [https://perma.cc/KN8D-6FEV].

the existing cries for corporate social responsibility.[264] Essentially, the RegTech proposal seeks to reinvent the neoliberal consensus through technology: financial institutions, by adopting RegTech to keep AI in check, can help the credit market cleanse its own imperfections through the private ordering.

But the promise of RegTech is illusory because, without changing the material conditions of exploitation that currently undergird unjust data relations, it is doubtful whether RegTech can meaningfully empower consumers against creditors. In fact, the opposite is more likely to be true. Currently, we are witnessing a wave of RegTech and FinTech acquisitions by some of the largest financial intermediaries. In June 2020, payments giant Mastercard acquired Finicity, one of the leading data aggregators in the U.S.[265] Mastercard's competitor, Visa, acquired Plaid, another leading data aggregator.[266] Similarly, banks have also tried to control and internalize the process of data aggregation by pushing data aggregators to sign bilateral agreements governing their collection and transmission of consumer data from the banks' platforms.[267] As of September 2020, Wells Fargo signed seventeen such agreements with data aggregators, governing "ninety-nine percent of the information being collected from its platforms for use by other financial institutions."[268] What this means is that RegTech, like FinTech, will further empower creditors against consumers. With RegTech incorporated into creditors' business model, creditors will effectively gain control of the entire data production process—including data aggregation, processing, distribution, and explanation.

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[264] *See, e.g.*, Vivienne Brand, *Corporate Whistleblowing, Smart Regulation, and RegTech: The Coming of the Whistlebot?*, 43 U. NEW S. WALES L.J. 801, 826 (2020) ("[T]his article suggests that given whistelblowing's particular vulnerability as a corporate regulatory device to the vicissitudes of human existence, the arrival of technology enhanced whistleblowing may ultimately be more significant for whistleblowing than for some other fields of human endeavor.").

[265] *See* FINREGLAB, DATA DIVERSIFICATION IN CREDIT UNDERWRITING 7 (2020), https://finreglab.org/data-diversification-in-credit-underwriting [https://perma.cc/3J7A-K8RS]. The top U.S. financial data aggregators include MX Technologies, Finicity, Yodlee, Plaid, and Akoya. *See A List of Financial data Aggregators in the United States*, MX BLOG (Nov. 18, 2023), https://www.mx.com/blog/a-list-of-financial-data-aggregators-in-the-united-states/ [https://perma.cc/3HZ9-LSVW].

[266] *See* FINREGLAB, DATA DIVERSIFICATION IN CREDIT UNDERWRITING, *supra* note 265, at 7.

[267] *See id.*

[268] *Id.* at 8.

RegTech therefore embodies a common symptom found in most neoliberal responses to social problems: subscription to the belief that the market is disconnected from social relations, and that technological problems in the market can be self-contained and resolved by technology alone. Proponents of RegTech have articulated a flawed vision of market internalism,[269] that all problems stemming from the markets can be solved by the markets themselves. On a technical level, the RegTech movement has also embraced a similarly flawed vision on technology—that all problems stemming from technology are self-containable through the development of new technologies.[270] But the RegTech movement has failed to realize that neither markets nor technologies can be dis-embedded from the social relations that constitute them. In ignoring the unjust social conditions giving rise to the problems that technologies were employed to solve, the RegTech and XAI movements have reframed the problem as outcomes of deviant individual conduct. As a result, the only viable solution they see is using technologies to discipline recalcitrant creditors, facilitate compliance, and then delegating the enforcement to the private markets. In this regard, RegTech has distracted us from the real sources of algorithmic harm—that is, unjust market relations of data production that enabled AI technologies to be used for commodification and exploitation.

IV
TOWARDS PROPERTARIAN REFORM: ALTERNATIVE PATHWAYS

So far, my analysis has largely centered on the dimensions of algorithmic exploitation in AI-mediated credit markets and how current proposals informed by neoliberal ideals fail to meaningfully address the risks of algorithmic exploitation. A lingering question is how to move forward.

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[269] Ben Green & Salomé Viljoen, *Algorithmic Realism: Expanding the Boundaries of Algorithmic Thought*, 2020 CONF. ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 19, 23, https://dl.acm.org/doi/pdf/10.1145/3351095.3372840 [https://perma.cc/F2Q2-HX9Z] ("Another attribute of algorithmic formalism is internalism: only considerations that are legible within the language of algorithms—e.g., efficiency and accuracy—are recognized as important design and evaluation considerations.").

[270] *See id.* at 23 (discussing algorithmic formalism, in which efforts to address ethics within the technology industry are overly reliant on technology itself); Jimmy Wu, *Optimize What?*, COMMUNE (Mar. 15, 2019), https://communemag.com/optimize-what/ [https://perma.cc/HB3N-HXKZ] (emphasis added) ("Techno-solutionism is the *very soul of the neoliberal policy designer*, fetishistically dedicated to the craft of incentive alignment and (when necessary) benevolent regulation. Such a standpoint is the effective outcome of the contemporary computational culture and its formulation as curriculum.").

As the last five decades of poverty intensification and systemic credit inequality have shown, neoliberalism has failed its promise of delivering meaningful equal credit access protection. The failures of neoliberalism are becoming even more salient today in the age of informational capitalism as AI has exposed the limits of free markets and consumer autonomy presumptions of regulation. To remediate these flaws, this Part explores possibilities of legal reform through (1) reimagining the nature of data ownership, (2) creating a collective intellectual property right in data, and (3) building a collective data governance infrastructure anchored in the open digital commons.

A. Why Collective Propertarian Data Governance?

By "propertarian reform," I do not mean to limit the discussion to private property rights. Instead, I refer to a panoply of property-related reforms that vests legal entitlement in the ownership of *things* rather than of *self*. This includes variations of common property, such as common pool governance, collective property, and joint ownership. As Salomé Viljoen has pointed out, thinking of data governance only in narrow dichotomous terms—"propertarian" versus "dignitarian"—constrains our imagination of what is possible.[271] The move to understand data in relational terms rejects the notion that individualist solutions are the only possibility for meaningful reform.

This article imagines collective data ownership as an alternative pathway to data governance. While individual data ownership helps rearrange unjust social relations of data production, circulation, and retainment within vertical systems of informational control, collective data ownership addresses horizontal relations.[272] Collective data ownership also rebalances the power disparities between the owners/users of AI (creditors) and the subjects of AI (consumers) on both vertical and horizontal dimensions. Since data is the most valuable and vital input for AI systems, changing the legal foundations of data ownership will impact the occurrence of algorithmic informational and decisional harms.

[271] Viljoen, *supra* note 36, at 628.

[272] *See generally* Peter Leonard, *Beyond Data Privacy: Data "Ownership" and Regulation of Data-Driven Business*, 16 SCITECH LAW. 10, 13–14 (2020).

In the context of consumer credit, granting consumers some form of property entitlement to the data can radically reshape existing relations of data aggregation and reorient the direction of power along the chains of data supply. For instance, if consumers are granted full property ownership over the data generated through their online activities—including the rights to possess, control, manage, use, enjoy, dispose, and sell[273]—then the data aggregators and brokers will need to purchase from consumers a right to access consumer data to conduct their business. Admittedly, full data ownership may have chilling effects on the speed and efficiency of data circulation since it breaks down existing economies of scale already formed between data aggregators and creditors, but full data ownership can also redirect power from creditors to consumers by incentivizing the market to invest in consumer-empowering FinTech and push data aggregators to disentangle with creditors. Even from a dignitarian standpoint, granting consumers a right to exclude others from accessing the data—anchored in the notion of personal dominion and sovereignty over things—can prevent the erosion of privacy and autonomy.[274] A propertarian data governance reform that entirely transforms the material underpinnings of data production can protect consumer autonomy better than any neoliberal regulation.

Alternatively, formalizing a partial property ownership of data can also reshape data relations, albeit with less radical restructuring effects on the credit market. For example, conceptualizing data ownership as an asset or an entitlement to income can reduce consumers' chronic dependence on unjust data relations to access the means of basic economic subsistence. Under an income-entitlement regime, data aggregators may not need explicit consumer consent to harvest data and sell them to creditors. But consumers will be entitled to a "data dividend"

[273] *See generally* Jesse Wall, *Taking the Bundle of Rights Seriously*, 50 VICTORIA U. WELLINGTON L. REV. 733, 735 (2019) (quoting TONY HONORE, *Ownership*, *in* MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL 161 (1987)) (explaining that, under the "bundle of rights theory," property rights represent "'an open-ended set' of 'activities' or 'privileges', that include the ability to possess, consume, derive income from, control, manage, transfer, exchange, sell, borrow against, or otherwise use, the object, asset, or resource").

[274] The Supreme Court has consistently treated the right to exclude is the hallmark of property ownership. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 82 (1980) ("[O]ne of the essential sticks in the bundle of property is the right to exclude."); Kaiser Aetna v. United States, 444 U.S. 164, 180–81 (1979) (stating the right to exclude is the most important stick in the bundle of property rights).

for the wealth generated from data usage.[275] While this approach to propertarian data governance might not break up existing bonds between data aggregators and creditors, it can certainly provide a wealth cushion that helps alleviate the burdens of the low-income and reduce credit inequality.[276]

In contrast to an individualist or dignitarian approach, a propertarian approach to data governance reform can remediate unjust relations of data production and circulation—the root causes of algorithmic harm. Whether in full or partial form, formalizing a property right to data can provide consumers a means to regain control over the processes and fruits of AI's atomization of consumer *selfhood*. However, to say that we should embrace a propertarian reform does not suggest that dignitarian interests in data are unimportant, or that individual rights do not matter. Individual autonomy, dignity, and integrity do matter—and, as the Introduction and Part I of this article have illustrated, they are embedded in the purpose of equal credit access protection. But a propertarian approach can protect these interests as well. A propertarian reform can also address systemic inequalities that have been ignored by the dignitarian approach for far too long.

B. Recommendations for Reshaping Unjust Data Relations

Of course, no legal reform is ever perfect—not even a radical restructuring of the market through consumer data ownership. While a propertarian framework for data governance can help us directly address the root causes of algorithmic harm in ways that no individualist or dignitarian regime can, it is important to recognize that there is no silver bullet to our present problems.[277] Ultimately, whether or not we should opt for full or partial data ownership (and, in the event we opt

[275] Former Presidential Candidate Andrew Yang has launched the Data Dividend Project to push companies like Meta and Google to pay users a "data dividend" for the wealth that these companies have generated through the commercialization of user data. *See* THE DATA DIVIDEND PROJECT, https://www.datadividendproject.com/ [https://perma.cc/DUE2-UDPQ].

[276] House Representative Alexandria Ocasio-Cortez has also posited data ownership as a potential solution to wealth inequality. Alexandria Ocasio-Cortez (@AOC), X (Feb. 19, 2020, 11:43 PM), https://twitter.com/AOC/status/1230352135335940096 [https://perma.cc/4YVZ-P3EE] ("[T]he reason many tech platforms have created billionaires is [because] they track you without your knowledge, amass your personal data [and] sell it without your express consent. You don't own your data, [and] you should.").

[277] There are still several reasons to be skeptical of propertarian data governance reforms. The first one is administrability. Operationalizing a reform at this scale may need significant political mobilization and legislative support. The second is incentive. Making data into personal property or some kind of income-

for partial ownership, which sticks within the bundle of rights to prioritize) is a trade-off between thoroughness and administrability of legal reform that should be considered in light of the current social priorities. That trade-off should be a subject of democratic, public, and open deliberation—a policy choice that lies beyond the scope of this article. Nevertheless, there are concrete steps we can take to remove distractions obstructing our clear view of what is possible. The following paragraphs illuminate what a thorough propertarian reform to reshape unjust market relationships will likely require.

1. Reimagining the Nature of Data Ownership

Any propertarian reform must first address a threshold question: what does it mean to say someone owns data?[278] Currently, several analogies are being deployed to make sense of data ownership: data as *oil*, as *personhood*, as *salvage*, and as *labor*.[279] Each time a "data-as" analogy is proposed, the proponent is suggesting that data should be regulated the same way the other thing is currently governed. The logic of each "data-as" analogy is as follows: First, it makes an analytical claim about what makes data valuable. Second, by identifying what makes it valuable, the analogy makes a normative judgment about who should own the data. Third, to implement the normative ideal, the analogy makes a legal claim about what rights, duties, and powers should be established to buttress its particular vision of data ownership.[280]

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generating asset may further incentivize consumers to share data about themselves online and sell to data aggregators. *See* Viljoen, *supra* note 36, at 621–23.

[278] Although the concept of "data" is already defined under existing data-governance laws, it does not preclude legal arguments to analogize data to other objects of ownership because these laws have broad definitions of data. For example, under GDPR, personal data is defined as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of that natural person." 2016 O.J. (L. 679) ch. 1, art. 4.

[279] *See generally* Mathias Risse, *Data as Collectively Generated Patterns: Making Sense of Data Ownership* 4 (Carr Ctr. for Hum. Rights Pol'y, Harv. Kennedy Sch., Discussion Paper, 2021), https://carrcenter.hks.harvard.edu/files/cchr/files/210426-data_ownership.pdf [https://perma.cc/ME2W-ZVEX].

[280] *Id.* at 1.

(i) *Data Is Not Oil*: The most common legal analogy is that data is just like oil, or any depletable natural resource. This concept is popularized by British mathematician Clive Humby, who declared in 2006 that "data is the new oil."[281] What Humby meant is that data, like oil, is valueless and useless in its raw state; to generate value, data needs to be refined, processed, and turned into something else—the value of data lies in its potential.[282] But "data-as-oil" fails as a legal analogy. Unlike oil, data can be infinitely supplied by its producers. It is continually updated by the consumer's daily engagement with the credit system, whether directly (*e.g.*, applying for loans) or indirectly (*e.g.*, supplying credit information). In that sense, data is not like oil—oil is relatively scarce, fungible, and rivalrous in consumption; whereas data is abundant, non-fungible, and non-rivalrous.[283] This challenges a central claim that many businesses have articulated in their legal battles to claim ownership of consumer data: *i.e.*, that unprocessed data is merely raw material floating freely in the natural domain readily available for economic appropriation.

(ii) *Data Is Not Personhood*: A competing analogy, anchored in dignitarian concepts of personal sovereignty, sees data as imprints of human expression in cyberspace.[284] Whereas "data-as-oil" views data as extracted from the natural domain, "data-as-personhood" views data as emanated from human subjectivity.[285] Under this theory, data is an extension of the self, an aspect of individual integrity and autonomy that is immune from appropriation (or expropriation). This analogy encourages us to think of data as not being owned at all. It urges legislators and policymakers to completely de-commodify access to data and make it unavailable for all market actors. But this legal analogy is flawed for two reasons. First, the analogy conflates the purpose and outcome of individual expression. While it's

[281] *See, e.g.*, Nisha Talagala, *Data as the New Oil Is Not Enough: Four Principles for Avoiding Data Fires*, FORBES (Mar. 2, 2022, 5:48 PM), https://www.forbes.com/sites/nishatalagala/2022/03/02/data-as-the-new-oil-is-not-enough-four-principles-for-avoiding-data-fires/?sh=45c7db1fc208 [https://perma.cc/GW9E-RM8H].

[282] *Id.* When we speak of data being "mined," we are implicitly subscribing to the idea that data can be extracted from the natural state.

[283] Risse, *supra* note 279, at 4; Lauren Henry Scholz, *Big Data is Not Big Oil: The Role of Analogy in the Law of New Technologies*, 86 TENN. L. REV. 863, 878—84 (2019).

[284] Risse, *supra* note 279, at 5.

[285] *See id.*

true that people express their personal desires, anxieties, thoughts, and lived experiences through communications in the digital medium, data is merely a byproduct of that expression. People do not engage with cyberspace for the purpose of producing data. Second, the analogy fails to recognize that people have more than a dignitarian interest in data. However uncomfortable it may be, data does have commercial value. If given the opportunity, many would trade their dignitarian interests for material benefit. Thus, the more sensible approach is to accommodate both dignitarian and propertarian interests by having consumers retain a portion of the wealth that is created through the commercialization of data.

(iii) *Data Is Not Salvage*: "Salvage" is defined as "a rescue of endangered property."[286] In maritime law, "salvage award" is a compensation for people who have rescued property that is lost at sea.[287] In finance, "salvage value" describes the remaining value that someone should receive after disposing of an asset that has exhausted its useful life.[288] What is common in both is the idea that whoever rescues an imperiled property from waste should be entitled to the value of the labor they have invested to save a property that would have perished but for the labor. In data governance, the analogy of "data-as-salvage" echoes with the sentiment that data miners and processors should be compensated for turning data into marketable outputs.[289] However, this analogy is also flawed because it fails to recognize that data is collectively generated. There's no doubt that data miners and processors have "mix[ed] their labor" in generating marketable data.[290] But to say that data miners "saved" data from an "imperiled state" and turned them into something useful is to grossly overstate their contribution to data production. Let us not forget that each cog in the chain of data production—consumers, data aggregators, miners, distributors, and financial intermediaries—have materi-

[286] *Salvage*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/salvage [https://perma.cc/LS2A-646K] (last updated July 2021).

[287] *See* Joshua C. Teitelbaum, *Inside the Blackwall Box: Explaining U.S. Marine Salvage Awards*, 22 SUP. CT. ECON. REV. 55, 56 (2014).

[288] *See* Will Kenton, *Salvage Value Meaning and Example*, INVESTOPEDIA, https://www.investopedia.com/terms/s/salvagevalue.asp [https://perma.cc/XY2S-HMAD] (last updated Apr. 17, 2023).

[289] Risse, *supra* note 279, at 5.

[290] *Id.* (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27. ("Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined it to something that is his own, and thereby makes it his property.")).

ally contributed to the process. Remove any single actor from the chain, and data would not be marketable.

(iv) *Data Is Not Labor*: Among the pantheon of analogies, the "data-as-labor" analogy is the most promising. At its core, this analogy aims to distribute the fruits of data production according to the proportion of labor invested by each actor on the data production chain.[291] Under this framework, consumers, data miners, and aggregators will each be entitled to compensation for the "wage labor" they invested in producing the data. This analogy strikes a balance between protecting both dignitarian and propertarian interests in data. It recognizes that, while people do express personhood value in the production of data, they will readily trade it for material benefit when given the opportunity. The "data-as-labor" analogy has also garnered much academic support. Glen Weyl and Eric Posner have introduced a proposal called Radical Markets, which "seeks to introduce a labor market for data."[292] In doing so, they aim to uproot the unjust foundations of data production, upon which the uncompensated fruits of "data laborers" are "distributed to a small number of wealthy savants rather than to the masses."[293] But there are still reasons to be skeptical of this analogy. First, if wage labor is equivalent to the value that each actor has invested in the production of data, then the distribution of wealth will be inherently unequal. Producers located on the lower-end of the data value chain (*i.e.*, consumers responsible for data provision) will get minimally compensated, while producers located on the higher-end of the chain (*i.e.*, data processors responsible for data repackaging and refinement) will retain most of the economic surplus. Second, "data-as-labor" does not account for market externalities. Crucially, markets and market prices are not neutral conduits for inherent value. While the market may be able to account for individualized value within the vertical relations of data production, it cannot account for the ag-

[291] *See* Eugene K. Kim, *Data as Labor: Retrofitting Labor Law for the Platform Economy*, 23 MINN. J.L. SCI. & TECH. 131, 137–40 (2021).

[292] ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 205–22 (2018)); *see also* Imanol Arrieta Ibarra, Len Goff, Diego Jiménez Hernández, Jaron Lanier & E. Glen Weyl, *Should We Treat Data as Labor? Let's Open Up the Discussion*, BROOKINGS INST. (Feb. 21, 2018), https://www.brookings.edu/articles/should-we-treat-data-as-labor-lets-open-up-the-discussion/#:~:text=We%20argue%20that%20thinking%20of,treating%20labor%20differently%20than%20capital [https://perma.cc/3FMK-GZAV].

[293] POSNER & WEYL, *supra* note 292, at 209.

gregate costs imposed on horizontal flows of data. The analogy's key omission is assuming that markets are dis-embedded.

2. Creating a Collective Intellectual Property Right in Data

(i) *Data as Collectively Generated Patterns*: If data is not oil, personhood, salvage, or labor, then what is it? Mattias Risse conceptualizes data as collectively generated patterns.[294] The idea is that the value of data "does not consist in individual items but in the emerging patterns."[295] Data is valuable not only for those who provide data within the vertical relations of data production, but also for people situated in horizontal relations of data flow, circulation, and distribution.[296]

The proposal that data consists of collectively generated patterns differs from other "data-as" proposals in that it is not an ontological claim about what data is or ought to be.[297] It is a purely descriptive and pragmatic claim about how data currently fits into the existing "human practices of assigning commercial value to entities."[298] From a descriptive lens, data is a microcosm of vast social networks that are continually adapted, updated, and reflected by those who generate, use, and consume data for economic means.[299] Thinking of data in relational rather than ontological terms helps us detect the blind spots of each aforementioned analogy.

From a legal standpoint, understanding data as collectively generated patterns opens new possibilities for restructuring the currently unjust data relations. If we accept the fluidity and amorphousness of data, then we can design a legal system that directly protects the data subjects' (consumers and platform users) access and engagement with other sources of data production. Thinking of data in fluid terms thus enables us to formulate a collective property right in data deriving from the management of social relations. For instance, we can imagine a membership-based joint tenancy or co-ownership of data that places the onus of data management on the community. Another possibility is to grant consumers

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[294] Risse, *supra* note 279, at 6.
[295] *Id.*
[296] *See id.*
[297] *See id.* at 9.
[298] *Id.*
[299] *See id.*

a right to access, control, and withdraw personal data from the digital commons, without granting a right to exclude. These propertarian reforms do not require analogizing data to already-existing things. Instead, it allows us to accept data as it is—that data is *sui generis*.

Here, it is important to note that the concept of collective property rights in data does not repudiate the notion that individuals have important dignitarian interests in data. But it does repudiate the idea that individual dignitarian interests in data are the only interests that matter to data governance law. It also rejects the notion that any interest in data is reducible to individual dignitarian interests. The fetishization of individualism, autonomy, and dignity is part and parcel of neoliberalism's effect of reducing complex social problems into outcomes of individual choice, as well as neoliberalism's legitimization of a systematic program of governmental divestment from public goods. By liberating ourselves from the intellectual constraints of neoliberalism, we can see new propertarian reforms for data governance and directly address the root causes of algorithmic harm.

(ii) *Where Data Meets Intellectual Property*: Once we recognize that the value of data lies in its circulation and compilation as collectively generated patterns, the next step is to conceptualize alternative forms of legal ownership to capture that value for the benefit of consumers. This is where data governance intersects with intellectual property (IP). Although conventional legal scholarship often associates IP with individualist propertarian solutions,[300] this subsection investigates ways in which new developments in intellectual property rights (IPR) protection outside the U.S. can offer powerful insights for collectivist propertarian reform.[301] Currently, copyright law protects data only in the narrow context of individual original authorship. In the U.S., copyright protection applies to data produced in connection with a creative activity or embedded in a creative expres-

[300] *See, e.g.*, Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535 (1993) (arguing that a properly conceived natural-rights theory of IP would provide significant protection for free speech interests, including the right of self-expression); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 329-30 (1988) (invoking John Locke's theory of labor entitlement of property to justify individual rights in IP).

[301] For a survey of recent IP scholarship exploring collective IPR, see Enninya S. Nwauche, *The Emerging Right to Communal Intellectual Property*, 19 MARQ. INTELL. PROP. L. REV. 221 (2015).

sion.[302] Raw data is uncopyrightable because courts consider them to be mere facts that are "discovered," rather than "created," under the existing copyright regime.[303] Processed data, such as compilations of data in algorithmic or automatic databases, may be copyrightable as "literary works" under section 102 of the Copyright Act.[304] Such data are copyrightable only if their arrangement or compilation is sufficiently creative that it amounts to original authorship.[305]

However, the problem with traditional IPR solutions is that they tend to reinforce, rather than redistribute, existing power inequalities in the value chain. Consumers have little control over the production and trade of consumer-generated data, despite being the ones who are subject to the information systems.

Fortunately, the U.S. can draw lessons from the legal experiments for database protection in other jurisdictions. For instance, the EU has created a *sui generis* legal protection for databases that are not covered by copyright.[306] Protection under the EU *sui generis* database right is not contingent on originality, creativity, novelty, or even commercial value.[307] Instead, any "maker" who takes the initiative to obtain, verify, or present the contents of the database and assumes its underlying risks is afforded property protection.[308] Anyone who takes a "substantial investment" in the above can also become a rightsholder of the database.[309] This broad definition of "maker" enables any collective or organization to claim direct or derivative rights in the database.

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[302] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

[303] *See* 17 U.S.C. § 102(b) (2022).

[304] *See* 17 U.S.C. § 102(a)(1) (2022).

[305] *See Feist Pub'ns*, 499 U.S. at 348 ("Factual compilations . . . may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.").

[306] 1996 O.J. (L 77).

[307] Ranjit Kumar G., *Database Protection—The European Way and Its Impact on India*, 45 IDEA: J.L. & TECH. 97, 109 (2005) ("The *sui-generis* right applies irrespective of the database's eligibility for copyright or other protection.").

[308] *See* 1996 O.J. (L 77) ch. III.

[309] *Id.* at art. 7(1).

While the EU's *sui generis* database right is certainly not perfect, the U.S. can learn from the EU's successes and avoid its mistakes. To avoid the risks of over-protection impeding the free flow of data,[310] the U.S. should create a two-tiered database protection system that distinguishes between original and derivative data compilations.[311] For example, original databases could continue to be protected under the copyright regime, while derivative databases could be protected under the *sui generis* right. To ensure that the database does not devolve into a tragedy of the anti-commons, the *sui generis* database right should accompany legal mechanisms to ensure the free flow of information—such as restricting the *sui generis* database owner's right to exclude while retaining their rights to enjoyment. Additionally, the legislation could set up sub-hierarchies of database rights within the *sui generis* legal conception by distinguishing between the "makers" of derivative data compilations and the rightsholders who merely "take substantial investment" in the preparation of derivative databases. These proposals are by no means exhaustive, but they can expand our imaginations of possible legal reform.

3. Building the Infrastructure for Open Digital Commons

This subsection considers what information infrastructures can be built to make the collective property right in data meaningfully enforceable.[312] In line with existing legal scholarship on the digital public domain, this subsection considers the creation of a digital commons as the foundation for any meaningful ex-

[310] *See generally* J.H. Reichman & Paul F. Ublir, *Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology*, 14 BERKELEY TECH. L.J. 793, 798, 812–19 (1999) (arguing against congressional enaction of a sui generis database right similar to that adopted by the EU, on the grounds that it may increase transactional costs for licensing, impede scientific research, and decrease access to public data).

[311] *See generally* Paul Keller, *A Vanishing Right? The Sui Generis Database Right and the Proposed Data Act*, KLUWER COPYRIGHT BLOG (Mar. 4, 2022), https://copyrightblog.kluweriplaw.com/2022/03/04/a-vanishing-right-the-sui-generis-database-right-and-the-proposed-data-act/ [https://perma.cc/R6J7-6EUS] (noting that the European Commission's Data Act "does not apply to databases containing data obtained from or generated by the use of a connected device").

[312] "Infrastructure" is broadly defined as "structured arrangements that facilitate, undergird, shape, and normalize the conditions of possibility for human activity over spaces and across scales." These arrangements represent "critical locations through which sociality, governance and politics, accumulation and dispossession, and institutions and aspirations are formed, reformed, and performed." Julie E. Cohen, *Infrastructuring the Digital Public Sphere*, 25 YALE J.L. & TECH. SPECIAL ISSUE 1, 16 (2023).

ercise of non-exclusive right to access, use, and withdraw data.[313] To implement this concept, this subsection illustrates steps to ensure that the digital commons remain open and common—meaning that it will neither regress into "tragedies of the commons"[314] or devolve into "tragedies of the anti-commons."[315]

(i) *The Public Data Trust Option*: To preserve the openness and commonality of the digital economy, it is necessary for us to resist and reverse the privatization of consumer data by creditors. One possibility is to develop an open database like the Human Genome Project.[316] Another is to establish a national data trust for the public good, under the supervision of an independent public-data management authority.[317] We can also draw inspiration from other countries. The UK and Canada explored national data trusts as a means to govern citizen data and regulate their access by businesses corporations.[318] A public data trust would allow individuals, communities, and organizations to grant the rights of control and access their data

[313] Legal scholarship on online speech and digital expression has long argued that the internet should support a digital public domain. For a sampling, see David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (introducing the notion of the public cyberspace as an important area of regulation); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (arguing that the Digital Millennium Copyright Act, the proposed Article 2B of the Uniform Commercial Code governing computer contracts, and the Collections of Information Antipiracy Act collectively represent an enclosure movement to privatize the digital public domain); LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2002) (explaining how the internet revolution produced a counter-revolution led by corporations, which established themselves as the owners of the internet and gatekeepers of the digital public domain).

[314] *See generally* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); Elinor Ostrom & Vincent Ostrom, *A Theory for Institutional Analysis of Common Pool Problems*, *in* MANAGING THE COMMONS 157, *passim* (Garrett Hardin & John Baden eds., 1977).

[315] *See generally* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

[316] *The Human Genome Project*, NAT'L HUM. GENOME RSCH. INST., https://www.genome.gov/human-genome-project [https://perma.cc/Y4JW-438M].

[317] *See* Viljoen, *supra* note 36, at 645.

[318] *See, e.g.*, Dame Wendy Hall & Jérôme Pesenti, *Growing the Artificial Intelligence Industry in the UK*, GOV.UK (Oct. 15, 2017), https://assets.publishing.service.gov.uk/media/5a824465e5274a2e87dc2079/Growing_the_artificial_intelligence_industry_in_the_UK.pdf [https://perma.cc/83XE-CVFF]; *Ontario Launches Consultations to Strengthen Privacy Protections of Personal Data*, ONTARIO (Aug. 13, 2020), https://news.ontario.ca/en/release/57985/ontario-launches-consultations-to-strengthen-privacy-protections-of-personal-data [https://perma.cc/F8ZL-QZUL]; *Data Trusts: Lessons from Three Pilots*,

to entrusted entities to manage their data for their benefit.[319] This would turn data intermediaries into data fiduciaries—meaning that they would be subject to the heightened duties of data stewardship.

(ii) *The Public Utilities Option*: An alternative solution is to build on existing informational infrastructures of credit data collection and distribution. Three of the largest National Credit Reporting Agencies (NCRAs)—Equifax, TransUnion, and Experian—have already amassed vast volumes of consumer data for credit reporting.[320] NCRAs have also developed extensive networks of data supply through business partnerships with FinTech companies and data aggregators.[321] One possibility to create a collective propertarian data infrastructure is to regulate NCRAs as public utilities—the same way that natural gas, electric power, cable, telecommunications, and water companies are governed.[322] In the common law tradition, courts have developed the public utility doctrine to ensure that industries providing goods and services essential to the public offer them "under rates and practices that [are] just, reasonable, and non-discriminatory."[323] Industries that qualify as public utilities typically meet two conditions: they are considered "natural mo-

OPEN DATA INST. (Apr. 15, 2019), https://theodi.org/news-and-events/blog/odi-data-trusts-report/ [https://perma.cc/98LT-GTCJ].

[319] *See* Peter Wells, *UK's First Data Trusts to Tackle Illegal Wildlife Trade and Food Waste*, OPEN DATA INST. (Jan. 31, 2019), https://theodi.org/news-and-events/news/uks-first-data-trusts-to-tackle-illegal-wildlife-trade-and-food-waste/ [https://perma.cc/BW5H-P2HM] ("Data trusts work by allowing people or organisations to give some control over data to a new institution, or 'trust,' so it can be used to create benefits for themselves or others, or both.").

[320] *See* CFPB, *CFPB Report Details How the Nation's Largest Credit Bureaus Manage Consumer Data*, CFPB NEWSROOM (Dec. 13, 2012), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-report-details-how-the-nations-largest-credit-bureaus-manage-consumer-data/#:~:text=Equifax%2C%20Experian%2C%20and%20TransUnion%20each,that%20supply%20data%20on%20consumers [https://perma.cc/294L-8C4L] ("Equifax, Experian, and TransUnion each have more than 200 million files on consumers. In a typical month, they receive updates from approximately 10,000 information 'furnishers,' which are entities that supply data on consumers. The furnishers do this on more than 1.3 billion 'trade lines,' which are individual information sources on a consumer report such as a consumer's accounts for a car loan, mortgage loan, or credit card.").

[321] *See, e.g.*, *Credit Score Consolidation with Equifax Data*, DEMYST, https://demyst.com/external-data/use-case/credit-score-consolidation/equifax [https://perma.cc/GSW6-MCMB].

[322] *See, e.g.*, Jennifer Shkabatur, *The Global Commons of Data*, 22 STAN. TECH. L. REV. 354, 399–402 (2019).

[323] Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1331 (1998).

nopolies"[324] and are "affected with a public interest."[325] Today, NCRAs and other credit data platforms have already satisfied the two conditions that historically triggered a public utility recognition. As public utilities, they will have affirmative obligations to the public to provide open data access, non-discrimination, and universal service. This "ensure[s] collective, social control over vital private industries that provide[] foundational goods and services on which the rest of the society depends."[326]

(iii) *Collective Social Governance of Data*: Whether we select the public trust or the public utilities option, governing data as open commons invites an additional challenge: how do we ensure data is made as openly accessible as possible, while still limiting access to data with the potential to do harm? Admittedly, not all data is appropriate for open public access.[327] Restriction is warranted for data that contain sensitive personal information or otherwise carry potential for intentional or accidental misuse.[328] Leakage of certain data can also pose security risks.

Establishing a legal infrastructure for the collective social governance of data can remediate unjust data relations without compromising people's privacy and security interests in data. One way to achieve this is to simultaneously vest the power of data management in the hands of consumer communities, while granting data access to an independent, entrusted entity acting under public interest.[329] Cur-

[324] *See* K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platform as the New Public Utilities*, 2 GEO. L. TECH. REV. 234, 236 (2018) ("In economistic terms, public control over infrastructure is warranted in conditions of natural monopoly, where high sunk costs and increasing returns to scale suggest that private market competition is likely to under-supply the good in question.").

[325] Munn v. Illinois, 94 U.S. 113, 129 (1876) (quoting Allnut v. Inglis [1810] 104 Eng. Rep. 206, 12 E. 527, 541) ("[W]hen private property is affected with a public interest, it ceases to be juris private only and, in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."). For further details on the modern economic theory of public utilities regulation, see generally CHARLES F. PHILLIPS JR., THE REGULATION OF PUBLIC UTILITIES (3rd ed. 1993).

[326] Shkabatur, *supra* note 322, at 400.

[327] *See, e.g.*, DIGIT. PUB. GOODS ALLIANCE ET AL., EXPLORING DATA AS AND IN SERVICE OF THE PUBLIC GOOD 5 (2023), https://digitalpublicgoods.net/PublicGoodDataReport.pdf [https://perma.cc/M83L-N8XP] (describing data in which open access would create "security risks").

[328] *Id.* at 8.

[329] See Shkabatur, *supra* note 322, at 394.

rently, the EU has considered a similar proposal that would allow public authorities to access data where doing so is "in the 'general interest' and would considerably improve the functioning of the public sector."[330] This proposal follows the logic of the 2016 French Digital Republic Act.[331] In the U.S., statistical agencies, census bureaus, and the Library of Congress have also established professional expertise in managing data for the public good while adhering to strict public-purpose limitations and high confidentiality standards.[332] These existing forms of public data management systems can serve as a model for collective social data governance.

CONCLUSION

Over the past half century, neoliberalism has entrenched a regulatory paradigm that saw social problems as outcomes of individual choice. This paradigm saw free markets and consumer autonomy as the panacea to market injustices. The twin ideals of neoliberalism find ubiquitous presence in our laws governing the supply and distribution of credit. Instead of providing meaningful credit access and equality, they have distracted us from the root problems: unjust market relations stemming from systemic social inequalities.

If the failures of neoliberal ideals of free markets and consumer autonomy were once hidden, then the ascendancy of AI made them apparent. AI situates the vast majority of consumers within systems of informational control where market price-signals are engineered and consent is manufactured. Within these digital environments, consumer data is ceaselessly harvested, extracted, refined, and repackaged into marketable products. This also causes the exploitation of consumers through microtargeting and price discrimination. Yet, existing proposals for AI governance, informed by neoliberalism, have continued to cast these problems as outcomes of imperfect markets and individual choice. They obscure the true source of algorithmic harm—unjust market relations of data production, circulation, and control that entrench and reproduce systemic inequalities.

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[330] EUR. PARL. DOC. (COM 2017/09 final) 12.

[331] *See* Loi 2016-1321 du 7 octobre 2016 pour une République numérique [Law 2016-1321 of October 7, 2016 Digital Republic Act], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Oct. 7, 2016, p. 96.

[332] *See generally* Eun Seo Jo & Timnit Gebru, *Lessons from Archives: Strategies for Collecting Sociocultural Data in Machine Learning*, FAIRNESS, ACCOUNTABILITY & TRANSPARENCY, Jan. 2020, at 3.

Moving beyond neoliberalism, recognizing algorithmic harm as both individually and socially constituted can help us imagine new possibilities to address the root causes of systemic credit inequality. A purely dignitarian reform of data governance which addresses only individual harm is bound to be incomplete. To fundamentally reshape the unjust social relations that currently underpin AI exploitation and build a just credit market, we need to push for a collective propertarian reform. To strive for this possibility, we must reimagine the nature of data ownership as collectively generated and relational, conceptualize a collective IPR in data, and construct an alternative information infrastructure to govern data as open commons.

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INTERNATIONAL IMPLEMENTATION OF THE DOCTRINE OF FOREIGN EQUIVALENTS: HOW TO SAVE FOREIGN GENERIC TERMS FROM APPROPRIATION

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Trademark protection became a subject of international regulations decades ago. However, in the modern era of globalization and international trade, it is vital to address new issues and undertake regulatory remedies. The foreign equivalents doctrine has been deemed as an "expired" doctrine in trademark law to the extent that it was abolished in some jurisdictions. Nonetheless, this article reveals the doctrine's true potential to provide a solution to the appropriation of foreign generic terms that might raise legal uncertainties and new challenges to the expansion of new products in foreign markets. The article proposes "reincarnation" of the doctrine with specific amendments to the TRIPS agreement and provides analyses of potential positive and negative impacts on trademark protection and possible issues that should be evaluated. The comparative law analysis reveals the vital necessity of such regulatory adoption and worldwide harmonization.

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INTRODUCTION

John is a Chicagoan who planned a tour with his daughter Tracy to Argentina. He decided to travel for one month. John had plans to start a business and he was interested in importing and marketing. On the 5th day of their trip, John and Tracy were walking down the street in Buenos Aires, when Tracy noticed a candy shop. They walked into the market and Tracy pointed out chewing gum. The product was far on the vitrine, and John tried to explain what his daughter wanted when he heard the shop assistant say, "chicle?," which is the Spanish equivalent of chewing gum. She handed the gum to Tracy, and they walked up to the cashier. John looked at his

daughter chewing and thought that it was a good idea to import chewing gums to the United States and market them under the mark "CHICLE."

John returned to the United States, and, as an aspiring entrepreneur, figured out that the word he sought to appropriate was in the public domain in almost every Spanish-speaking country and community. Regardless, John established a company and met his friend Albert to discuss the trademark registration. John explained that he was planning to file an application with the U.S. Patent and Trademark Office ("USPTO") under § 1 subsection (b) of the Lanham Act and was worried about possible failure because the term is in the public domain.[1] Albert was not the most sophisticated trademark lawyer, but he explained that there is no precise answer to that question. John was surprised, but as a scholar, Albert promised to do some research and try to come up with a solution.

While diving into the problem, Albert faced substantial issues. What if all the Spanish communities in the United States use that word to describe such a product in general? Can the generic term be appropriated from the public domain of a foreign language? Suppose that the trademark obtains a United States registration, and the business expands to Spanish-speaking countries. Can the trademark be protected internationally?

The above questions look complicated, but the problem goes beyond that. Especially, the issue can arise even when there is no foreign language involved.[2] UGG boots originated in Australia—another English-speaking society—where the term refers to regular sheepskin winter shoes.[3] Unexpectedly, UGG is a registered trademark in the United States.[4] Moreover, the Australian company that imported such footwear for years was unsuccessful in its attempts to cancel such registration.[5] Both are English-speaking countries with multiple common legal and cultural similarities. How can one country hold a term generic and unregistrable but the other one grants protection to the same term? How does this ambiguity support international trade and global economic growth?

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[1] *See generally* 15 U.S.C. § 1051(b)(3)(D) (requiring that the trademark applicant testify that no other person has the right to use such a mark in commerce in the identical or nearly identical form).

[2] *See* Decker Outdoor Corp. v. Australian Leather PTY., 340 F. Supp. 3d 707, 707 (N.D. Ill. 2018).

[3] *Id.* at 707.

[4] *Id.* at 709 (stating that Australian Leather sought declaratory judgment and cancellation of Decker's trademark registration of "UGG").

[5] *Id.* at 711.

The doctrine of foreign equivalents stands to protect consumers across jurisdictions from linguistic clashes over generic terms. This doctrine focuses on the foreign generic terms which can be used as a trademark in a local market.[6] According to the classic approach of the doctrine, those terms should be translated to be tested for possible confusion raised for the consumers,[7] but there are several limits and issues that this paper will reveal further. The doctrine was criticized over the years and was met with calls to abolish it in the United States.[8] Today, the USPTO applies the "stop and translate" test,[9] which might raise practical issues discussed in further detail below. As a result, there is no equitable test for its application. The doctrine application problem is left to a case-by-case resolution in the EU as well.[10] There are 24 official languages in the EU and no definitive binding regulation regarding foreign equivalents.[11]

Because of the lack of precise international regulations, the doctrine under discussion loses its functionality and raises risks in international trade by restraining prospective entrepreneurs from expanding their business to foreign markets. This regulatory gap also results in a failure to address a crucial function of trademark law: to protect consumers from potential confusion and deception when a foreign generic term is used as a trademark.

This article proposes an international standard for the prohibition of generic term appropriation by foreign economies and highlights the necessity of international implementation of the doctrine of foreign equivalents to prevent a negative impact on international trade and markets. The possible detrimental consequences of the appropriation of foreign generic terms should not be ignored in the age of global trading.

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[6] *See* 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 12:41 (5th ed. 2019) (stating that a word commonly used in another language cannot be imported into the United States and used as a valid trademark).

[7] *Id.* (stating that foreign words used as a mark must be tested for descriptiveness, genericness, and similarity of a meaning to determine confusing similarity with an English word).

[8] Serge Crimnus, *The Doctrine of Foreign Equivalents at Death's Door*, 12 N.C. J.L. & Tech. 159, 161 (2010).

[9] *See* Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 1377 (Fed. Cir. 2005).

[10] Stephan Erickson, *Is European trademark protected in all EU languages?*, Dossier Labs, https://www.dossierlabs.com/knowledge-base/is-european-trademark-protected-in-all-eu-languages [https://perma.cc/N9LZ-US4T].

[11] *Id.*

Part I discusses the historical development of the doctrine of foreign equivalents and how the scopes of the implementation were narrowed in the United States. It compares how the doctrine survives in other jurisdictions such as the EU and Australia, what problems it can raise, and how the lack of international harmonization and the doctrine's downfall may impact international trade. Part II proposes a solution through international regulations that may stimulate the implementation of the doctrine worldwide and decrease the negative impact of the appropriation of generic terms. Part III responds to criticisms of the doctrine and possible new difficulties that should be considered before the international execution of the proposed solutions.

I
The Doctrine of Foreign Equivalents in a Global Perspective

The appropriation of foreign generic terms is another way to get an advantage in a competitive market. The doctrine of foreign equivalents was used to restrict the perspective of such forfeiture. "A 'generic' term is one that refers, or has come to be understood as referring, to the genus of which the particular product or service is a species. It cannot become a trademark under any circumstances."[12]

The problem is that globally there are different approaches to foreign generic words' registrability as a trademark, and the rationales are, in some cases, different even in domestic jurisdictions. For example, in the United States judiciary, there is a circuit split about the doctrine implementation.[13] This Part expands on the problem of ambiguous regulations and different approaches to the doctrine, as well as the lack of international harmonization.

A. The Doctrine of Foreign Equivalents and Comparative Overview

The purification and clear implementation of the doctrine is the only method to avoid the issues raised above. The doctrine has developed in diverse directions in different jurisdiction which should be considered in determining the overall problem discussed in this paper. This Section compares the approaches to foreign generic terms as a trademark in the U.S., EU, and Australia.

[12] Surgicenters of America, Inc. v. Medical Dental Surgeries Co., 601 F.2d 1011, 1014 (9th Cir. 1979) (citing Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9–10 (2d Cir. 1976)).

[13] Petition for a Writ of Certiorari at 10, Australian Leather Pty. Ltd. v. Deckers Outdoor Corp., 847 F. App'x 917 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 587 (Dec. 6, 2021).

1. The Circuit Split in the United States

Under the doctrine of foreign equivalents, a word commonly used in another language as the generic name of a product cannot be registered in the United States as a valid trademark.[14] The doctrine was developed to serve two main purposes.[15] The first purpose is to protect multilingual customers from possible confusion.[16] Especially, a term that is generic in a foreign language should be translated into the language of the local jurisdiction and evaluated in terms of distinctiveness and likelihood to deceive prospective customers.[17] The second purpose serves a global purpose of comity.[18] When one country is strict with trademark registrations but another is open to foreign generic terms, it raises issues within the economic collaboration of those countries. The protection from foreign generic term appropriation expands the opportunities for trademark owners to evolve in international trade.[19] The registrant faces the barrier of its native generic words usage in the foreign market, as they are already registered as a trademark in the state in which one plans to expand.[20] The latter raises competitive issues, as the registrant of a foreign equivalent can gain an unfair advantage by owning a name which is descriptive of a product or a generic term that is in the public domain.[21]

The protection of multilingual consumers alleges a narrower interpretation of the doctrine. As the Trademark Trial and Appeal Board ("T.T.A.B.") observed, the doctrine of foreign equivalents "extends the protection of the [Lanham] Act to those consumers in this country who speak other languages in addition to English. . . . At least one significant group of ordinary American purchasers is the purchaser who is knowledgeable in English as well as the pertinent foreign language."[22]

From the perspective of international comity, the doctrine is interpreted broadly. Historically, the main commercial progress was in the United States, which majorly consists of multilingual communities, and it was the fastest-growing

[14] *See* Holland v. C. & A. Import Corp., 8 F. Supp. 259, 261 (S.D.N.Y. 1934).
[15] *E.g.*, McCarthy, *supra* note 6.
[16] *Id.*
[17] *Id.*
[18] *Id.* at n.12.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *In re* Spirits Int. N.V., 86 U.S.P.Q.2d 1078, 1084–85 (T.T.A.B. 2008).

economy of the 20th century.[23] As a novelty, the doctrine served to avoid the possible appropriation of English words by foreign countries. Especially U.S. courts, in their analysis, emphasize the necessary reciprocal protection of generic foreign equivalents from possible registration considering the threat of market restriction caused by the registration of generic or destructive English words by foreign governments.[24]

The market restriction threat was the cornerstone of the U.S. courts' decisions for about eighty years.[25] In 1931, a court held that "the general practice of the Patent Office and courts was to deny registration to any misleading term even where it only becomes misleading through the understanding of a foreign language."[26] In *McKesson & Robbins v. Charles H. Phillips Chemical Co.*, the Second Circuit described this rule as a "sound" one that has been followed for a long time.[27] In 1934, this position was evolved by determining that "a word commonly used in other countries to identify a kind of product and there in the public domain as a descriptive or generic name may not be appropriated here as a trade-mark on that product."[28] In 1961, a court was compelled to consider the registration of the name, in Hungarian, of at least some of the noodle products enumerated in the registration.[29] Further, in 1997, T.T.A.B. held that the mark FRUTTA FRESCA plainly designates a genus of fruit that is fresh.[30]

Following such a restrictive approach, the Second Circuit interpreted the doctrine of foreign equivalents—finding the genericness of the term in its country of origin as an obstacle.[31] The court in that case considered a dispute between two importers of Japanese sake over the use of the term "otokoyama."[32] In reversing the district court's opinion, the Second Circuit described "a bedrock principle of the

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[23] *See List of countries by GDP growth 1980-2010*, Wikipedia, https://en.wikipedia.org/wiki/List_of_countries_by_GDP_growth_1980%E2%80%932010 [https://perma.cc/TRV3-7DY9].

[24] *See, e.g.*, Otokoyama Co. v. Wine of Japan Import, Inc., 175 F.3d 266, 272 (2d Cir. 1999).

[25] Petition for a Writ of Certiorari at 10, Australian Leather Pty. Ltd. v. Deckers Outdoor Corp., 847 F. App'x 917 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 587 (Dec. 6, 2021).

[26] McKesson & Robbins v. Charles H. Phillips Chemical Co., 53 F.2d 1011, 1011 (2d Cir. 1931).

[27] *Id.*

[28] Holland v. C. & A. Import Corp., 8 F. Supp. 259, 261 (S.D.N.Y. 1934).

[29] Weiss Noodle Co. v. Golden Cracknel & Specialty Co., 290 F.2d 845, 847 (C.C.P.A. 1961).

[30] *In re* Sambado & Son Inc., 45 U.S.P.Q.2d 1312, at *4 (T.T.A.B. 1997).

[31] *See* Otokoyama Co. v. Wine of Japan Import, Inc., 175 F.3d 266, 268 (2d Cir. 1999).

[32] *Id.*

trademark law that no trader may acquire the exclusive right to the use of a term by which the covered goods or services are designated in the language."[33] The court determined that "if otokoyama in Japanese signifies a type of sake, and one United States merchant was given the exclusive right to use that word to designate its brand of sake, competing merchants would be prevented from calling their product by the word which designates that product in Japanese."[34]

As we've seen above, several Circuits still prioritize the genericness of foreign equivalents in their country of origin and therefore prevent misappropriation. In addition to the Second Circuit, this pattern is followed in the Fifth[35] and Seventh Circuits.[36]

The Federal Circuit, on the other hand, has adopted a narrower rule, which stipulates that the foreign equivalents doctrine "applie[s] only when it is likely that the ordinary American purchaser would 'stop and translate [the word] into its English equivalent.'"[37] The term "ordinary American purchaser" includes both those who would tend to translate foreign words into English and those who would not.[38] Under the Federal Circuit's rule, therefore, there may be situations in which a term is generic in its place of origin—and would be recognized as generic by purchasers familiar with the term—but nevertheless protectable as a trademark simply because "the ordinary American purchaser" would not first translate the word into English.[39]

This circuit split is a good example of how the uncertainty or lack of regulations results in legal unpredictability for entrepreneurs and creates artificial

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[33] *Id.* at 270.

[34] *Id.* at 272.

[35] *See* Enrique Bernat F., S.A. v. Guadalajara, Inc., 210 F.3d 439, 441–45 (5th Cir. 2000) (considering the doctrine of foreign equivalents as the "governing" one regarding the registration of word "chupa" in combination as a trademark and thus prohibiting the registration substantiating the possibility of confusion among Spanish-speaking American consumers).

[36] *See* Donald F. Duncan, Inc. v. Royal Tops Mfg. Co., 343 F.2d 655, 662 (7th Cir. 1965) (noting that the word combination "yo-yo" had "originated and was used in the Philippine Islands as the generic name of the toy," so the registration of that term as a trademark was improper).

[37] Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 1377 (Fed. Cir. 2005) (quoting *in re* Pan Tex Hotel Corp., 190 U.S.P.Q. 109, 110 (T.T.A.B. 1976)).

[38] *In re* Spirits Intern., N.V., 563 F.3d 1347, 1352 (Fed. Cir. 2009).

[39] *See, e.g.*, *id.*

obstacles to economic growth. Recently, there was an outstanding opportunity to design a precise test on the registrability of foreign equivalents.

In 2016, the Australian company that imported UGG boots, Australian Leather, appeared in a lawsuit with Deckers Outdoor Corporation.[40] The core of the dispute was whether the UGG registration in USPTO can be appropriated in ignorance of the genericness of the term in its English-speaking country of origin.[41] Australian Leather argued the word "ugg" originated from Australia, and the Australian customer associated that term with any sheepskin boot in general.[42] They also argued that, for any surfer, the term is a general description of the boots used in surfing.[43]

Unfortunately, the district court missed the opportunity to determine a specific test and concluded that the mere fact of the term being generic in a foreign market was insufficient to uphold its genericness.[44] Moreover, this court provided no ruling regarding the applicability of the doctrine when the generic term originates from another English-speaking country.[45] The district court held that UGG was a distinctive mark in the United States.[46] The court absolutely ignored the fact that the term under discussion was held generic in foreign English-speaking jurisdictions.[47] Importantly, the Australian Trademark Office ("ATMO") found the term UGG to be generic.[48] The Australian decision noted The Macquarie Dictionary (1981), The New Shorter Oxford Dictionary (1993), the Dinkum Dictionary (1988), The Australian Concise Oxford Dictionary of Current English (1982), and the Oxford English Dictionary Online (2004) all independently recognized one or multiple spellings of "ugg" to be a generic term.[49] Nevertheless, the district court ordered the contrary.

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[40] Deckers Outdoor Corp. v. Australian Leather Pty. Ltd., 340 F. Supp. 3d 706, 708 (N.D. Ill. 2018), *aff'd*, 847 F. App'x 917 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 587 (Dec. 6, 2021).

[41] *Id.* at 709.

[42] *Id.* at 710.

[43] *Id.*

[44] *Id.* at 710.

[45] *Id.* at 715–16.

[46] *Id.* at 720.

[47] *See Deckers Outdoor Corporation v B&B McDougal* [2006] ATMO 5 (16 January 2006) 9 (Austl.).

[48] *Id.* at 5.

[49] *Id.* at 4.

Further, the decision was appealed by Australian Leather but the Federal Circuit—as the supporter of the doctrine's narrow interpretation—affirmed without an opinion.[50] Afterward, the appellant filed a petition to the Supreme Court of the United States,[51] giving the Supreme Court a good opportunity to draw definite outlines for the doctrine implementation. Unfortunately, in December 2021, the Supreme Court rejected that opportunity and the issue was left unresolved.[52] The Supreme Court of the U.S. mentioned that "one must be wary of United States trademark rights for terms that are generic for a product in the country of origin. . . . [S]imilar concerns also exist for U.S. companies hoping to enter foreign markets with terms considered generic in the U.S., but not in prospective foreign markets."[53] This is one of the concerns this paper proposes to regulate.

2. How Does the EU Deal with Foreign Equivalents?

The European trademark system consists of two components: the Trade Mark Directive ("TMD") and the European Union Trade Mark Regulation ("EUTMR").[54] The EUTMR has established a unitary right extending throughout the EU, based on registration filed at a central office, the European Union Intellectual Property Office ("EUIPO").[55] The TMD was enacted to impose on the member states to harmonize the main regulation on essential requirements and frames of trademark protection in the national systems.[56] The member state systems and EU systems are intended to co-exist and exclude a hierarchical structure prioritizing one or the other.[57]

Along with the development of the European trademark system, back in 2010, it was decided to create a commission for the evaluation of its functionality.[58]

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[50] *See Deckers*, 847 F. App'x 917 (Fed. Cir. 2021).

[51] *See Deckers*, 142 S. Ct. 587 (Dec. 6, 2021).

[52] *Supreme Court Refuses to Hear Case Over Ugg Trademark in Win for Deckers*, The Fashion Law, (Dec. 8, 2021) https://www.thefashionlaw.com/supreme-court-refuses-to-hear-case-over-ugg-trademark-in-win-for-deckers/ [https://perma.cc/59VL-TEUS].

[53] *Id.*

[54] Annette Kur, The EU Trademark Reform Package–(Too) Bold a Step Ahead or Back to Status Quo?, 19 Marq. Intell. Prop. L. Rev. 15, 19 (2015).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

The representatives from Max Planck Institute for Intellectual Property and Competition Law[59] in Munich were the members upholding the investigation about needed reforms.[60] The study was delivered in 2011 and published as a proposal for Community for Trade Mark Regulation (former EUTMR) amendment in March 2013.[61] The amendment included analyses and proposals concerning the registrational issues of foreign equivalents in the EU excerpted below.[62]

The examination at the EUIPO considers barriers actual in any member state; however, under the current law, member states merely take into account obstacles existing in their own respective territories.[63] This relates to the language in which the examination takes place as well.[64] Although all official EU languages are observed in proceedings at the EUIPO, member states usually confine the assessment to their own language.[65] Thus, a Greek term that is generic to describe the product cannot be registered as an EU Trademark, however, there are no bars against registration of that term in the member states other than Greece if the generic meaning of the word is not perceived outside Greece.

The proposal of the Commission offered a change to the system by determining an obligation for national offices to refuse trademark registration in cases when the rejection grounds were obtained in the other member state, or if the foreign language trademark application is filed along with translation or transcription in script or language of member states.[66] The proposal was rejected by the European Parliament and raised consistent objections from the member states.[67] An often cited reason for the rejection was that the scope of examination would be broadened and this burden might be disproportionate because the right would still be valid only in one member state.[68]

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[59] This is now re-named "Max-Planck-Institute for Innovation and Competition."
[60] Kur, *supra* note 54, at 19–20.
[61] *Id.* at 20.
[62] *Id.* at 27–28.
[63] *Id.* at 27.
[64] *Id.* at 26.
[65] *Id.*
[66] *Id.* at 26–27.
[67] *Id.* at 27.
[68] *Id.*

Although the Commission has not given an express motivation for its move, it is generally assumed to be a reaction to a case in which a generic term "Matratzen"—meaning mattresses in German—was registered in Spain for bed accessory products.[69] The Spanish owner of the mark opposed the Community Trade Mark (former EUTM) application of the German mark MATRATZEN CONCORD based on the argument that Spanish consumers were likely to be confused by the German mark because "matratzen" was the dominant part of the sign.[70] Subsequent attempts by the German company to invalidate the Spanish mark because of its descriptive character were in vain.[71]

The question of whether the registration was likely to result in an impediment to the free movement of goods (i.e., importation of mattresses from Germany) was referred to the Court of Justice of the European Union but was denied.[72] The court specified that "Article 3(1)(b) and (c) of the Directive does not preclude the registration in a Member State, as a national trademark, of a term borrowed from the language of another Member State in which it is devoid of the distinctive character or descriptive of the goods or services in respect of which registration is sought unless the relevant parties in the Member State in which registration is sought are capable of identifying the meaning of the term."[73] This determination mirrors the ambiguity of EU regulations, and it seems like there is no doctrine of foreign equivalents at all. The *Matratzen* holding was further confirmed by *Bimbo SA v. OHIM* in 2012, a case involving the registration of DOUGHNUTS in Spain.[74]

This poses a significant issue if national registrars—as happened in the *Matratzen* case—continue to ignore cases wherein the trademark registration is sought for a term that simply identifies the product in the language of another member state.[75] Unfortunately, Parliament rejected Commission proposals on the first reading, which was the ultimate approach to such a substantial problem.[76] It would be sufficient to adopt the doctrine of foreign equivalents as it is interpreted

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[69] *Id.*

[70] Case C-3/03 P, Matratzen Concord GmbH v. Office for Harmonisation in the Internal Market, 2004 E.C.R. I-03657.

[71] Kur, *supra* note 54.

[72] Case C-421/04, Matratzen Concord AG v. Hukla Ger. SA, 2006 E.C.R. I-02303.

[73] *Id.*

[74] Case C-591/12P, Bimbo SA v. OHIM, 2014 E.C.R. 305, 1.

[75] Kur, *supra* note 54, at 27.

[76] *Id.*

in the Second, Fifth, and Seventh Circuits and reject the registration if those are generic or merely descriptive in other languages of member states.[77]

There is an obvious difference between the EUTMR approach and member states' policy, and this dual standard should be covered by precise and unambiguous regulation. In fact, the EU law provides no precise harmonized regulation on how to deal with foreign generic term registration, which gives a good chance for member countries to adopt the doctrine. But even if the doctrine is adopted by the majority of member states, it would not provide a harmonized application, so the issues discussed above would persist.

3. The Australian Approach to Foreign Equivalents Doctrine

ATMO considers a diverse range of factors in foreign language mark distinctiveness analysis and explicitly ignores the international comity issues.[78] The approach of ATMO regarding trademarks consisting in part or in whole of foreign terms is that "such marks are subject to the same principles that apply to English words."[79] To be eligible for registration, the characters, letters, or words of foreign marks should not be perceptive as to their indigenous meaning by a substantial part of the nationwide population.[80] In the opposite situation, if the foreign mark does not distinguish the goods, the registration can be rejected or, at least, provide grounds for opposition.[81]

As discussed in the U.S. regulation analysis, Australian Leather sought to invalidate the registration of the mark UGG, which is in the public domain in Australia.[82] Surprisingly, the Australian High Court, just several years ago, granted protection to descriptive foreign-language marks, taking the position of U.S. Federal Circuit Court.[83] The High Court ruled that even though a wordmark should be "substantially different from any word in ordinary and common use... it need not be wholly meaningless and it is not a disqualification that it may be traced to a

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[77] *See id.* at 27, 28.

[78] David Price, *The Multicultural Trade Mark: The Registration in Australia of Trade Marks with Foreign Language Elements*, 1 J. Australasian L. Tchrs. Ass'n 171, 171 (2008).

[79] *Id.* at 172.

[80] *Id.*

[81] *Id.*

[82] Deckers Outdoor Corp. v. Australian Leather Pty. Ltd., 340 F. Supp. 3d 706, 708 (N.D. Ill. 2018), *aff'd*, 847 F. App'x 917 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 587 (Dec. 6, 2021).

[83] *Cantarella Bros Pty Ltd v Modena Trading Pty Ltd* [2014] HCA 48, at 38 (Austl.).

foreign source or that it may contain a covert and skillful allusion to the character or quality of the goods."[84] In that case, Cantarella Bros. had marked for coffee products registered as CINQUE STELLE and ORO.[85] These words originated from Italian and translate to "five-star" and "gold."[86] Only 1.4 percent of the population in Australia was Italian-speaking at a time.[87] The Court analyzed the marks by prioritizing the "ordinary significance" of the marks to Australian consumers and whether they were distinctive—namely, "inherently adapted to distinguish" the source of the goods.[88] The High Court concluded so by substantiating that marks CINQUE STELLE and ORO were adapted to distinguish the source of Cantarella's coffee because they do not "convey a meaning or idea sufficiently tangible to anyone in Australia concerned with coffee goods as to be words having a direct reference to the character or quality of the goods."[89]

Contrary to the EU and U.S. approaches, the Australian courts look more persuasive by at least trying to determine some kind of pattern on how to deal with foreign terms.[90] Anyway, there is still no harmonized approach to ensure international regulatory comity and avoid consumer deception.

B. International Harmonization of the Doctrine

Although the Paris Convention for Protection of Industrial Property (1967) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (2005) provide some general regulations on the international protection of registered trademarks, they correspondingly delegate distinctiveness issues to each member state.[91] Unfortunately, there is no clear regulation regarding trademarks that are not distinctive in other states the registrant seeks to register, and how to deal with the international protection of such marks to avoid comity and customer

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[84] *Id.* at 15.

[85] *Id.* at 1.

[86] *Id.* at 4.

[87] *2011 Census All persons QuickStats*, AUSTL. BUREAU OF STATS., https://www.abs.gov.au/census/find-census-data/quickstats/2011/0 [https://perma.cc/LV7G-SCQS].

[88] Thomas Merante, *Tomato, Tamatie? Revising the Doctrine of Foreign Equivalents in American Trademark Law*, 6 N.Y.U. J. INTELL. PROP. & ENT. L. 310, 345 (2017).

[89] *Id.*

[90] *See, e.g.*, Price, *supra* note 78, at 173–79.

[91] Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

confusion issues. Unfortunately, this gap is one of the main reasons for global ambiguity and uncertain application of the doctrine.

1. The Lack of International Harmonization

The first problem with the current approach to foreign equivalents is the absence of an internationally defined applicable scope of application of the doctrine, which creates ambiguity and unpredictability in trademark registration procedure. The Marrakesh Declaration of 1994 finalized the establishment of the World Trade Organization ("WTO").[92] As a result, international trade was transferred from the General Agreement on Tariffs and Trade ("GATT") regulations to the WTO structure.[93] Simultaneously, the new system encompassed the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), which designed a worldwide consensus of the frames of intellectual property rights protection and terms of enactment.[94] At the time, the TRIPS agreement was a hopeful light at the end of a tunnel, but it barely cleared the air in this context.

The agreement is just a detailed replication of Paris Convention principles.[95] Article 15 determines the scope of protectable subject matter, but it provides no guidance on how to deal with foreign equivalent terms that are generic in one member state and distinctive in another.[96] In fact, it is a logical obligatory sequel of the Paris Convention for the Protection of Industrial Property, which contains Article 6quinquies. This determines the protection of marks registered in a country of the union.[97]

Article 6quinquies restricts a member country from rejecting domestic registration of an already registered foreign mark unless that mark (i) infringes the rights of a third party in the country where registration is being claimed; (ii) is devoid of any distinctive character or has "*become customary in the current*

[92] Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 3; 33 I.L.M. 1197 (1994).

[93] *Id.*

[94] TRIPS Agreement, *supra* note 91, at art. 15, ¶1.

[95] *See* Jonathan Skinner, *Overcoming Babel's Curse: Adapting the Doctrine of Foreign Equivalents*, 93 J. Pat. & Trademark Off. Soc'y 57, 59 (2011).

[96] TRIPS Agreement, *supra* note 91, at art. 15, ¶1.

[97] Paris Convention, *supra* note 91, at art. 6quinquies.

language or in the bona fide and established practices of the trade of the country where protection is claimed"; or (iii) is contrary to public order and morality or is likely to cause confusion.[98]

By acknowledging that a foreign mark could become customary in bona fide practices, it appears that Article 6quinquies touches upon the doctrine of foreign equivalents. However, this provision sheds little to no light on the doctrine application as it determines no specific regulation for determining the bona fide genericness of the term.

As in the examples specified in Section A of this Part, countries simply ignore the genericness of a mark if it's in a foreign language or even in the same language. The regulations of the Paris Convention are replicated otherwise in the TRIPS Agreement where the first paragraph of Article 15 determines the protectable subject matter of marks and the second paragraph refers to the Paris Convention: "Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967)."[99] This provision ties TRIPS's scope of protection to the Paris Convention, but the latter's regulation appears vague. Instead of elaborating bona fide genericness, TRIPS simply ignores the doctrine of foreign equivalents and refers to the Paris Convention.

Article 17 of the TRIPS Agreement provides exceptions such as fair use.[100] But, as discussed in Section A, there is no practical implementation of a fair use defense for foreign equivalents in the U.S., Australia, and the EU. Fair use defense relates to the situations where the term is used to describe the product;[101] however, the doctrine of foreign equivalents is the "protector" of generic terms of foreign languages or jurisdictions from appropriation.

Member countries of the WTO retain the right to implement their obligations through domestic legislation or judiciary.[102] A good example of how this performs with domestic regulations is Section 44 of the Lanham Act,[103] which allows an

[98] *Id.* (emphasis added).
[99] TRIPS Agreement, *supra* note 91.
[100] *Id.* at art. 17.
[101] *See generally* 15 U.S.C. § 1115.
[102] TRIPS Agreement, *supra* note 91, art. 41.
[103] 15 U.S.C. § 1051.

applicant to register a mark in the United States based upon an application to register the mark in a foreign country which is a party to a trademark treaty with the United States (Sec. 44(d)) or upon registration for the mark in that country (Sec. 44(i)).[104]

The EU has its unique approach to this issue. Due to the multiplicity of official languages of the European Union, marks are not necessarily translated into a specific language. Instead, "[p]roposed marks are examined for descriptiveness simultaneously in virtually all of the languages of the community."[105]

These realities show how the doctrine of foreign equivalents is "artificially adapted" to existing uncertainty. Moreover, in Section A of this Part, it is revealed that both in the European Union and the United States the doctrine was interpreted and executed in critically different ways even in internal examinations.

2. Why Do We Need to Imply the Doctrine Internationally?

Another problem solved by the implementation of the doctrine of foreign equivalents relates to international comity. In such an integrated world economy, ensuring the freedom of international trade "requires the free competitive use in all nations of the generic names of goods in any language."[106] For example, if United States producers want to prohibit the registration of a generic English word in a non-English speaking country, principles of reciprocity and international comity would require that the United States not permit the registration of foreign generic words in its country.[107] As we see from the position of the Federal Circuit as well as the Australian and EU approaches, there is no reciprocity perspective in that scope.

This issue was allocated and specified by U.S. courts several times. In terms of importing, the exclusive right granted to a generic or descriptive foreign equivalent word would destructively constrain goods in the same classification from entering the United States and "give that importer a competitive advantage that the law

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[104] 15 U.S.C. § 1126.

[105] Eric E. Bowman, *Trademark Distinctiveness in a Multilingual Context: Harmonization of the Treatment of Marks in the European Union and the United States,* San Diego Int'l L.J. 513, 520 (2003).

[106] Skinner, *supra* note 95, at 63 (quoting J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §12:41 (5th ed. 2019)).

[107] *Id.*

of trademark should not allow."[108] "No merchant may obtain the exclusive right over a trademark designation if that exclusivity would prevent competitors from designating a product as what it is in the foreign language their customers know best."[109] The Fifth Circuit in 2000 specified the problem more explicitly:

> [T]he policy of international comity has substantial weight in this situation. If we permit [plaintiff] Chupa Chups to monopolize the term "chupa," we will impede other Mexican candy makers' ability to compete effectively in the U.S. lollipop market. Just as we do not expect Mexico to interfere with Tootsie's ability to market its product in Mexico by granting trademark protection in the word 'pop' to another American confectioner, so we cannot justify debilitating [defendant's] attempts to market "Chupa Gurts" in the United States by sanctioning [plaintiff] Chupa Chups' bid for trademark protection in the word "chupa." [110]

The EU regulations are obviously contradictory and need plain regulations, too. The EUTMR constrains registration by requiring translation of the mark in all EU member state languages but, at the same time, member states are not obliged to do so. The EUTMR approach goes further than the U.S. approach, considering the specific nature of a multilingual union, but, as discussed earlier, it has some specific disadvantages, too.[111]

Some scholars offer general solutions such as a new treaty that would provide precise and detailed international regulations, which, in turn, would support harmonization and economic growth.[112] Those proposals are usually limited to a specific type of mark such as well-known marks. This paper proposes a general solution for all inherently generic foreign equivalent marks by amending existing international treaties.

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[108] OrtoConserviera Cameranese d Giacchetti Marino & C. s.n.c. v. Bioconserve, s.r.l., No. 97 CIV. 6638 (JSM), 1999 WL 47258, at *2 (S.D.N.Y. Feb. 3, 1999), *aff'd sub nom.* Orto Conservia Cameranese Di Giacchetti Marino & C., S.N.C., 205 F.3d 1324 (2d Cir. 2000).

[109] Otokoyama Co. v. Wine of Japan Import, Inc., 175 F.3d 266, 271 (2d Cir. 1999).

[110] Enrique Bernat F., S.A. v. Guadalajara, Inc., 210 F.3d 439, 445 (5th Cir. 2000).

[111] Bowman, *supra* note 105, at 522.

[112] *See* Edward Lee, *The Global Trade Mark*, 35 U. Pa. J. Int'l L. 917, 938 (2014) (proposing creation of a new treaty called Global Trade Mark for well-known marks).

II
Proposal

The discussion in Part I leads us to the idea that there should be a solution to the ambiguity. The precise international legislative approach to foreign marks is necessary to provide foreseeability and clarity in international trade and market development. It may have a substantial economic impact encouraging foreign entrepreneurs to enter new markets and diminish investment risks. Moreover, there is an increasing potential for markets to expand to online platforms, such as the Metaverse. McDonalds filed a trademark application for a virtual restaurant, MCMETAVERSE, along with nine other marks to compete in virtual reality in 2022.[113] Panera Bread had similar plans.[114] Even though the Metaverse is no longer a hot topic, this virtual platform agenda is yet to come. This means that new issues are about to rise along with technological growth regarding foreign generic terms in the foreseeable future, and the best solution is to determine international regulation in the agreement regulating intellectual property circulation, preventing appropriation of generic terms, and monopolizing the market. The rest of Part II proposes the Amendment to the TRIPS Agreement for regulating the implementation of the doctrine of foreign equivalents.

A. Amending the TRIPS Agreement

The TRIPS Agreement is the most modern and inclusive international regulation dedicated to intellectual property rights. This Agreement provides the main outlines for intellectual property rights protection, and the doctrine of foreign equivalents could help to reinforce those rights. The general purpose of this amendment is to specify the outlines which would steer the course for the legislative implementation of the doctrine of foreign equivalents.

1. Proposing the Text of the Provision

This article proposes to amend the TRIPS Agreement with a provision that would determine additional limits for trademark registration which would regulate the following main aspects:

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[113] Brian Newar, *McDonald's files trademarks for McMetaverse restaurants … that deliver*, Cointelegraph (Feb. 10, 2022), https://cointelegraph.com/news/mcdonalds-files-trademarks-for-mcmetaverse-restaurants-that-deliver [https://perma.cc/X689-VHT2].

[114] *Id.*

- Prevent monopolization by generic term appropriation,
- Respect language terms of Member States of WTO which are in the public domain and were held generic in their jurisdictions,
- Fair use defense implementation with regards to the doctrine of foreign equivalents, and
- Determine the applicability of the doctrine for the same-language societies.

The amendment would likely be included in Section 2 of the TRIPS Agreement, as that Section determines the regulations of trademark rights, and the provision would succeed Article 15 "Protectable Subject Matter" as a separate Article 15 bis. The reasoning behind this positioning is that specified limits relate to protectability which should be determined as an additional requirement. Article 15 bis would consist of four new paragraphs with the following content:

1. Any mark that in whole consists of an inherently generic term in a Member State's official language and held so by the administrative or judicial body of that Member State should be considered generic in any other jurisdiction.
2. Any mark that, in part, consists of an inherently generic term in a Member State's official language and held so by the administrative or judicial body of that Member State should be considered generic in any other jurisdiction for that part only.
3. Any trademark that in part or in whole consists of an inherently generic term in a specific foreign Member State's official language, and held so by the administrative or judicial body of that Member State of WTO, may be a subject of the fair use exception consideration specified in Article 17 if the mark is already protected in another Member State.
4. If the mark was not held generic in any Member State of WTO but it totally or in part consists of an inherently generic term in a specific foreign Member State's official language supported by an admissible and relevant evidence, that mark may not be protected as a trademark if reasonable percentage of population is likely to be confused. The reasonable percentage should be determined by each Member State.

The above-mentioned amendment would revive the doctrine of foreign equivalents. This text would cover the majority of issues the member states

have already faced regarding foreign generic terms and would provide additional guarantees for international traders.

2. Analyzing the Key Parts of the Provision

The proposed amendment offers a new, expanded approach to the doctrine of foreign equivalents. Under the proposed amendment, the doctrine would function as a balancing and restraining factor for foreign generic term appropriation by markets which may lead to possible competition and confusion related to issues in international trade. The proposed provision consists of four points which are constructed to correlate with the TRIPS Agreement. The remainder of this Section discusses and analyzes key parts of the amendment.

i. Decisions of Foreign Jurisdictions

The first and second parts of the provision consider the decisions of foreign sovereigns while examining the term appropriated from the foreign language as a trademark. The provision obliges the courts not to ignore the determinations of member states regarding the languages they use and provides a binding authority to the respective jurisdictions to decide the genericness of their terms. This approach means that all member states—regardless of their economic power—must respect the foreign culture and conform to international comity. It would prohibit other jurisdictions from granting protectability to a trademark which is generic in other jurisdictions where the same product or service can appear. If every jurisdiction must prohibit the appropriation of a generic term from the public domain, each jurisdiction should also have a reasonable opportunity to implement those rights internationally and to have those rights respected by other jurisdictions.

It is definitely impractical to let another jurisdiction appropriate one's generic term because the marketplace is extremely globalized, which allows businesses to expand beyond borders quickly. Online marketing and international trade allow businesses to market a product in foreign jurisdictions easily.

The first and second sections of the provision would also prohibit possible monopolization of specific products through the appropriation of a foreign generic term and, in doing so, provide additional guarantees to the market competitiveness.

ii. Same-Language Jurisdictions

The first and second parts of the proposal also address the problem raised in *Deckers Outdoor Corporation v. Australian Leather*, namely, whether the doctrine of foreign equivalents should apply when both jurisdictions have the same official language. Though the court held that it should not, this paper proposes a different approach. Basically, the purpose of the doctrine of foreign equivalents is to protect foreign generic terms from appropriation and, by doing so, prevent foreign jurisdictions from obtaining a legal monopoly on terms that directly describe and distinguish the product. It is obvious that this purpose cannot be accomplished if the doctrine would apply only to foreign languages. If the equivalent of a sheepskin boot was always called "ugg" and held generic in Australia, that means that for the United States UGG is a foreign equivalent of a sheepskin boot. Therefore, it is inappropriate for the United States to determine the Japanese term "otokoyama" for sake to be generic[115] but to also grant protection to the UGG mark.

The above-mentioned examples show how relevant it is to determine international regulation for applicability of the doctrine of foreign equivalents to issues involving same-language jurisdictions. So the first and second provisions would provide another guarantee of the doctrine's equal application.

iii. Retroactivity

The third part of the provision is dedicated to the retroactivity problem. Specifically, the provision suggested in the first point cannot apply to foreign generic trademarks which are already registered or used in respective jurisdictions and are protectable by state law. The only *de minimis* harmful way, which would not explicitly intervene with member states' sovereignty, is to include such issues under possible fair use defense. This proposal would regulate situations where the importer names their product with a generic term which is already registered in the local registrar or, in cases with the United States, is already used and therefore is protectable. The importer would be able to seek a defense and succeed in that.

If this provision would explicitly provide retroactivity to these regulations, then in cases of adoption, member states should cancel the registrations of foreign generic terms. This issue may serve as a significant obstacle to adoption. Anyway,

[115] Otokoyama Co. v. Wine of Japan Import, Inc., 175 F.3d 266, 268 (2d Cir. 1999).

the final decision is left to the judiciary of the specific jurisdiction. This provision only imposes the obligation to discuss fair use possibility in consideration of Article 17 of the TRIPS Agreement, which states the following: "[E]xceptions take account of the legitimate interests of the owner of the trademark and of third parties."[116]

iv. Genericness by Evidence

The fourth part of the provision relates to cases where the mark is not officially held generic in any of the respective member states, but the substantial evidence supports that the current mark is an inherently generic term in any specific language. The purpose of this proposal is not only to cover cases where the mark was officially held generic, but also to provide some guidance to states on how to deal with foreign generic terms.

Because there is no reasonable way to determine a percentage that would be a "golden middle" standard applicable for all member states, the percentage should be left for each jurisdiction to decide, considering their demographic, ethnic, racial, and market specifics. The necessity to propose this loose approach is dictated by practical differences in different jurisdictions. In the Australian case, *Cantarella Bros v. Modena Trading*, 1.4% of the population that was familiar with foreign language was considered insufficient for rejecting the protectability of the mark. In the USPTO, the census as evidence for foreign language speaking population is interpreted in different ways. For example, a census of 0.6% of the French-speaking population in the United States was used against the applicant as a sufficient number to find that French is a commonly spoken language.[117] A similar situation was raised regarding the Russian-speaking population in the United States: 706,000 people (approximately 0.22% of the U.S. population) was considered sufficient "to establish that a 'significant portion of consumers' would understand the English meaning of the Russian mark for Russian vodka."[118] Therefore, proposing a specific percentage would be unreasonable considering how dramatically different societies and markets of member states can be.

[116] TRIPS Agreement, *supra* note 91, art. 17.
[117] *In re* Thomas, 79 U.S.P.Q.2d 1021, 1024 (T.T.A.B. 2006).
[118] *In re* Joint-Stock Co. "Baik," 80 U.S.P.Q.2d 1305, 1310 (T.T.A.B. 2006).

B. Substantiation for Adopting the Proposal

This proposal serves a specific purpose and to accomplish the main goals it is relevant to discuss how the proposal solves the problem of foreign generic terms. That problem is revealed by the decades of legal analysis and developments which are discussed in this paper. This Section discusses the solutions of the most significant ones.

1. Harmonization Perspective

The first reason to adopt the proposal is harmonization of the legislature, which is a key element to solving the differentiated approach. This article reveals different approaches of countries to a similar issue of appropriation of foreign generic terms. This differentiation was considered during the drafting of the text of the provision, and the overall ratification of the proposed amendment would make a balanced regulation for all member states. Especially, the amendment would provide a specific outline for the countries as to how to implement the doctrine of foreign equivalents in the member states. The TRIPS Agreement has all the necessary mechanisms to solve the implementation issue, as the most regulating and adopted international agreement in intellectual property law.[119]

2. International Comity Perspective

The second reason to adopt the proposal is the problem of international comity which was specified in several court cases.[120] This problem arises when separate jurisdictions have separate approaches to foreign equivalents, and one state appears in a predominant position. For example, if the U.S. court considers "otokoyama" as a generic term with respect to Japanese sake type, but Japan then ignores the genericness of "chair" as a trademark for imported chairs and grants protection for that mark to a Japanese entrepreneur. The Japanese entrepreneur would obtain a monopoly on that term by gaining an unfair advantage over potential competitors from the U.S., who would limit their marketing strategy as to not infringe upon a registered mark. It might also raise issues when that Japanese company tries to expand its product to the U.S. market.

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[119] *Overview: the TRIPS Agreement*, WTO, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm [https://perma.cc/5L3J-XCMS].

[120] *See, e.g.*, Enrique Bernat F., S.A. v. Guadalajara, Inc., 210 F.3d 439, 443 (5th Cir. 2000).

In this situation, Japan in fact appropriates generic terms from English-speaking countries and hinders the possibility of rivals competing in the market for chairs. By doing so, Japan violates international comity and regulatory reciprocity in international trade. Yet, it does not directly violate any international law. Looking to its prioritized sovereignty in this situation, Japan just applies a stricter approach than the U.S. This provision would solve this inequality and unfairness by determining the "rules of the game." This provision would balance all member states with respect to rights and obligations.

3. Solving Market Predictability Problem

The third and most general reason to adopt the proposal is the economic problem of regulatory ambiguity, which relates in some way to all issues discussed in this paper. If the entrepreneur plans to conduct a business in a foreign market, he has no idea whether the generic words he uses to specify his product are not registered trademarks by another party. In other words, businessmen from Japan never know what words from the Japanese were appropriated by the U.S. market, considering the fact that in the U.S. registration is not necessary for the trademark to be protected. Well, the obvious argument is that he could research the mark on the USPTO website and get the information, but in practice, it is not so easy. In the United States, trademarks may gain protection without registration. Indeed, Section 43(a) of the Lanham Act addresses infringement claims of unregistered trademarks.[121] Therefore, there is no guarantee to Japanese entrepreneurs that they would steer clear of trademark infringement claims if they were to enter the U.S. market. So it is crucial to have precise regulations that would make the world market predictable and stimulate international trade. If generic terms of one country can be appropriated by another, the market would continue to generate higher upstart and cross-border expansion costs to international traders. This reality is just another obstacle to world economic growth.

III
Responding to the Criticism

The proposed amendment to the TRIPS Agreement would likely raise significant criticism. As this proposal relates to marketing and international trade, the two most global subjects of possible criticism are the implementation feasibility

[121] 15 U.S.C. § 1125.

from political and economic perspectives. The analysis below tries to reveal the major possible issues in that respect and provide some countervailing responses.

A. Political Feasibility

The proposal can be objected to the extent of practical implementation by the member states. The member states can avoid ratification of this amendment because it imposes an obligation to recognize and verify foreign judicial orders, which can be challenging. The recognition of foreign judicial and administrative decisions is usually a subject of separate international agreements and frequently reflects specific political purposes. The opposing party may claim that states would barely agree to undertake the obligation to recognize a foreign state's official decisions just to protect foreign generic terms from appropriation. Moreover, they might claim that such recognition creates limits in language policy, as the determination of genericness by the same language entities may significantly impact each other's markets.

This critique is undermined by the fact that each state is also interested in protecting the generic terms of its official language. In other words, the ratification of this provision by all member states would create an appropriate political balance, as each state would be interested in protecting its language's generic terms from appropriation and would have equal opportunities to do so. Probably the biggest player in this game would be the U.S., so this amendment would majorly limit opportunities for registration there. However, the benefit of avoiding consumer deception definitely outweighs the freedom of trademark choice. This would help to prioritize the initial intent of trademark law to allow consumers to identify the source of the good.

As to the recognition of foreign decisions, there is a successful example against that critique. Especially because Section 3 of Article 22 of the TRIPS Agreement allows a member state to request that other member states "refuse or invalidate the registration of the trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated."[122] This provision allows the foreign state to intervene in trademark registration on special occasions which in fact is included in TRIPS. This example

[122] TRIPS Agreement, *supra* note 91, at art. 22.

shows that the consideration of a foreign state's ruling is not something unrealistic and can be practically implemented.

It is worth mentioning that the USPTO requests a word's meaning in foreign language to be provided while submitting a trademark application.[123] This means that the USPTO's policy tends to address the issue of potential appropriation of foreign equivalents. Therefore, as to the U.S., this proposal has a potential of political feasibility.

B. Economic Disadvantages

The economic impact is another issue that can be raised in regard to this proposal. Especially, one critique may be that limits on trademark choice may limit the opportunities of trademark holders to protect their rights. The efforts of a trademark owner to promote and advertise its product under a specific foreign equivalent term can be uncredited by a decision of a foreign official authority. How would this risk encourage business and trade? This objection looks substantiated until one considers the following factors:

- First, the entrepreneur majorly would be aware that she is using a potentially generic term in foreign language, and would be able to undertake reasonable steps to check whether the term contains risks to be held generic in the appropriate jurisdiction.
- Second, this proposal would provide foreseeability to entrepreneurs and liberty to international trade. Businesses would be provided by common binding rules equal for all members. This would help to evaluate more precisely the possible issues that may arise regarding trademark infringement and feel free to use generic terms to describe the products.
- Third, this proposal does not automatically invalidate existing foreign equivalent trademarks. It just makes them a subject of possible fair use. This retroactivity consideration tends to protect businessmen that have already invested substantial amounts in their marketing and still leave opportunities to protect their trademark rights.

[123] *Trademark/Service Mark Application*, *Principal Register*, USPTO, https://www.uspto.gov/sites/default/files/trademarks/teas/new_teas.pdf [https://perma.cc/X5GV-QTDC].

- Fourth, even though concerns about trademark depletion are increasing[124] it is still hard to imagine that all marks in the world are expired and the only trademark that can be used is a foreign generic term. Every language has a substantial remainder of terms to be chosen as a trademark. There is no necessity to appropriate foreign generic terms, gain advantages in competitive markets, and raise risks of consumer confusion.

Conclusion

The problem of foreign generic terms raises issues with international trade and comity. Businesses are not shielded from a possible appropriation of generic terms by foreign companies, which limits their opportunities to expand their business to those markets. WTO member states have different approaches to this problem. Even within the U.S., there is a circuit split which causes legal chaos and uncertainty. A worldwide solution should be provided to eliminate those problems. The best way to do that is to amend the TRIPS Agreement by determining mandatory outlines for implementation of the doctrine of foreign equivalents. The doctrine—which seems to be exhausted—may be a hidden lifebuoy that international trademark protection can rely on.

[124] Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 Harv. L. Rev. 945, 948–50 (2018).

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THE HORRORS OF COPYRIGHT LAW: AN ANALYSIS OF CHARACTER COPYRIGHT ISSUES & ICONIC HORROR VILLAINS

ALEXA BROWNING

Character copyrightability is a complex and nuanced legal issue that the courts have wrestled with for decades. Due to this, the outcomes of copyright protection cases can be unpredictable. This unpredictability can lead the creators of original content to feel insecure in the preservation of their work, which is crucial for the future of impactful and creative original works. While the issue of character copyrightability has been explored, this paper will examine character copyright protection for infamous horror movie villains whose likenesses were appropriated following their rise to popularity. This article will utilize cases involving the villains Michael Myers, Jason Voorhees, Freddy Krueger, and Ghostface to delve into the issue of horror movie character copyrightability. Characters' images and likenesses drive the popularity of horror movies and franchises. This is why the protection of horror movie characters specifically is imperative. Character copyright protection allows creators to freely produce original concepts and be rewarded for creativity. Character copyrightability should be a reliable legal approach to ensure the preservation of iconic horror characters.

INTRODUCTION

The 1968 horror film *Night of the Living Dead*,[1] co-written and directed by George Romero, has been cited as one of the most influential zombie movies ever made.[2] Prior to the film's release, the popular interpretation of zombies was heavily inspired by voodoo zombies.[3] Romero's *Night of the Living Dead* completely changed the popular perception of zombies and has continued to influence the depiction of zombies in modern film & TV up to this day.[4] However, this groundbreaking film lives in the public domain and Romero hardly saw any profit from the movie, despite it being a box-office success and grossing thirty million dollars.[5]

Before the film was called *Night of the Living Dead*, the working title was "Night of the Flesh Eaters."[6] The title was not changed to "Night of the Living Dead" until shortly before its release.[7] Unfortunately, after this change the dis-

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[1] NIGHT OF THE LIVING DEAD (Image Ten 1968).

[2] *See* Richard Newby, *The Lingering Horror of 'Night of the Living Dead'*, HOLLYWOOD REP. (Sept. 28, 2018, 9:00 AM), https://www.hollywoodreporter.com/movies/movie-news/why-night-living-dead-is-more-relevant-ever-1145708/ [https://perma.cc/T8DR-JKAJ]; *see also* Alissa Wilkinson, George Romero *Didn't Mean to Tackle Race in Night of the Living Dead, but he did Anyway*, VOX (July 22, 2017, 10:00 AM), https://www.vox.com/culture/2017/7/22/15985492/night-of-living-dead-movie-week-george-romero-zombies-get-out-jordan-peele [https://perma.cc/2D6D-CPP6]; *see also Zombies & America's Nightmares*, DEAD MEAT PODCAST (Aug. 7, 2018), https://www.youtube.com/watch?v=9P1zAWQbOoI&list=PLbV5-cW2vcuNb2X8vEW_N-JYCdxpTaCHq&index=5 [https://perma.cc/97DJ-S9TR].

[3] *See* WHITE ZOMBIE (Halperin Productions 1932); *see also Zombies & America's Nightmares*, *supra* note 2.

[4] *See* Wilkinson, *supra* note 2; *see also* Daga Nyang, *The Surprising And Enduring Importance Of Night Of The Living Dead*, FLA. INT'L UNIV.: FILM STUDIES CERTIFICATE PROGRAM (Apr. 17, 2019), https://film.fiu.edu/the-surprising-and-enduring-importance-of-night-of-the-living-dead/ [https://perma.cc/U4PS-WH2R].

[5] *See The First Horror Movie & The History of the Horror Genre*, N.Y. FILM ACAD. (July 21, 2022), https://www.nyfa.edu/student-resources/how-horror-movies-have-changed-since-their-beginning/ [https://perma.cc/C2KZ-GAGF]; *see also* Michael Kennedy, *How Night of the Living Dead Accidentally Became Public Domain*, SCREENRANT (Nov. 16, 2019), https://screenrant.com/night-living-dead-movie-public-domain-copyright-accident/ [https://perma.cc/G7CG-ALLZ].

[6] *See* Kennedy, *supra* note 5.

[7] *Id.*

tributor forgot to put the copyright notice in the final print and the film was unable to be protected under copyright.[8] Therefore, the film lives in the public domain.

The horror genre specifically has experienced its fair share of copyright disputes. Horror has historically been overlooked as a genre and has not been considered a serious art.[9] Due to this, horror filmmakers have often created films without a clear idea of how successful they would be. However, the unexpected widespread popularity of certain horror films has led to many attempts at appropriating infamous antagonists.[10] This article examines character copyright protection and how it applies to infamous horror movie villains. Copyright protection for horror movie characters allows the original creators of the characters to portray them in the most authentic way possible. Characters are known to evolve over the decades for many reasons,[11] but only their original creators can incorporate such changes while maintaining the heart of their characters and staying true to the original concept.

Section I will discuss the history of horror films and identify the horror movie villains discussed throughout the remainder of the article. Section II will examine copyright law and character copyright. Section III will review copyright cases that involve the horror movie villains identified in Section I. Section IV will conclude the article and argue why horror movie characters should be protected by copyright.

I
THE HISTORY OF HORROR

Since the beginning of film there have always been "horror" movies, however, they did not gain widespread popularity until around the 1920s.[12] Films such

[8] *See id.*; 17 U.S.C. § 406.

[9] *See* Josh Rosenberg, *When Will the Oscars Finally Give Horror Its Due?*, ESQUIRE (Mar. 10, 2023), https://www.esquire.com/entertainment/movies/a42748643/oscars-horror-academy-awards-essay/ [https://perma.cc/DE9U-6YUK].

[10] *See generally* New Line Cinema Corp. v. Russ Berrie & Co., 161 F. Supp. 2d 293 (S.D.N.Y. 2001); Don Post Studios, Inc. v. Cinema Secrets, Inc., 124 F. Supp. 2d 311 (E.D. Pa. 2000); Easter Unlimited, Inc. v. Rozier, No. 18-CV-06637, 2021 WL 4409729, at *1 (E.D.N.Y. Sept. 27, 2021).

[11] *See generally* SCREAM 4 (Outerbanks Entertainment 2011).

[12] *See The First Horror Movie & The History of the Horror Genre*, *supra* note 5.; *see also* Open Culture, *The First Horror Film*, *George Méliès' The Haunted Castle (1896)*, YOUTUBE (Nov. 26, 2016), https://www.youtube.com/watch?v=exNsVliQFMA [https://perma.cc/AX6Q-A3BG].

as The *Cabinet of Dr. Caligari*[13] and *Nosferatu*[14] were catalysts for the genre's popularity.[15] Both are German films influenced by the country's perspective on authority and fear after World War I.[16] Since the release of these films, there have been an array of notable films that similarly reflect the social issues and fears of the time they were released.[17]

Frankenstein[18] and *Freaks*,[19] for example, both examine the theme of otherness that was prevalent in the 1930s. During this period, eugenics was a pervasive concern that caused high value to be put into a "healthy" or "superior" appearance.[20] Due to this, "visible disability or difference was interpreted as a sign of this inner deviance, which was also interpreted in terms of immorality and criminality."[21] While *Freaks*[22] features actors with disabilities, *Frankenstein*[23] features a deformed monster. Although Mary Shelley, the author of the gothic novel *Frankenstein*,[24] wrote her novel before the ideology of eugenics was popularized, the film incorporates more timely themes into the story.[25] The two films present

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[13] THE CABINET OF DR. CALIGARI (Decla-Film 1920).

[14] NOSFERATU (Prana Film 1922).

[15] *See The First Horror Movie & The History of the Horror Genre*, *supra* note 5.

[16] *See* SIEGFRIED KRACAUER, FROM CALIGARI TO HITLER: A PSYCHOLOGICAL HISTORY OF THE GERMAN FILM 72 (2019).

[17] *See Nightmare on Our Street: Social Commentary in Modern Horror*, WRITERS GUILD OF AM. W. (Nov. 12, 2021), https://www.wga.org/news-events/news/connect/11-12-21/nightmare-on-our-street-social-commentary-in-modern-horror [https://perma.cc/UWG8-U4UE]; *see also How Social Fears Play an Important Role in Horror Films*, UKESSAYS (Aug. 24, 2021), https://www.ukessays.com/essays/film-studies/horror-film-how-social-fears-play-an-important-role.php [https://perma.cc/Q3ZE-FJ4T].

[18] FRANKENSTEIN (Universal Pictures 1931).

[19] FREAKS (Metro-Goldwyn-Mayer 1932).

[20] *See* Karen Norrgard, *Human Testing, the Eugenics Movement, and IRBs*, NATURE EDUC. (2008), https://www.nature.com/scitable/topicpage/human-testing-the-eugenics-movement-and-irbs-724/ [https://perma.cc/5VNA-T4UC]; *see also Eugenics*, HISTORY (Oct. 28, 2019), https://www.history.com/topics/germany/eugenics [https://perma.cc/7AYU-SAND].

[21] *See* Kristen Lopez, *'Freaks' Is the Granddaddy of Disabled Horror, for Better and Worse*, INDIEWIRE (Oct. 6, 2020), https://www.indiewire.com/2020/10/freaks-disabled-horror-movie-1234590637/ [https://perma.cc/M57Y-7WHD].

[22] FREAKS, *supra* note 19.

[23] FRANKENSTEIN, *supra* note 18.

[24] MARY SHELLEY, FRANKENSTEIN (1818).

[25] FRANKENSTEIN, *supra* note 18.

the audience with a prevalent social fear of "visible disability or difference."[26] This societal fear was so strong, in fact, that the director of *Freaks*, Tod Browning, saw his career ultimately end as a result of the film's negative reception.[27]

The 1960s were another notable decade for the horror genre and the United States. Because of the rise of the civil rights movement and the civil unrest in many cities due to racial discrimination and police brutality, 1968 was a violent year in American history.[28] The Vietnam War, which began in 1964, contributed to the ongoing presence of violence in the United States. As the first televised war, Americans at home were exposed to the horrors of combat in real time.[29] *Night of the Living Dead*,[30] released in 1968, sheds light on the fears widely held by society at the time. Just a year before the 1968 release of *Night of the Living Dead*, the March on the Pentagon took place with thousands of attendees protesting the Vietnam War.[31] Additionally, civil rights leader Martin Luther King Jr. and presidential candidate Robert F. Kennedy were assassinated that same year.[32] As a whole, 1968 was polluted with violence and anger, which led many Americans to think "their country was having a nervous breakdown."[33] Although the director of *Night of the Living Dead*, Romero, did not intend for the film to be about race and

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[26] *See* Lopez, *supra* note 21.

[27] *See id.*

[28] *See* Farrell Evans, *The 1967 Riots: When Outrage Over Racial Injustice Boiled Over*, HISTORY (June 17, 2021), https://www.history.com/news/1967-summer-riots-detroit-newark-kerner-commission [https://perma.cc/8KQ4-EXM8].

[29] *See* Jessie Kratz, *Vietnam: The First Television War*, PIECES OF HIST. (Jan. 25, 2018), https://prologue.blogs.archives.gov/2018/01/25/vietnam-the-first-television-war/ [https://perma.cc/9RHN-YMGX].

[30] NIGHT OF THE LIVING DEAD, *supra* note 1.

[31] *See U.S. Marshals and the Pentagon Riot of October 21, 1967*, U.S. MARSHALS SERV., https://www.usmarshals.gov/who-we-are/about-us/history/historical-reading-room/us-marshals-and-pentagon-riot-of-october-21-1967 [https://perma.cc/KG36-82QZ].

[32] *See The Day That Martin Luther King Jr. Died*, NAT'L. CONST. CTR. (Apr. 4, 2022), https://constitutioncenter.org/blog/the-day-that-dr-martin-luther-king-jr-died#:~:text=At%206%3A05%20P.M.%20on,and%20died%20an%20hour%20later [https://perma.cc/3JXC-AUPV]; *Robert F. Kennedy is fatally shot*, HISTORY (June 2, 2022), https://www.history.com/this-day-in-history/bobby-kennedy-is-assassinated [https://perma.cc/TDL8-5V5D].

[33] *See* Kenneth T. Walsh, *1968: The Year That Changed America Forever*, U.S. NEWS & WORLD REP. (Dec. 31, 2017), https://www.usnews.com/news/national-news/articles/2017-12-31/1968-the-year-that-changed-america-forever [archival link omitted].

unrest,[34] he has since said that it captures the "anger" and "disappointment" of the time it was released.[35]

The societal changes and fears of the 60s carried on into the 1970s, with the effects of the Vietnam War prevalent in 1970s culture.[36] The 70s saw a breakdown of traditional Christian values, a rise in individuality, and a surge of various liberation movements.[37] Amidst these cultural changes, the 1970s were also when some of the most iconic horror villains came to life on the big screen for the first time.

In 1978, John Carpenter's *Halloween*[38] was released and popularized the slasher genre.[39] Merriam Webster defines a "slasher" as a person who "mutilates or kills with an edged blade."[40] Slasher films typically feature an antagonist who stalks then harms or kills a group of people.[41] Although *Halloween*[42] was not the first slasher movie,[43] its influence on the horror genre was massive and its

[34] *See* Nyang, *supra* note 4; *see also* Joe Kane, *How Casting a Black Actor Changed 'Night of the Living Dead'*, THE WRAP (Aug. 31, 2010, 5:20 PM), https://www.thewrap.com/night-living-dead-casting-cult-classic-20545/ [https://perma.cc/TTP9-Y78X].

[35] NIGHTMARES IN RED, WHITE, AND BLUE (Lux Digital Pictures 2009).

[36] *See* Ryan Bergeron, *'The Seventies': Time Magazine's Take on the End of the Vietnam War*, CNN (Aug. 17, 2015), https://www.cnn.com/2015/06/23/living/the-seventies-time-magazine-vietnam-war/index.html [https://perma.cc/2D39-K54W].

[37] *See 1970s America*, NAT'L ARCHIVES (July 6, 2021), https://www.nixonlibrary.gov/news/1970s-america [https://perma.cc/Z7JZ-PA2X].

[38] HALLOWEEN (Compass International Pictures 1978).

[39] *See* Samuel R. Murrian, *John Carpenter's 1978 'Halloween' Is One of the Best, Scariest Horror Movies of All Time—Here's Why*, PARADE (Oct. 12, 2022), https://parade.com/606101/samuelmurrian/7-reasons-why-john-carpenters-halloween-is-one-of-the-most-beloved-horror-films-of-all-time/ [https://perma.cc/B27P-36LG].

[40] *Slasher*, MERRIAM-WEBSTER.COM DICTIONARY (2022), https://www.merriam-webster.com/dictionary/slasher/ [https://perma.cc/3XJP-LGEE].

[41] *See generally* STACEY ABBOTT ET AL., STYLE AND FORM IN THE HOLLYWOOD SLASHER FILM (Wickham Clayton ed., 2015).

[42] HALLOWEEN, *supra* note 38.

[43] *See* Murrian, *supra* note 39; *see also* PSYCHO (Shamley Productions 1960); PEEPING TOM (Michael Powell Theatre 1960).

impact is still apparent.[44] It could be argued that without *Halloween*, the other films discussed in this article would not have been created.[45]

In 2006, *Halloween* was selected for preservation in the United States National Film Registry[46] by the Library of Congress as being "uniquely artistic, frightening and a horror film keystone,"[47] and the main villain, Michael Myers, has been ranked the greatest slasher villain of all time.[48] Michael Myers' defining characteristics are his slow and steady pace, blue utility jumpsuit, and white mask.[49] In the first *Halloween* film, Michael wields a large butcher knife and is often associated with knives, but his weapon of choice changes depending on his surroundings.[50] *Halloween* shaped the horror movies which came after it and aided in the rise of the slasher film.[51]

Shortly after, *Friday the 13th*[52] was released in 1980. The film's producers were inspired by the success of *Halloween* and wanted to create a similarly

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[44] *See* Murrian, *supra* note 39.

[45] *See What Tropes and Themes Did "Halloween" Help Introduce to the Horror Genre?*, THE TAKE, https://the-take.com/watch/what-tropes-and-themes-did-halloween-help-introduce-to-the-horror-genre#:~:text=It%20was%20largely%20responsible%20for,staples%20within%20the%20horror%20genre [https://perma.cc/Z35Z-33UE].

[46] *Complete National Film Registry Listing*, LIBR. OF CONG., https://www.loc.gov/programs/national-film-preservation-board/film-registry/complete-national-film-registry-listing/ [https://perma.cc/7DN2-8RC3].

[47] *Brief Descriptions and Expanded Essays of National Film Registry Titles*, LIBR. OF CONG, https://www.loc.gov/static/programs/national-film-preservation-board/documents/halloween.pdf [https://perma.cc/KS22-DPM2].

[48] Chad Byrnes, *A Killer List: The Greatest Slasher Movies of All Time*, LA WEEKLY (Oct. 22, 2018), https://www.laweekly.com/a-killer-list-the-greatest-movie-slashers-of-all-time/ [https://perma.cc/7C3T-B6T6].

[49] *See* HALLOWEEN, *supra* note 38.

[50] *Id.*; *see also* Jake Dee, *Halloween: Michael Myers' 10 Best Murder Weapons, Ranked*, SCREENRANT (Mar. 28, 2021), https://screenrant.com/halloween-michael-myers-10-best-murder-weapons-ranked/#:~:text=Just%20as%20Freddy%20Krueger%20is,majority%20of%20his%20Halloween%20victims [https://perma.cc/MVV4-DS8D].

[51] *See* Amanda Bell, *The Evolution of Slasher Films Explained*, LOOPER (July 14, 2021, 3:01 PM), https://www.looper.com/461144/the-evolution-of-slasher-films-explained/ [https://perma.cc/SE7K-4NEK].

[52] FRIDAY THE 13TH (Georgetown Productions, Inc. 1980).

fashioned movie.[53] The movie was a box office success[54] and *Friday the 13th* is considered one of the most successful media franchises in the United States.[55] Jason Voorhees is the antagonist in *Friday the 13th*[56] and is widely recognized for his hockey mask.[57] He often wears dark, drab, and tattered clothing.[58] Although he is mistakenly known to carry a chainsaw,[59] Jason most often carries a machete.[60] Additionally, Jason is not the killer in the first installment of *Friday the 13th*;[61] however, he is the killer in all the *Friday the 13th* sequels and represents

[53] *See* Kelly Konda, *Celebrating Friday the 13th By Looking at The Origins of the Film It Ripped Off: John Carpenter's Halloween*, WE MINORED IN FILM (June 13, 2014),https://weminoredinfilm.com/2014/06/13/celebrating-friday-the-13th-by-looking-at-the-origins-of-the-film-it-ripped-off-john-carpenters-halloween/ [https://perma.cc/9KZP-YPBR]; *see also* Samuel Lowery, *The Brutal Horror Movie Friday the 13th Copied (Not Halloween)*, SCREENRANT (Sept. 10, 2022), https://screenrant.com/italian-horror-a-bay-of-blood-inspired-friday-the-13th/#:~:text=It%27s%20no%20secret%20that%20Friday,in%20a%20new%20location%20while [https://perma.cc/SKG6-HT2S].

[54] *See* Matt Slovick, *'Friday the 13th' Film History*, WASH. POST (1996), https://www.washingtonpost.com/wp-srv/style/longterm/movies/features/friday13/friday13.htm [https://perma.cc/2B2V-353R].

[55] *See Top 25 Movie Franchises of All Time: #7*, IGN (May 14, 2012, 3:44 PM), https://www.ign.com/articles/2006/12/18/top-25-movie-franchises-of-all-time-7 [https://perma.cc/R3YG-BB7R].

[56] FRIDAY THE 13TH, *supra* note 52.

[57] *See* Adrienne Tyler, *Friday the 13th: How Jason Got His Hockey Mask (In Both Versions)*, SCREENRANT (Sept. 12, 2019), https://screenrant.com/friday-13th-movie-jason-hockey-mask-origin-explained/ [https://perma.cc/8VJL-9QQM].

[58] *See* FRIDAY THE 13TH, *supra* note 52.

[59] *See* Joséphine Michèle, *How The Simpsons Convinced People Jason Voorhees Carries a Chainsaw*, SCREENRANT (Dec. 18, 2021), https://screenrant.com/simpsons-cape-feare-homer-jason-voorhees-chainsaw/ [https://perma.cc/9HJ7-HTJZ].

[60] *See* Melody MacReady, *Friday The 13th: Jason Voorhees' 13 Best Weapons*, SCREENRANT (Oct. 11, 2022), https://screenrant.com/friday-the-13th-jason-voorhees-best-weapons/ [https://perma.cc/6CLF-UFV9].

[61] *See* FRIDAY THE 13TH, *supra* note 52.

the franchise.[62] Jason's mother, Pamela Voorhees, is the killer in the first *Friday the 13th* movie, where she dies at the end and Jason is resurrected.[63]

1984 ushered in the next big slasher film in the genre, *A Nightmare on Elm Street*.[64] Directed by Wes Craven, *A Nightmare on Elm Street*,[65] marked a shift in the slasher genre, as it subtly departed from its predecessors.[66] Unlike *Halloween*[67] and *Friday the 13th*[68], the main villain in *A Nightmare on Elm Street*[69] is not a masked and silent killer. Instead, Freddy Krueger is cocky, loud, and expressive.[70] Freddy has severe burn marks on his face, and he wears a brimmed brown hat with a green and red striped sweater.[71] His most iconic feature, however, is his razor-fingered glove.[72] *A Nightmare on Elm Street*[73] was one of the first films produced by New Line Cinema, which would later be referred to as "The House That Freddy Built."[74] The film was nominated for Best Horror Film by the

[62] FRIDAY THE 13TH PART 2 (Georgetown Productions, Inc. 1981); FRIDAY THE 13TH PART III (Paramount Pictures, Jason Productions, Inc. 1982); FRIDAY THE 13TH: THE FINAL CHAPTER (Paramount Pictures 1984); FRIDAY THE 13TH: A NEW BEGINNING (Paramount Pictures, Georgetown Productions, Inc., Terror, Inc. 1985); FRIDAY THE 13TH PART VI: JASON LIVES (Paramount Pictures, Terror, Inc. 1986); FRIDAY THE 13TH PART VII: THE NEW BLOOD (Paramount Pictures, Friday Four, Inc. 1988); FRIDAY THE 13TH PART VIII: JASON TAKES MANHATTAN (Paramount Pictures, Horror, Inc. 1989); JASON GOES TO HELL: THE FINAL FRIDAY (New Line Cinema 1993); JASON X (Crystal Lake Entertainment, Friday X Productions 2001).

[63] *See* FRIDAY THE 13TH, *supra* note 52; FRIDAY THE 13TH PART 2, *supra* note 62.

[64] A NIGHTMARE ON ELM STREET (New Line Cinema 1984).

[65] *Id.*

[66] *See* Cathal Gunning, *Most Modern Slasher Movies Steal Nightmare On Elm Street's Best Trick*, SCREENRANT (June 24, 2022), https://screenrant.com/nightmare-elm-street-fantasy-elements-defined-modern-slasher-movies-how/ [https://perma.cc/2CMP-9748].

[67] HALLOWEEN, *supra* note 38.

[68] FRIDAY THE 13TH, *supra* note 52.

[69] A NIGHTMARE ON ELM STREET, *supra* note 64.

[70] *Id.*

[71] *Id.*

[72] *See* New Line Cinema Corp. v. Russ Berrie & Co., 161 F. Supp. 2d 293, 293 (S.D.N.Y. 2001).

[73] A Nightmare on Elm Street, *supra* note 64.

[74] *See* THE HOUSE THAT FREDDY BUILT (Automat Pictures, New Line Home Entertainment 2006).

Academy of Science Fiction, Fantasy, & Horror Films in 1985[75] and was selected for preservation in the United States National Film Registry by the Library of Congress in 2021.[76]

The 1990s turned away from traditional slasher films. Movies like *The Silence of the Lambs* and *The Blair Witch Project* were released and veered closer to psychological or supernatural thrillers, and yet were still widely celebrated.[77] Then in 1996 the self-aware and sometimes humorous *Scream* was released.[78] The film was monumental and pioneered the modernization of the slasher film.[79] *Halloween* and *Scream* have been cited by horror enthusiasts as the two most influential films for the horror genre,[80] and the characters in *Scream*[81] are even shown watching *Halloween* in a scene during the movie. To further solidify the two films' significance, *Scream* was the highest-grossing slasher film in the world until the 2018 release of *Halloween*.[82]

Scream features its infamous antagonist Ghostface.[83] Although the culprit underneath the mask changes in each installment of the franchise, Ghostface al-

[75] *Academy of Science Fiction, Fantasy, & Horror Films*, USA 1985 Awards, IMDb, https://www.imdb.com/event/ev0000004/1985/1/ [https://perma.cc/G5EG-YWQ7].

[76] *Complete National Film Registry Listing*, *supra* note 46.

[77] *See* Aja Romano, *Understanding Silence of the Lambs' Complicated Cultural Legacy*, VOX (Feb. 16, 2021, 4:30 PM), https://www.vox.com/culture/22281548/silence-of-the-lambs-cultural-impact-legacy-feminist-transphobia [https://perma.cc/9LFU-GKYQ]; *see also* Josh Billinson, *'90s Kids Were Terrified By The Blair Witch, But Here's The Story Behind The Movie*, BUZZFEED (Oct. 21, 2019, 10:56 AM), https://www.buzzfeednews.com/article/joshbillinson/blair-witch-project-halloween-horror-movie [https://perma.cc/W2GH-PLEH].

[78] SCREAM (Woods Entertainment 1996).

[79] *See* Paolo Carlos, *Scream at 25: How Scream Revived and Changed the Slasher Genre*, NYLON MANILA (Oct. 28, 2021), https://nylonmanila.com/scream-at-25-how-scream-revived-and-changed-the-slasher-genre/ [https://perma.cc/2HU7-L6W9] (showing the film broke a box office record for the genre).

[80] Dead Meat, *Movies That Changed Horror*, YOUTUBE (May 22, 2018), https://www.youtube.com/watch?v=xTJbax_s1vU&list=PLbV5-cW2vcuNb2X8vEW_N-JYCdxpTaCHq&index=3 [https://perma.cc/WRK3-YHFA].

[81] SCREAM, *supra* note 78.

[82] *Genre Keyword: Slasher*, BOX OFFICE MOJO, https://www.boxofficemojo.com/genre/sg1977610497/ [https://perma.cc/325R-WAL2]; *see* Carlos, *supra* note 79.

[83] SCREAM, *supra* note 78.

ways looks the same.[84] The killer always dons the distinctive white mask that features a long and distorted face.[85] He (or she) also wears a black cloak, often wields a discrete knife, and uses a voice changing device that distorts their speech into the famous "Ghostface voice."[86]

Michael Myers,[87] Jason Voorhees,[88] Freddy Krueger,[89] and Ghostface,[90] are four of the most prolific horror movie villains, and have been leaving audiences terrified for half a century. The slashers from *Halloween*,[91] *Friday the 13th*,[92] *A Nightmare on Elm Street*,[93] and *Scream*[94] all gained enough popularity to produce numerous sequels and have notable franchises within the horror movie industry.[95] The *Friday the 13th*[96] franchise, for example, has a whopping 12 movies, including a 2009 reboot.[97] *A Nightmare on Elm Street*[98] follows closely behind with 9 movies, which also includes a 2010 reboot.[99] *Scream 6*,[100] which was released in 2023 and became the highest grossing film in the franchise[101] brought in a new generation of fans. Similarly, *Halloween Ends*, the final film in the rebooted

[84] SCREAM, *supra* note 78; SCREAM 2 (Craven-Maddalena Films, Miramax Films, Konrad Pictures, Dimension Films, Maven Entertainment Inc. 1997); SCREAM 3 (E1 Entertainment, Dimension Films, Craven-Maddalena Films, Konrad Pictures 2000); SCREAM 4 (The Weinstein Company, Corvus Corax, Outerbanks Entertainment 2011); SCREAM 5 (Paramount Pictures 2022); SCREAM 6 (Paramount Pictures 2023).

[85] *See id.*

[86] *See id.*

[87] HALLOWEEN, *supra* note 38.

[88] FRIDAY THE 13TH, *supra* note 52.

[89] A NIGHTMARE ON ELM STREET, *supra* note 64.

[90] SCREAM, *supra* note 78.

[91] HALLOWEEN, *supra* note 38.

[92] FRIDAY THE 13TH, *supra* note 52.

[93] A NIGHTMARE ON ELM STREET, *supra* note 64.

[94] SCREAM, *supra* note 78.

[95] *See The First Horror Movie & The History of the Horror Genre*, *supra* note 5.

[96] FRIDAY THE 13TH, *supra* note 52.

[97] FRIDAY THE 13TH (New Line Cinema, Paramount Pictures 2009).

[98] A NIGHTMARE ON ELM STREET, *supra* note 64.

[99] A NIGHTMARE ON ELM STREET (New Line Cinema, Paramount Pictures 2010).

[100] SCREAM 6, *supra* note 84.

[101] Rebecca Rubin, *'Scream VI' Crosses $100 Million, First in Franchise to Hit Box Office Milestone in 26 Years*, VARIETY (Apr. 6, 2023, 11:09 AM), https://variety.com/2023/film/box-office/scream-6-box-office-100-million-milestone-1235575749/ [archival link omitted].

Halloween trilogy, was released on October 14th, 2022, marking the franchise's thirteenth film.[102]

II
DISTINCTLY DELINEATED: PRECEDENT FOR COPYRIGHT PROTECTION

Copyright protection for original characters has been argued for decades. Through certain cases, the courts have produced reliable character copyrightability tests that have been continually upheld, and pave the way for original works to receive protection.[103] Its intended purpose is to give authors the right to protect their creative works from infringement.[104] However, copyright protection is not inherent to all creative works. The Copyright Act states that if a work is original, creative, fixated, and falls within one of the eight categories outlined, such as dramatic works or motion pictures, then the work is eligible for copyright protection,[105] and the author can apply to register a work through the U.S Copyright Office.[106]

Regarding character copyright protection, a key foundational case is *Nichols v. Universal Pictures Corp*.[107] Anne Nichols, author of the play *Abie's Irish Rose*, sued Universal Pictures Corporation for copyright infringement.[108] Universal Pictures Corporation produced a play titled *The Cohens and the Kellys*, which Nichols believed infringed on the copyright of *Abie's Irish Rose*.[109] Both stories feature Jewish and Irish Catholic families who deal with the scandal of interfaith marriages.[110] The court found that the similarities of the plays mostly involved

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[102] HALLOWEEN ENDS (Universal Pictures, Miramax, Blumhouse Productions, Trancas International Films, Rough House Pictures 2022).

[103] *See What is copyright?*, U.S. COPYRIGHT OFF., https://www.copyright.gov/what-is-copyright/ [https://perma.cc/4P6E-H4VS]; *see also* KURT SAUNDERS, SAUNDERS' INTELLECTUAL PROPERTY LAW: LEGAL ASPECTS OF INNOVATION AND COMPETITION 259 (West Academic Publishing 2016).

[104] *See* SAUNDERS, *supra* note 103.

[105] *See id.* at 262.

[106] *See Registering a Work*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/faq-register.html [https://perma.cc/X8YZ-JHYL].

[107] Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930).

[108] *Id.* at 120.

[109] *Id.*

[110] *Id.*

the young lovers and fathers in each story.[111] However, both plays have unique attributes and plot points.[112]

The court held that the characters in *Abie's Irish Rose* were not distinctly delineated and therefore, were not able to be protected by copyright.[113] The Second Circuit Court of Appeals reasoned that characters who are well delineated may be protected by copyright.[114] *Nichols* established a three-step test to decipher how a character can be distinctly delineated.[115] First, the character must have a personality and identifiable physical expression.[116] Second, the character must be delineated enough to be recognized outside of the work that features the character.[117] Third, the character must have unique attributes.[118] Based on these three elements, the court found the characters in Abie's Irish Rose to not be copyrightable.[119]

The "distinctly delineated"[120] character test was later applied to a new set of facts in *Warner Bros. Pictures v. Columbia Broadcasting System*.[121] Dashiell Hammett (Hammett) was the author of a mystery story titled The Maltese Falcon. Each installment of the story was copyrighted by the publisher.[122] The publishing company, Alfred A. Knopf, Inc. (Knopf), entered a contract with Hammett to publish *The Maltese Falcon* as a book, and subsequently copyrighted the book.[123] After the book was published, Warner Bros. Pictures, Inc. (Warner Bros.) was defined as a purchaser of the work.[124]

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[111] *Id.* at 121–22.

[112] *Id.*

[113] *Id.* (holding that the themes and characters of the plaintiff's play relied on abstract and generalized stereotypes that lacked the novelty that is essential to copyright).

[114] *See id.* ("A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of Romeo and Juliet.").

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945 (9th Cir. 1954).

[122] *Id.* at 946.

[123] *Id.*

[124] *Id.*

Within the contract between Hammett, Knopf, and Warner Bros., along with the assignment of copyright executed by Knopf, the motion picture company was granted defined rights to use *The Maltese Falcon* stories in motion pictures, radio, and television.[125] Following this contract, Hammett continued to use the characters from his stories and so did Warner Bros.[126] Warner Bros., however, claimed copyright infringement because Hammett was contracting with and allowing third parties to use the character Sam Spade from *The Maltese Falcon* in motion pictures, television, and radio.[127]

Applying the "distinct delineation" test established in *Nichols*,[128] as well as other precedents, the court found the character Sam Spade unable to be protected by copyright.[129] The Ninth Circuit court held that a character can be protected by copyright if the character "constitutes the story being told."[130] The court ruled the character Sam Spade was a "vehicle" for the story.[131] This created the Sam Spade test, which would be utilized in later character copyright cases.

Building upon the holdings in *Nichols*[132] and *Warner Bros.*[133] came the decision in *Universal City Studios, Inc. v. Kamar Industries*.[134] Universal City Studios, Inc. (Universal) produced the major motion picture entitled *E.T. The Extra-Terrestrial*, which premiered in May of 1982.[135] The movie focuses on E.T., an alien puppet character. Universal owned the copyright to the movie, which became a box-office success.[136] In collaboration with the licensing agent Merchandising Corporation of America, Universal was able to profit from licensed E.T.

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[125] *Id.* at 948.
[126] *Id.*
[127] *Id.*
[128] *Nichols*, 45 F.2d at 119.
[129] Warner Bros. Picture v. Columbia Broad. Sys., 216 F.2d at 951; *see generally* Warner Bros. Pictures v. Majestic Pictures Corp., 70 F.2d 310, 311 (2d Cir. 1934) (indicating the line between infringement and non-infringement must be drawn).
[130] Warner Bros. Picture v. Columbia Broad. Sys., 216 F.2d at 950.
[131] *Id.*
[132] *Nichols*, 45 F.2d at 122.
[133] Warner Bros. Picture v. Columbia Broad. Sys., 216 F.2d at 950.
[134] Universal City Studios v. Kamar Industries, No. H-82-2377, 1982 WL 1278, at *3 (S.D. Tex. Sept. 20, 1982).
[135] *Id.* at *1.
[136] *Id.*

merchandise ranging from toys, mugs, and clothing.[137] However, Kamar Industries (Kamar) began to promote merchandise with the phrases "I E.T." and "E.T. Phone Home!" without Universal's consent.[138]

Texas's Southern District court ruled that characters who are an essential part of a story are protected by copyright, including *Nichols*[139] and *Warner Bros.*,[140] along with the "common law of trademark infringement and unfair competition."[141] Addressing the copyright claim, the distinctly delineated[142] test was applied to the character E.T. and the court found E.T. to be a developed and well-delineated character,[143] as the movie *E.T. The Extra-Terrestrial*[144] would not be the same without the character E.T., and the story of the movie revolved around him.[145] Based on this reasoning, E.T. was granted copyright protection.[146]

Similarly to *Universal City Studios*,[147] *Anderson v. Stallone* deals with the issue of iconic characters and their copyright protections.[148] Sylvester Stallone wrote and starred in the successful motion pictures *Rocky I*, *II*, and *III*.[149] In the movies, Stallone plays the titular character Rocky Balboa, who is the main character in each of the film installations.[150]

After seeing *Rocky III*, writer Timothy Anderson wrote a thirty-one-page script summary entitled "Rocky IV." [151] Anderson hoped his summary would be used by Stallone and the production company MGM/UA Communications Co.

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[137] *Id.*
[138] *Id.* at *2.
[139] Nichols v. Universal Pictures Corp., 45 F.2d 119, 119 (2d Cir. 1930).
[140] Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945, 945 (9th Cir. 1954).
[141] *Universal City Studios*, 1982 WL 1278, at *4.
[142] *Id.* at *3.
[143] *Id.* at *4.
[144] E.T. THE EXTRA-TERRESTRIAL (Amblin Entertainment 1982).
[145] *Universal City Studios*, 1982 WL 1278, at *3.
[146] *Id.* at *4.
[147] *Id.* at *1.
[148] Anderson v. Stallone, No. 87-0592 WDKGX, 1989 WL 206431, at *1 (C.D. Cal. Apr. 25, 1989).
[149] *Id.*; ROCKY (Chartoff-Winkler Productions 1976); ROCKY II (Chartoff-Winkler Productions 1979); ROCKY III (Chartoff-Winkler Productions 1982).
[150] *Anderson*, 1989 WL 206431, at *1.
[151] *Id.*

(MGM) as a sequel to *Rocky III*.[152] The script summary written by Anderson used characters created by Stallone in the Rocky franchise and listed Stallone as a co-author.[153] Without consulting Anderson or formally acknowledging his script summary, MGM released a fourth Rocky movie that had similar components to the summary written by Anderson.[154]

The court ruled that Rocky was a well-delineated character.[155] The court stated that the original author of a copyrightable work cannot infringe on a derivative work by another author.[156] Additionally, they asked whether the *Rocky* characters were entitled to copyright protection.[157] Based on the application of law, the court found that Rocky was identifiable by his physicality and mannerisms.[158] Similar to E.T., Rocky was also ruled to be necessary for the story of *Rocky* and therefore, the character was protected by copyright.[159]

Several years later, the same district court in California applied the rule established in *Anderson v. Stallone*[160] to *Metro-Goldwyn-Mayer v. American Honda*.[161] The motion picture studio, Metro-Goldwyn-Mayer (Metro), brought action against the automobile manufacturer, American Honda Motor Co. (Honda), and its advertising agency.[162] Metro argued that Honda was airing television advertisements that infringed on the studio's character James Bond.[163] Metro had copyright of the character James Bond, who appeared in sixteen Metro produced films.[164] The court affirmed the holdings in *Nichols*,[165] *Warner Bros.*,[166] and

[152] *Id.*; ROCKY III, *supra* note 149.
[153] *Anderson*, 1989 WL 206431, at *1.
[154] *Id.*
[155] *Id.* at *6-7 (citing Walt Disney Prods. v. Air. Pirates, 581 F.2d 751, 755 (9th Cir. 1978); Olson v. Nat'l Broad. Corp., 855 F.2d 1446, 1451–52 n.6 (9th Cir.1988)).
[156] *Anderson*, 1989 WL 206431, at *8; 17 U.S.C. § 106(2).
[157] *Anderson*, 1989 WL 206431, at *7.
[158] *Id.*
[159] *See id.* at *8.
[160] *Id.* at *1.
[161] Metro-Goldwyn-Mayer v. American Honda, 900 F. Supp. 1287, 1293 (C.D. Cal. 1995).
[162] *Id.* at 1291.
[163] *Id.*
[164] *Id.*
[165] Nichols v. Universal Pictures Corp., 45 F.2d 119, 119 (2d Cir. 1930).
[166] Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945, 945 (9th Cir. 1954).

Anderson[167] and serves as a recent interpretation of copyright protection for characters.

III
A VILLAIN'S DAY IN COURT

The courts have established a rule of law to determine the copyrightability of certain characters. The distinctly delineated test, along with the Sam Spade test, can be applied to all fictional characters, including horror movie villains. Therefore, an application of the distinctly delineated test and the Sam Spade test to the characters from *Halloween*, *Friday the 13th*, *A Nightmare on Elm Street*, and *Scream* provide the most accurate analysis in regard to the copyrightability of these characters.

Don Post Studios, Inc. v. Cinema Secrets, Inc.[168] questions the copyrightability of a horror villain's mask. Don Post Studios (Don Post) created a prototype mask for the 1978 movie *Halloween*, which is donned by Michael Myers for the entire length of the movie.[169] Although the mask was created by Don Post, the company did not reserve any rights to the mask worn by Michael.[170]

After the release of *Halloween*, Don Post created their version of the Michael Myers mask for sale after they were denied a license from the filmmakers to sell the mask.[171] Don Post attempted to secure a copyright registration for their mask; however, their first application was rejected.[172] Don Post reapplied without any mention of the character Michael Myers or *Halloween* and the copyright application was approved.[173]

Two years later, in collaboration with the holder of the *Halloween* copyright, Cinema Secrets Inc. (Cinema Secrets) began to produce and market a Michael Myers mask based on the movie character.[174] Don Post subsequently filed a

[167] Anderson v. Stallone, No. 87-0592 WDKGX, 1989 WL 206431, at *1 (C.D. Cal. Apr. 25, 1989).
[168] Don Post Studios, Inc. v. Cinema Secrets, Inc., 124 F. Supp. 2d 311, 315–16.
[169] *Id.* at 312.
[170] *Id.*
[171] *Id.* at 314.
[172] *Id.*
[173] *Id.*
[174] *Id.* at 314-15.

lawsuit against Cinema Secrets, alleging that Cinema Secrets' mask copied their mask.[175] The court ruled that Don Post's copyright in their mask was invalid for "lack of originality" because Don Post copied the Michael Myers mask from *Halloween*.[176] Conclusively, the court held that Cinema Secrets' sale of the masks did not constitute copyright infringement.[177]

Michael Myers is a well-delineated character when analyzed through the scope of the distinctly delineated test.[178] Michael has a quiet yet threatening personality and an identifiable physical expression.[179] His slow and stealthy walk, accompanied by his large, tall frame can be unmistakably recognized as Michael Myers.[180] Although other slashers, such as Jason Voorhees, have a similar slow walk and large frame, Michael Myers is individually recognizable outside of *Halloween*.[181] His physical expression combined with his unique attributes are what make him so iconic, even outside of the *Halloween* franchise.[182] Michael's most unique attribute, aside from his navy-blue utility jumpsuit, is the white mask he dons.[183] The white mask is so unique to Michael's character that it was the crux of the debate in *Don Post Studios*.[184]

Michael Myers also passes the Sam Spade test.[185] The story of *Halloween*[186] would not be the same without Michael. Like E.T., the character disputed in *Universal City Studios, Inc.*,[187] Michael begins the story being told in *Halloween*.[188] Michael's point of view is also a recurring shot throughout the movie that builds

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[175] *Id.* at 315.
[176] *Id.* at 316.
[177] *Id.* at 320.
[178] *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121–22 (2d Cir. 1930).
[179] HALLOWEEN, *supra* note 38.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] Don Post Studios, Inc. v. Cinema Secrets, Inc., 124 F. Supp. 2d 311, 311.
[185] *See* Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945, 950 (9th Cir. 1954).
[186] HALLOWEEN, *supra* note 38.
[187] *See* Universal City Studios v. Kamar Industries, No. H-82-2377, 1982 WL 1278, at *3 (S.D. Tex. Sept. 20, 1982).
[188] HALLOWEEN, *supra* note 38.

suspense and puts the audience in Michael's shoes.[189] Furthermore, the plot of *Halloween* and most of its sequels rely on Michael to push the story forward.[190] Many of the characters in *Halloween* are focused on Michael, whether it is the sheriff or Michael's psychiatrist, the characters in *Halloween* are centered around Michael.[191] While Michael Myers is the main villain, Laurie Strode is the heroine, or final girl,[192] in *Halloween*[193] and both characters rely on each other for a purpose within the movie.[194]

Following the *Don Post Studios* case, the motion picture company, New Line Cinema Corporation (New Line) and their production company sued toy company Russ Berrie & Company, Inc. (Russ Berrie).[195] New Line claimed Russ Berrie infringed on its copyright and trademark for the character Freddy Krueger.[196]

New Line was the sole owner of a valid trademark for *A Nightmare on Elm Street* and the Freddy character.[197] Utilizing their trademark, New Line began selling a "Freddy Glove" in 1987.[198] The glove was a model of Freddy Krueger's glove from the movie, which features protruding razor blades.[199] However, in 1993, Russ Berrie began selling a similar glove with protruding razor blades and called it the "Ghostly Gasher."[200]

Furthermore, the court held that the copyright protections of *A Nightmare on Elm Street* and Freddy Krueger extended to the glove worn by Freddy because "'[c]opyright protection is extended to the component part of the character which significantly aids in identifying the character.'"[201] Due to these rulings, and the

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[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *See* CAROL CLOVER, MEN, WOMEN, AND CHAINSAWS (1992) (originating the term "final girl" as the sole woman survivor in a horror movie).
[193] *Id.*
[194] *Id.*
[195] New Line Cinema Corp. v. Russ Berrie & Co., 161 F. Supp. 2d 293, 293 (S.D.N.Y. 2001).
[196] *Id.* at 294.
[197] *Id.* at 295.
[198] *Id.*
[199] *Id.*; A NIGHTMARE ON ELM STREET, *supra* note 64.
[200] *New Line Cinema Corp.*, 161 F. Supp. 2d at 295.
[201] *Id.* at 302 (citing New Line Cinema Corp. v. Easter Unlimited, Inc., 17 U.S.P.Q.2d 1631, 1633 (E.D.N.Y. 1989)).

evidence that Russ Berrie had access to New Line's copyrighted material, the court held that Russ Berrie did infringe on New Line's copyright of *A Nightmare on Elm Street* and Freddy Krueger.[202]

The distinctly delineated test[203] also shows that Freddy Krueger is a well delineated character. Freddy has a loud and boisterous personality and a distinct physical expression.[204] Whereas Michael and Jason are tall and solid, Freddy is smaller and makes fluid movements.[205] The limbo between dreams and reality that continues throughout *A Nightmare on Elm Street* is also represented by Freddy's physicality.[206] He is a surreal character with surreal physicality; he is shown ripping his face off, filled with maggots, and cutting his fingers off.[207] Along with that, Freddy is recognizable outside of *A Nightmare on Elm Street*.[208] He does not rely on the story or setting to be a distinct and independent character.[209] Unique attributes associated with Freddy are not only his outfit and burned skin,[210] but most notably his razor blade glove which was the topic of dispute in *New Line Cinema Corp. v. Russ Berrie & Co., Inc*.[211]

Freddy also passes the Sam Spade test.[212] His character constitutes the story being told because *A Nightmare on Elm Street* is about Freddy.[213] Throughout the movie, Freddy terrorizes the character Nancy in her dreams.[214] Later, Nancy's mother reveals that Freddy used to be a real person who was a child murderer.[215] Due to his crimes, and no conviction, her mother and other teens at the time trapped Freddy in an old warehouse and burned it down with him inside.[216]

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[202] *Id.* at 305.
[203] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121–22 (2d Cir. 1930).
[204] A NIGHTMARE ON ELM STREET, *supra* note 64.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] New Line Cinema Corp. v. Russ Berrie & Co., 161 F. Supp. 2d 293, 293 (S.D.N.Y. 2001).
[212] Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945, 948 (9th Cir. 1954).
[213] A NIGHTMARE ON ELM STREET, *supra* note 64.
[214] *Id.*
[215] *Id.*
[216] *Id.*

Freddy's dark and twisted backstory is what fuels his malevolence and makes his character a central aspect of the *A Nightmare on Elm Street* story.[217] He is the thread between all the movies in the franchise and makes the story.[218]

Years later, the *Friday the 13th* franchise found itself in a legal battle in *Horror Inc. v. Miller*.[219] The film production company, Horror Inc., along with its successor, Manny Company (Manny), sought a legal declaration that *Friday the 13th*'s screenwriter, Victor Miller, was a work for hire.[220] Miller wrote the screenplay for the film in 1979; however, in 2016 Miller gave notice to Manny that he planned to terminate Manny's copyright.[221]

Manny argued Miller was an employee of the company, and therefore Manny owned the screenplay because it was a "work made for hire."[222] However, Miller argued that he was an independent contractor for Manny when he wrote the screenplay, giving him the authority to reclaim the screenplay as his own.[223] After considering the factors used to distinguish independent contractors and employees, as well as the factors used to analyze whether a work is prepared as a work made for hire in the context of copyright law, the court held that Miller was an independent contractor when he wrote the screenplay for *Friday the 13th*.[224] This ruling meant Miller was entitled to authorship rights for the screenplay.[225] Additionally, the court held that Manny and Horror Inc. did not recant Miller's authorship in a way that would generate a limitations period for an authorship claim.[226]

When examined under the lens of the distinctly delineated test, Jason Voorhees passes.[227] Jason has a dull disposition and an identifiable physical expression.[228]

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[217] *Id.*
[218] *Id.*
[219] Horror Inc. v. Miller, 15 F.4th 232 (2d Cir. 2021).
[220] *Id.* at 240.
[221] *Id.* at 236.
[222] *Id.* at 240.
[223] *Id.* at 236.
[224] *Id.* at 249–50; *see* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989); Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 116 (2d Cir. 2000).
[225] *Horror Inc.*, 15 F.4th at 259.
[226] *Id.*
[227] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
[228] FRIDAY THE 13TH, *supra* note 52.

He is slow in his pursuit of his victims, but unlike Michael Myers, is not graceful.[229] Jason is also recognizable outside of *Friday the 13th* and does not rely on his settings to be familiar.[230] Jason's unique attributes aid in making him recognizable outside of the *Friday the 13th* franchise.[231] Jason's hockey mask is undoubtedly his most unparalleled attribute.[232] In *Horror Inc. v. Miller*,[233] the discussion of having a masked killer is included in the facts of the case. The creators of Jason's character were inspired by Michael Myers, so the inclusion of a masked killer was necessary for the story.[234] Although there are similarities between Jason and Michael, their personalities, physical expression, and unique attributes make them both distinctly identifiable.[235]

Jason also constitutes the story being told. The *Friday the 13th* franchise is about Jason and the audience learns more about his childhood and character overall as the franchise continues.[236] In the first film, the audience learns that Jason drowned as a child at camp while the counselors were neglecting their duties.[237] Motivated by Jason's death, his mother, Pamela, seeks revenge by killing camp counselors.[238] At the end of the film, Jason is inexplicably resurrected, and from then, he continues his mother's legacy of killing.[239] Although Jason is not the killer in the first movie, Pamela is motivated by Jason's death and Jason pushes the story forward.[240] While the characters Jason targets change in each movie, Jason remains the common denominator in all the *Friday the 13th* movies.[241]

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[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *See* Tyler, *supra* note 57.
[233] *Horror Inc.*, 15 F.4th at 238.
[234] *See* Konda, *supra* note 53.
[235] *See* FRIDAY THE 13TH, *supra* note 52; HALLOWEEN, *supra* note 38.
[236] FRIDAY THE 13TH, *supra* note 52; FRIDAY THE 13TH PART 2, *supra* note 62.
[237] FRIDAY THE 13TH, *supra* note 52.
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*

The *Scream* franchise dealt with its own copyright issues in *Easter Unlimited, Inc. v. Rozier*.[242] Easter Unlimited Inc. (Easter Unlimited) designs, manufactures, and sells costume supplies and novelty gifts,[243] and the Ghost Face Mask is one of the many products sold by the company. Additionally, they've held the copyright for it since 1993.[244] Along with the mask, Easter Unlimited also holds a trademark registration for a stylized Ghost Face logo.[245] In 1996, Easter Unlimited gave Dimension Films a license to use their Ghost Face Mask in the movie *Scream*.[246] The movie's villain, Ghostface, wears the mask throughout the film.[247]

In 2018, Terry Rozier, a successful basketball player in the NBA, earned the nickname "Scary Terry" from sports media outlets and fans.[248] The popularity of this nickname encouraged Rozier to start his own line of merchandise featuring a cartoon version of himself wearing the Ghost Face Mask used in *Scream*.[249] Scary Terry merchandise never claimed to be affiliated with Easter Unlimited, and Easter Unlimited never authorized use of the Ghost Face Mask for any merchandise created by Rozier.[250] Subsequently, Easter Unlimited claimed that Rozier committed copyright infringement.[251]

For the purpose of subsequent analysis, the court assumed that Easter Unlimited did own a valid copyright,[252] and found that, despite the imagery being used across different mediums, Rozier did copy elements of the Ghost Face Mask.[253] The court stated that substantial similarity "'is a factual question and the appropriate test for determining whether substantial similarity is present is whether an average lay observer would recognize the alleged copy as having been appropri-

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[242] *See generally* Easter Unlimited, Inc. v. Rozier, 18-CV-06637 (KAM), 2021 WL 440972, at *1 (E.D.N.Y. Sept. 27, 2021).
[243] *Id.*
[244] *Id.*
[245] *Id.* at *2.
[246] *Id.*; SCREAM, *supra* note 78.
[247] SCREAM, *supra* note 78.
[248] *Easter Unlimited, Inc.*, 2021 WL 440972, at *2.
[249] *Id.* at *3; SCREAM, *supra* note 78.
[250] *Easter Unlimited, Inc.*, 2021 WL 440972, at *3.
[251] *Id.* at *6.
[252] *Id.* at *9.
[253] *Id.* at *10.

ated from the copyrighted work.'"[254] Using the facts of the case, the court held that "the two works are substantially similar."[255]

Although the court found Rozier to have committed unauthorized copying, the court also held that fair-use doctrine protected[256] Rozier's use of the Ghost Face Mask.[257] Out of the four factors that make up the fair-use doctrine,[258] the court reasoned that factors one and four supported Rozier's fair-use claim.[259] Factor one pertains to the purpose of the use and factor four questions the effect on the market value of the copyrighted work. The court also found factors two and three, which relate to the nature of the work and the importance of the portion of the work being used, respectively, to be unable to overcome the strength of factors one and four in the overall decision.[260] The court subsequently held that Rozier's "use of the *Scream* mask constitute[d] fair use."[261]

Ghostface is also a distinctly delineated character.[262] Although the culprit behind the mask changes throughout the films, Ghostface always has the same voice and demeanor.[263] The person wearing the mask always reveals their use of a voice changing device that makes their voice sound the same as the voice in the first *Scream* movie.[264] Additionally, Ghostface consistently acts with swift and furtive movements.[265] Ghostface is recognizable outside of *Scream*.[266] The

[254] *Id.* (quoting Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966)); *see generally* Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1001 (2d Cir. 1995); Malden Mills, Inc. v. Regency Mills, Inc., 626 F.2d 1112, 1113 (2d Cir. 1980).

[255] *Easter Unlimited, Inc.*, 2021 WL 440972, at *10.

[256] *See generally* Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, No. 19-2420-CV, 2021 WL 3742835, at *4 (2d Cir. Aug. 24, 2021) (quoting Blanch v. Koons, 467 F. 3d 244, 250 (2d Cir. 2006)) ("The fair use doctrine seeks to strike a balance between an artist's intellectual property rights to the fruits of her own creative labor … 'and the rest of us to express them—or ourselves by reference to the works of others.'").

[257] *Easter Unlimited, Inc.*, 2021 WL 440972, at *17.

[258] 17 U.S.C. § 107.

[259] *Easter Unlimited, Inc.*, 2021 WL 440972, at *17.

[260] *Id.* at *15–16.

[261] *Id.* at *11.

[262] Nichols v. Universal Pictures Corp., 45 F.2d 119, 119 (2d Cir. 1930).

[263] SCREAM, *supra* note 78.

[264] *Id.*

[265] *Id.*

[266] *Id.*

villain's most unique attribute is the stark white mask, which was the object of contention in *Easter Unlimited, Inc. v. Rozier*.[267] Ghostface is especially unique because the mask existed before *Scream*;[268] however, the mask is now widely associated with the movie.[269]

Like other slashers, Ghostface is in all the *Scream* installments and plays an essential role in the story.[270] The movie starts with Ghostface terrorizing a teen alone inside her home in Woodsboro, where *Scream* is set.[271] Panic then ensues in the small California town and the characters discuss the masked killer, and their true identity, at length throughout the movie.[272] Like *Halloween*, the main heroine in *Scream*, Sidney Prescott, relies on Ghostface to tell her character's story and vice versa.[273] *Scream* and its sequels rely on Ghostface to incite terror and continue the story.[274]

The characters Michael Myers, Jason Voorhees, Freddy Krueger, and Ghostface have similarities, though, that are applicable to other horror villains. Michael, Jason, and Ghostface all wear masks which is a recurring theme in the horror genre. While their masks are unique, being a masked killer is not unique in horror.[275] Additionally, the antagonist in horror movies usually wears plain and tattered clothes, like Jason, Michael, and Ghostface. While Freddy's clothes are not plain, they are noticeably tattered.[276] The villains in horror movies are also typ-

[267] Easter Unlimited, Inc. v. Rozier, 18-CV-06637 (KAM), 2021 WL 440972, at *1 (E.D.N.Y. Sept. 27, 2021).

[268] SCREAM, *supra* note 78.

[269] *See* Rodrigo Kurtz, *The Ghost Face Mask*, HELLO SIDNEY, https://hellosidney.com/ghostface/ [https://perma.cc/75EW-83F8].

[270] *See id.*

[271] SCREAM, *supra* note 78.

[272] *Id.*

[273] *Id.*

[274] Kurtz, *supra* note 269.

[275] *See* Colin McCormick, *10 Best Masked Killers in Movies, According to Ranker*, SCREENRANT (June 26, 2022), https://screenrant.com/best-horror-movie-masked-killers-ranker/ [https://perma.cc/PP7U-EDV3].

[276] *See* A NIGHTMARE ON ELM STREET, *supra* note 64.

ically tall and large to make their character even more intimidating.[277] Michael and Jason fit this description, whereas Freddy's build is less evident.[278] The killer under the Ghostface disguise changes in every movie so his build changes but is generally depicted as tall and large.[279] Horror villains usually always wield a bladed weapon that varies in size, hence their victims being "slashed" to death.[280] Michael Myers, Jason Voorhees, Freddy Krueger, and Ghostface are no exception to this generalization.[281]

CONCLUSION

George Romero passed away in 2017, leaving behind a legendary legacy of horror films.[282] Regrettably, he did not see any monetary credit for his first and extremely notable work *Night of the Living Dead* because it was not protected by copyright.[283] Copyright laws allow for authors to protect their work and preserve it for up to seventy years after their death.[284] This protection is crucial because creators of horror movies and characters know their creations best; they are able to produce the most authentic versions of their stories and characters. Although remakes in horror franchises can be passed along to different directors, producers, etc., the original creator of the film and its characters are the core of these franchises and thus deserve reliable protection.

Movies, characters, and franchises can evolve over time and still be great. However, without the original movie, remakes and sequels would not exist. With-

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[277] *See* Kayleena Pierce-Bohen & Shawn S. Lealos, *The 10 Tallest Horror Movie Villains (& 10 Shortest)*, SCREENRANT (Oct. 2, 2023), https://screenrant.com/horror-movie-villains-tallest-shortest/ [https://perma.cc/5BGT-DSDN].

[278] *See* HALLOWEEN, *supra* note 38; FRIDAY THE 13TH, *supra* note 52; A NIGHTMARE ON ELM STREET, *supra* note 64.

[279] SCREAM, *supra* note 78.

[280] *See* Ben Hathaway, *10 Most Iconic Horror Movie Weapons*, SCREENRANT (May 15, 2022), https://screenrant.com/iconic-horror-movie-weapons/ [https://perma.cc/V5NH-EX3P].

[281] *See* HALLOWEEN, *supra* note 38; FRIDAY THE 13TH, *supra* note 52; A NIGHTMARE ON ELM STREET, *supra* note 64; SCREAM, *supra* note 78.

[282] *See* Tre'vell Anderson, *George A. Romero, 'Night of the Living Dead' Creator, Dies at 77*, LA TIMES (July 16, 2017, 7:25 PM), https://www.latimes.com/entertainment/movies/la-me-george-romero-20170716-story.html [https://perma.cc/CJ7T-RJLP].

[283] *See* Kennedy, *supra* note 5.

[284] 17 U.S.C. § 302; *see also* SAUNDERS, *supra* note 103, at 261.

out John Carpenter's creation of *Halloween*,[285] there would be no *Halloween Ends*.[286] Without Wes Craven, there would be no *Scream 6*[287] or even *Scary Movie* franchise. Without Sean Cunningham, Victor Miller, and Craven, there would be no *Freddy vs. Jason*.[288] Remakes and sequels are controversial,[289] however, film is constantly building upon itself and the source material for remakes and sequels is valuable intellectual property.

Many horror films are based on existing novels,[290] like *Frankenstein*.[291] This furthers the point that the original authors of stories and characters can do them the most justice. Similar to remakes and sequels, films based on novels can be valuable and enjoyable. Yet, those films would not be what they are without the original source material. For example, Stephen King is one of the most notable horror authors who has numerous movies based on his novels.[292] King's novels and the movies based on his books are cherished by horror fans; so much so that there is a podcast dedicated to King's works.[293] For some projects based on his work, King was able to collaborate with the filmmakers to produce an authen-

[285] HALLOWEEN, *supra* note 38.

[286] HALLOWEEN ENDS, *supra* note 102.

[287] SCREAM 6 (Spyglass Media Group 2023).

[288] FREDDY VS. JASON (New Line Cinema, Crystal Lake Entertainment 2003).

[289] *See* Emily Kubincanek, *Retracing Hollywood's Fascination with the Remake*, FILM SCHOOL REJECTS (Mar. 20, 2020), https://filmschoolrejects.com/hollywood-remake-history/ [https://perma.cc/6WB8-7NHR]; Kayleigh Donaldson, *A Nightmare on Elm Street and the Disappointing Mediocrity of Horror Remakes*, SYFY WIRE (Apr. 27, 2020, 7:05 AM), https://www.syfy.com/syfy-wire/a-nightmare-on-elm-street-mediocrity-of-horror-remakes [https://perma.cc/ESF6-UC8N]; Keith Phipps, *Will Anyone Remember Any of the 21st Century Horror Remakes?*, THE RINGER (Oct. 2, 2018, 6:00 AM), https://www.theringer.com/movies/2018/10/2/17915924/horror-movie-remakes-2000s-psycho-texas-chainsaw-massacre-halloween [https://perma.cc/V3BD-2UCC].

[290] *See* Mike R., *Top 10 Horror Novels Made Into Great Horror Movies*, HUDSON BOOKSELLERS (Oct. 9, 2015 3:30 AM), https://www.hudsonbooksellers.com/top-10-horror-adaptions [https://perma.cc/R63P-W4KU]; Alanna McAuliffe, *From Page to Scream: 35 Spine-Chilling Listens that Inspired Horror Movies*, AUDIBLE BLOG (Oct. 22, 2022), https://www.audible.com/blog/article-horror-movies-based-on-books [https://perma.cc/66W4-UHQH].

[291] FRANKENSTEIN, *supra* note 18.

[292] *Movies - A to Z*, STEPHEN KING (2022), https://stephenking.com/works/movie/index.html [https://perma.cc/W4UT-ACYF].

[293] The Kingcast, *A Conversation With Stephen King* (Mar. 2, 2022, 4:00 AM), https://podcasts.apple.com/us/podcast/the-kingcast/id1512844649?i=1000552672902 [https://perma.cc/S9J3-43K6].

tic adaptation of his stories.[294] The movies that King was able to have input on uniquely captured his characters and stories.[295]

Michael Myers, Jason Voorhees, Freddy Krueger, and Ghostface, however, are all original characters; they were not based off any book. The four characters are pillars of the horror genre and have inspired other horror filmmakers to invent villains of their own.[296] After decades of films, it is difficult to create a truly unique and distinctly delineated horror villain. It would be remiss not to reward creativity and original concepts. The originality of unique horror villains, like the ones covered in this article, should be preserved by copyright, even when it comes to sales of merchandise, video games, and toys.

For many horror fans, 2022 was considered a notable year for the genre.[297] After such an outstanding year for horror, there are a growing number of aspiring horror artists that should be able to rely on copyright protection for new and unique horror characters. Unlike other genres, the antagonists in horror drive the plot of the film and are a critical component to the story. Copyright protection for horror villains in particular is so vital because without them, these iconic films, franchises, and legacies would not exist. As the horror genre continues to expand and grow in popularity, it is imperative to analyze the application of copyright protection to horror villains. Character copyright protection is a reliable legal approach to preserve horror villains that are the crux of their stories and should be applied to these villains to secure the future of the horror genre.

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[294] *See, e.g.*, CREEPSHOW (Laurel Entertainment 1982); CREEPSHOW 2 (Laurel Entertainment 1987); CAT'S EYE (Dino De Laurentiis Company, Famous Films 1985); SILVER BULLET (Dino De Laurentiis Company 1985); PET SEMETARY (Laurel Productions 1989); A GOOD MARRIAGE (Screen Media Films 2014); CELL (Benaroya Pictures 2016).

[295] *See generally Movies - A to Z*, *supra* note 292.

[296] *Movies That Changed Horror*, *supra* note 80.

[297] *See* Michael Cavna, *How 2022 became a huge year for horror movies*, HOUSTON CHRON. (Nov. 8, 2022), https://preview.houstonchronicle.com/movies-tv/how-2022-became-a-huge-year-for-horror-movies-17562219 [https://perma.cc/AAC9-AKEP].

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WORKING STIFF: EXTENDING THE STATUTORY LABOR DISPUTE EXEMPTION TO WWE WRESTLERS

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INTRODUCTION

In 1987, professional wrestler and future Governor of Minnesota Jesse "the Body" Ventura attempted to unionize the wrestlers of the World Wrestling Federation (WWF). According to Ventura's telling, he stood in the middle of the locker room and appealed to a group of other WWF wrestlers on the eve of WrestleMania II, the second installment of the WWF's marquee pay-per-view

event.[1] Vince McMahon, then the chairman and chief executive officer of the WWF, had invested heavily in the event and promoted the show with the promise of matches between fan favorites like Ventura, Hulk Hogan, and King Kong Bundy.[2] Ventura reasoned with his fellow wrestlers that "if we all stick together and simply tell Vince we're refusing to wrestle unless we're allowed to unionize, what are they gonna be able to do?"[3]

Ventura soon learned the answer. One of the wrestlers, later revealed to be Hogan himself, informed McMahon of the plans to unionize.[4] Due either to actual pressure from management or fear of retaliation, the wrestlers backed out of Ventura's plan.[5] In the aftermath, the WWF fired one less-prominent wrestler known to be pro-union.[6] Ventura left the WWF shortly afterwards to film a movie, which gained him membership in the Screen Actors Guild.[7] WrestleMania II went on as planned, followed by thirty-seven more installments of the pay-per-view program to date.[8] The WWF, since re-branded as World Wrestling Entertainment (WWE), remains non-unionized.[9]

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[1] JESSE VENTURA, I AIN'T GOT TIME TO BLEED 105–06 (1999).

[2] *Id.*

[3] *Id.* at 106.

[4] *Id.* at 108.

[5] *See* Michael Schiavone, A Wrestler's Life: Full-Time Worker as Independent Contractor, 10 WORKINGUSA: J. LAB. & SOC'Y 485, 493 (2007).

[6] *See id.*

[7] VENTURA, *supra* note 1, at 106.

[8] *See, e.g.*, *WWE Wrestlemania 39 Matches, Card, Date, Location, News, Stories, and Information*, ESPN (Mar. 30, 2023, 9:30 AM), https://www.espn.com/wwe/story/_/id/31012524/wwe-wrestlemania-matches-card-date-location-news-stories-information [https://perma.cc/UJ89-HZZB].

[9] The company officially changed its name to WWE in 2002. To avoid confusion, I use "WWE" to refer to the company throughout this paper, even when discussing events that occurred prior to 2002. As of September 2023, WWE operates alongside the Ultimate Fighting Championship (UFC) as a division of TKO Group Holdings following an acquisition by UFC's parent company Endeavor. *See* Todd Spangler, *WWE, UFC Officially Merge to Form TKO Group, New Stock to Start Trading*, VARIETY (Sept. 12, 2023), https://variety.com/2023/tv/news/wwe-ufc-deal-closes-tko-group-1235719908/ [https://perma.cc/GMB5-9TSZ].

Academics, journalists, and wrestling fans alike have examined why the WWE does not have a union.[10] The main barrier to unionization is that the WWE classifies all its wrestlers as independent contractors rather than employees.[11] As independent contractors, WWE wrestlers are not covered by the rights and protections of the National Labor Relations Act (NLRA) and thus have no federal statutory right to engage in concerted activities and collective bargaining.[12] As such, wrestlers have no recourse under the NLRA should they face retaliation, including firing, for their organizing activities.[13] Further, there is another, often overlooked, obstacle to professional wrestlers' ability to organize and engage in collective action: the threat of antitrust liability.[14] Workers classified as employees are permitted to engage in otherwise-illegal concerted action as part of a dispute over wages or working conditions under the "statutory labor dispute exemption" derived from the Clayton Act of 1914 and the Norris-LaGuardia Act of 1932.[15] Historically, independent contractors have been categorically ineligible for this exemption.[16] Thus, as independent contractors, if wrestlers organized to demand

[10] *See* Schiavone, *supra* note 5; David Cowley, *Employees vs. Independent Contractors and Professional Wrestling: How the WWE Is Taking a Folding-Chair to the Basic Tenets of Employment Law*, 53 U. LOUISVILLE L. REV. 143, 150 (2014); Geoff Estes, *New Bargaining Order: How and Why Professional Wrestlers in the WWE Should Unionize Under the National Labor Relations Act*, 29 MARQ. SPORTS L. REV. 137, 138 (2018); Stephen S. Zashin, *Bodyslam from the Top Rope: Unequal Bargaining Power and Professional Wrestling's Failure to Unionize*, 12 U. MIAMI ENT. & SPORTS L. REV. 1, 4 (1995); David Shoemaker, *On WWE and Organized Labor*, GRANTLAND (July 18, 2012), https://grantland.com/features/wwe-hell-cell-john-cena-history-wrestling-real-scripted-labor-movement/ [https://perma.cc/92SL-ARMN]; *Last Week Tonight with John Oliver: WWE* (HBO television broadcast Mar. 31, 2019), https://www.youtube.com/watch?v=m8UQ4O7UiDs&ab_channel=LastWeekTonight [https://perma.cc/6ZD8-TW4V].

[11] *See, e.g.*, Cowley, *supra* note 10, at 150 ("The first step to unionization and, hence, collective bargaining, will be characterizing WWE wrestlers as employees in a court of law.").

[12] *See id.* at 151.

[13] *See id.*

[14] *See* Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. 969, 982 (2016) (documenting how the "specter of antitrust liability has significantly suppressed" the ability of independent contractor truck drivers to engage in collective action to improve their wages and working conditions).

[15] Cynthia Estlund & Wilma B. Liebman, *Collective Bargaining Beyond Employment in the United States*, 42 COMP LAB. L. & POL'Y J. 371, 373–77 (2021).

[16] *See id.* at 376–77.

higher wages or better working conditions, they could be sued under the Sherman Antitrust Act, enjoined, and forced to pay treble damages to the WWE.[17] Wrestlers could even face criminal antitrust liability.[18]

One option for WWE wrestlers interested in organizing would be winning reclassification as employees via private litigation.[19] However, litigating classification status is costly and time consuming.[20] Further, as the classification determination hinges on the specifics of the wrestlers' employment relationship, the WWE could respond by altering the working conditions of its wrestlers to frustrate litigation efforts, allowing the company to continue to identify wrestlers as independent contractors.[21]

Absent enduring and winning a fight over their classification status, WWE wrestlers, like other independent contractors, face dual threats to any attempt to organize for better pay or working conditions: retaliation by their employer and antitrust liability.[22] However, recent reanalysis of the statutory labor exemption

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[17] *See* Paul, *supra* note 14, at 979.

[18] *See id.*

[19] A group of former wrestlers attempted to litigate the classification issue as part of a 2008 lawsuit, but the case was dismissed on procedural grounds. Levy v. World Wrestling Ent., Inc., No. CIV.A.308-01289, 2009 WL 455258, at *2 (D. Conn. Feb. 23, 2009). Scholars considering the classification status of WWE wrestlers have consistently found them to be improperly classified as independent contractors. *See* Cowley, *supra* note 10, at 170–71 (concluding that WWE wrestlers are employees under the factors considered by the IRS); Estes, *supra* note 10, at 153 (concluding that WWE wrestlers are employees under the common law "right to control" test); Schiavone, *supra* note 5, at 490 (concluding that WWE wrestlers are employees under the factors considered by the IRS).

[20] *See generally* Scott Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 U.C. IRVINE L.R. 939, 1130–40 (2014) (describing the practical barriers to classification litigation in the context of port truck drivers).

[21] *See* Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 279, 288–89 (2011) ("Another example of this dynamic is simply employer choices of organizational form in the shadow of anticipated legal classification. If a firm designs a work structure to achieve an independent contractor designation, simply asking after the fact whether the workers are employees or independent contractors misses the way that both the firm and the law already set up the problem.") (citation omitted).

[22] *See* Paul, *supra* note 14, at 969 ("[Independent contractors] find themselves in the position of most workers prior to the New Deal: at once lacking labor protections, yet exposed to antitrust liability for organizing to improve their conditions.").

provides an opportunity for professional wrestlers to organize, collectively bargain, and even strike while avoiding antitrust liability.[23] In *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, a 2023 case concerning a work stoppage organized by an association of Puerto Rican jockeys, the First Circuit rejected the categorical exclusion of independent contractors from the statutory labor dispute exemption and extended antitrust protection to a union of non-employee workers for the first time.[24] Following the lead of the jockeys in *Confederación Hípica*, professional wrestlers should be able to unionize and engage in collective action without facing antitrust liability.

This paper proceeds in three parts. In Part I, I detail some of the critical issues facing WWE wrestlers that demonstrate the need for collective representation. In Part II, I outline the statutory labor dispute exemption and deconstruct the common assumption that independent contractors fall outside of its protection. In Part III, I apply the First Circuit's decision in *Confederación Hípica* to professional wrestlers and demonstrate why they should be included under the statutory labor dispute exemption.

I
LABOR IN PROFESSIONAL WRESTLING

Wrestling for the WWE is a precarious job. Wrestlers lack assurances of long-term employment, receive compensation far below that of professional athletes, and endure serious injuries and an extensive travel schedule. In a 1998 documentary, former WWE wrestler Bret "The Hitman" Hart described the WWE's treatment of its wrestlers:

> Vince McMahon has always had this mentality about treating wrestlers like circus animals. All these wrestlers who have broke their backs making this living for years end up with nothing when it's over. And

[23] *See* Brief of Amicus Curiae Professor Samuel Estreicher in Support of Defendants-Appellees, Chamber of Com. v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640) [hereinafter Estreicher Amicus Brief]; Estlund & Liebman, *supra* note 15.

[24] Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 307 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023) (mem.).

> then they sort of take you out back and they put a slug in the back of your head and dump you. That's the life of a professional wrestler.[25]

Hart knew the life of a professional wrestler well: he wrestled for the WWE for thirteen years before a concussion sustained in the ring ended his career.[26] A year after the documentary aired, Bret's brother Owen was killed during a WWE event when a harness malfunctioned and he fell seventy feet to the ground.[27] Although the WWE's treatment of its professional wrestlers has improved since Hart's time with the company,[28] a litany of hardships still remain that a wrestler's union could address.

The WWE currently employs close to 250 wrestlers, which includes wrestlers under WWE's two "main roster" brands, Raw and Smackdown, as well as its developmental promotion, NXT.[29] The WWE classifies all of its wrestlers as independent contractors.[30] WWE wrestlers' contracts include a clause specifying their status as independent contractors.[31] As a result, the WWE avoids providing its wrestlers with health insurance and contributing to Social Security, Medicare, and unemployment insurance.[32] As independent contractors, WWE wrestlers are forced to pay a 15% self-employment tax.[33] Despite WWE wrestlers' independent contractor status, the WWE imposes strict limitations on their ability to earn money outside of WWE events. WWE wrestlers are signed to exclusive contracts and thus cannot appear in matches for other wrestling promotions.[34] Further,

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[25] HITMAN HART: WRESTLING WITH SHADOWS (Trimark Pictures 1998), https://www.youtube.com/watch?v=U9ob-BZnhBQ [https://perma.cc/XB4U-S3KB].

[26] DAVID SHOEMAKER, THE SQUARED CIRCLE: LIFE, DEATH, AND PROFESSIONAL WRESTLING 354 (2013).

[27] *Id.* at 300.

[28] *See, e.g.*, Mick Rouse, *How the WWE is Taking Concussions Seriously*, GQ (Feb. 9, 2016), https://www.gq.com/story/daniel-bryan-retirement-wwe-cte [https://perma.cc/KCU6-VLHN].

[29] WORLD WRESTLING ENTERTAINMENT, 2021 ANNUAL REPORT 7 (2022) [hereinafter WWE ANNUAL REPORT], https://corporate.wwe.com/~/media/Files/W/WWE/annual-reports/wwe-2021-annual-report.pdf [https://perma.cc/E4GA-6RSD].

[30] *Id.*

[31] Exhibit D § 13.1, Laurinaitis v. World Wrestling Ent., Inc., No. 3:16-cv-01209 (D. Conn. July 18, 2016) [hereinafter Guerrero Contract].

[32] Cowley, *supra* note 10, at 148.

[33] *Id.*

[34] *See* Guerrero Contract, *supra* note 31, § 5.1.

this exclusivity extends not only to other work as wrestlers, but also to all other services. As such, wrestlers cannot secure work as actors on non-wrestling television shows or movies without the WWE's express consent.[35]

One recent episode demonstrates the extent of the WWE's control over its wrestlers' appearances outside of WWE content. When the COVID-19 pandemic forced the WWE to cease its usual touring schedule, several wrestlers began streaming on platforms such as Twitch to make money and connect with fans.[36] In October of 2020, WWE issued a memorandum to its wrestlers, requiring them to cease all such activities "within the next 30 days."[37] The memorandum stated that the wrestlers were using their names and likenesses, which the WWE owns outright in most cases, in "ways that are detrimental to [the] company."[38] Several wrestlers appealed to WWE management to rescind the order without success.[39] One wrestler, Thea Budgen, who wrestled under the in-ring name "Zelina Vega," defied the order and continued to stream on Twitch and other platforms.[40] Budgen, who as a "lower-card" female wrestler was likely earning in the mid-five figures,[41] claimed to be making more money on Twitch than from wrestling.[42] After her refusal to deactivate her Twitch account, the WWE fired Budgen.[43]

As part of their work, WWE wrestlers maintain an intense travel schedule. Former WWE wrestler Bryan Danielson, who wrestled for the company under the

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[35] *See id.*

[36] *See* Dave Powell, *Wrestlers Have Always Wanted a Union. Why Don't They Have One?*, ORG. WORK (Nov. 18, 2020), https://organizing.work/2020/11/wrestlers-have-always-wanted-a-union-why-dont-they-have-one/ [https://perma.cc/3NL2-HJS8] (describing the "proliferation of wrestlers starting streams" online to engage with fans).

[37] Ryan Boman, *The Power of the Pin: Pro Wrestling's State of the Union and WWE's Role*, SPORTSKEEDA (Oct. 6, 2020), https://www.sportskeeda.com/wwe/the-power-of-the-pin-pro-wrestling-s-state-union [https://perma.cc/5NVE-6J49].

[38] *Id.*

[39] Powell, *supra* note 36.

[40] *Id.*

[41] *See* Oliver Bateman, *How Pro Wrestling Gives its Talent a Raw Deal*, ALJAZEERA AMERICA (May 4, 2014), http://america.aljazeera.com/opinions/2014/5/wrestling-labor-wwevincemcmahonultimatewarrior.html [https://perma.cc/P39Y-3GEV].

[42] Powell, *supra* note 36.

[43] *Id.* WWE has since rehired Bugden. Tim Adams, *WWE Re-Signs Zelina Vega Seven Months After Her Release*, CBR (May 13, 2021), https://www.cbr.com/wwe-re-signs-zelina-vega-report/ [https://perma.cc/2ZZ6-VV3U].

in-ring persona "Daniel Bryan" from 2009 to 2021, described his travel schedule in a 2013 interview:

> We're on the road 250 days a year. Last year I ended up doing 219 shows. We don't have an offseason, so week in and week out, we fly out on Friday, we'll do a show Friday night, Saturday night, Sunday night, all of which are untelevised unless we're doing a pay-per-view on a Sunday. Then we do a live Raw on Monday, we film SmackDown and Main Event on Tuesday, and then we fly home on Wednesday. So we have half of Wednesday and Thursday to get our stuff repacked, and then we fly back out on Friday. And that's when we don't have international tours. . . . It's pretty grueling.[44]

The WWE pays for wrestlers' flights to the first event of the week and back from the last event of the week.[45] However, wrestlers are required to pay for their own rental cars, hotel accommodations, and other travel expenses incurred while on the road.[46] Due to the cost of these expenses, lower paid WWE wrestlers can suffer an overall loss when working a show as their compensation is not enough to cover their out-of-pocket expenses.[47] Although a rational wrestler might otherwise forgo traveling to a show where they would incur a loss, the WWE will fine, suspend, and even fire wrestlers who do not appear at events for which they are booked.[48]

In addition to the wear from travel, wrestlers regularly endure injuries as part of their work. As every young wrestling fan one day comes to realize, professional wrestling matches are staged exhibitions between cooperating performers. When a wrestler writhes on the mat after a body slam or falls over stunned from a right hook, they are more likely to be embellishing than hurt. Despite the theatrics, serious injuries are a common occurrence for professional wrestlers.[49] According

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[44] David Shoemaker, *Daniel Bryan: Q&A With a Reluctant Hero*, GRANTLAND (Dec. 27, 2013), http://grantland.com/features/masked-man-does-qa-wwe-superstar-daniel-bryan [https://perma.cc/GE96-CPU9].

[45] Schiavone, *supra* note 5, at 488.

[46] *See id.* at 489.

[47] *See id.*

[48] *See* Guerrero Contract, *supra* note 31, § 8.

[49] *See, e.g.*, Blake Oestriecher, *WWE Statistics Show Its Stars Are Being Overworked, Especially on SmackDown*, FORBES (Jan. 17, 2018, 8:36 AM), https://www.forbes.com/sites/blakeoestriecher/2018/01/17/

to former WWE wrestler Scott "Raven" Levy, injuries are "part of the job … If you want to be a wrestler, you have to be a big guy, and you have to perform in pain."[50] The WWE currently pays for all medical expenses stemming from in-ring injuries.[51] However, wrestlers need to purchase their own health insurance and, after their retirement from or termination by the WWE, are left to pay the medical costs for ongoing injuries incurred during their career.[52] Further, WWE contracts absolve the company of all liability for a wrestler's in-ring injuries, including death, even as a result of the company's own negligence.[53]

In recent years, WWE has taken measures to address some of the health and wellness issues of its wrestlers. In 2006, following the death of WWE wrestler Eddie Guerrero at the age of thirty-eight, the company implemented a new "Talent Wellness Policy" that includes required testing for steroids and other drugs.[54] The WWE has also instituted a concussion management program and banned moves that the company identified as causing concussions.[55] However, some observers have criticized the Talent Wellness Policy as being lenient to the point of ineffectiveness,[56] and wrestlers describe feeling pressured to perform while

wwe-statistics-show-its-stars-are-being-overworked-especially-on-smackdown/?sh=1f49de9fa622 [https://perma.cc/QR4A-3PLA]; Ryan Dilbert, *Exploring the Causes of WWE's Recent Surge in Injuries*, BLEACHER REPORT (May 18, 2016), https://bleacherreport.com/articles/2627439-exploring-the-causes-of-wwes-recent-surge-in-injuries?curator=SportsREDEF [https://perma.cc/KF3U-CAXN].

[50] Jon Swartz, *High Death Rate Lingers Behind Fun Facade of Pro Wrestling*, USA TODAY (Mar. 12, 2004), http://usatoday30.usatoday.com/sports/2004-03-12-pro-wrestling_x.htm [https://perma.cc/YU68-3GJ3].

[51] WWE ANNUAL REPORT, *supra* note 29, at 15.

[52] *See* Schiavone, *supra* note 5, at 487.

[53] Guerrero Contract, *supra* note 31, § 9.12(c).

[54] *Substance Abuse and Drug Testing Policy*, Corporate WWE (July 23, 2013), https://corporate.wwe.com/what-we-do/talent/substance-abuse-and-drug-testing-policy [https://perma.cc/4UXJ-AVGB].

[55] Rouse, *supra* note 28.

[56] *See* Pavitar Sidhu, *WWE: The Truth Behind Wellness Policy*, BLEACHER REPORT (Nov. 17, 2011), https://bleacherreport.com/articles/944506-wwe-the-truth-behind-wellness-policy [https://perma.cc/TU73-DGMS]; Shaun Assael, *WWE and Steroids: Still a Tough Target*, ESPN (Apr. 13, 2009), http://www.espn.com/espn/e60/columns/story?columnist=assael_shaun&id=4055522 [https://perma.cc/E7YM-7LR4].

injured.[57] Further, wrestlers' contracts include a clause allowing the WWE to unilaterally reduce their annual compensation should they miss more than eight weeks due to an injury sustained while performing.[58]

Despite maintaining travel and work schedules that greatly exceed those of other professional athletes, wrestlers are compensated at a level far below their counterparts in the "Big Four" professional sports.[59] In 2021, WWE reported net revenues of just over $1 billion.[60] According to wrestling journalist Dave Meltzer, WWE wrestlers earn less than 10% of the company's revenue.[61] In contrast, players in the NFL and NBA, both of which have players associations with collective bargaining agreements, are guaranteed roughly 50% of league revenues[62] Even fighters in the Ultimate Fighting Championship (UFC), who, like WWE wrestlers, are non-unionized and classified as independent contractors, earn

[57] *See* Joseph Fargiorio, *WWE: Wrestling, Wellness & Entertainment – An Analysis of Work and Health in Professional Wrestling* (2014) (M.A. thesis, University of Guelph) (on file with the Atrium, University of Guelph); Art of Wrestling, *CM Punk*, at 1:16 (Nov. 27, 2014) (downloaded using Apple Podcasts) ("I got a concussion. But we were leaving for Europe the next day. So, Doc was leaning on me going 'do you want me to . . . do you have a concussion or can you go to Europe' kind of thing. And I was just like 'you fucking . . . you pigs. I'll go to Europe. Whatever.'").

[58] Guerrero Contract, *supra* note 31, § 7.13.

[59] The "Big Four" refers to the National Football League (NFL), the National Basketball Association (NBA), Major League Baseball (MLB), and the National Hockey League (NHL).

[60] WWE ANNUAL REPORT, *supra* note 29, at 23.

[61] Wrestling Observer Radio, *RAW, Japan Restrictions, Tokyo Dome, Ratings, TripleMania, More!*, WRESTLING OBSERVER, at 45:03 (Nov. 30, 2021), https://www.f4wonline.com/podcasts/wrestling-observer-radio/wor-raw-japan-restrictions-tokyo-dome-ratings-triplemania-more-361116 [https://perma.cc/V8S6-59CT].

[62] *E.g.*, Kurt Badenhausen, *Baseball Salary Growth Trails NFL and NBA as Sports Revenues Boom*, YAHOO! SPORTS (Dec. 8, 2021), https://sports.yahoo.com/baseball-salary-growth-trails-nfl-050116056.html [https://perma.cc/5TUT-ST3H]; JC Tretter, *NFL Economics 101*, NATIONAL FOOTBALL LEAGUE PLAYERS ASS'N (Oct. 27, 2021), https://nflpa.com/posts/nfl-economics-101 [https://perma.cc/37ZE-C64X].

close to 20% of the company's revenues.[63] As Meltzer puts it, "there is not one person on [the WWE] roster who is not greatly underpaid."[64]

Although professional wrestling is not a professional sport per se, the collective bargaining agreements achieved by professional sports players associations provide some indication of what collective action in the WWE might be able to achieve. For example, per the NFL's collective bargaining agreement, active NFL players and their dependents receive medical and life insurance.[65] Further, players who attain at least three "credited seasons" are eligible for a 401(k) savings plan as well as a pension plan.[66] Former players who have reached such "vested" status also have access to medical and life insurance for five years after they retire.[67] WWE wrestlers do not enjoy any such benefits.[68]

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[63] Marc Raimondi, *UFC President Dana White Not Planning Fighter Raises: 'These guys get paid what they're supposed to get paid'*, ESPN (Aug. 12, 2022), https://www.espn.com/mma/story/_/id/34389555/ufc-president-dana-white-not-planning-fighter-raises-guys-get-paid-supposed-get-paid [https://perma.cc/DYU4-LJCB]. As of September 2023, the UFC and WWE have merged but continue to operate as independent businesses under the umbrella company TKO Group Holdings. *See* Spangler, *supra* note 9. UFC fighters' revenue share was uncovered prior to the merger as part of ongoing class action litigation brought against the UFC by a group of former fighters. *See* Le v. Zuffa, LLC, 216 F. Supp. 3d 1154 (D. Nev. 2016). The fighters allege that the UFC has engaged in anticompetitive conduct to achieve and maintain monopsony power in the market for fighter labor. *See id.*

[64] Wrestling Observer Radio, *supra* note 61, at 45:03.

[65] *See Player Benefits, Active Practice Squad Players*, NFL, (Aug. 2020), https://static.www.nfl.com/image/upload/v1613673602/league/k8j5zhaoxnmvdepreyrm.pdf [https://perma.cc/26GP-WSDW].

[66] *Player Benefits, Vested Active Players*, NFL, (Aug. 2020), https://static.www.nfl.com/image/upload/v1613673951/league/k6mtb60spqbrqkwre6ui.pdf [https://perma.cc/UW3V-RFDR].

[67] *Player Benefits, Vested Former Players*, NFL, (Aug. 2020), https://static.www.nfl.com/image/upload/v1613674163/league/zvha8z8hwj8mbvyprmii.pdf [https://perma.cc/SM9B-TJRB].

[68] *See* Christian D'Andrea, *WWE and UFC Now Have the Same Owner. Now's the Time for a Combat Sports Union*, FOR THE WIN (Apr. 3, 2023), https://ftw.usatoday.com/2023/04/wwe-sold-ufc-owner-endeavor-unionization-fighter-wrestler-pay [https://perma.cc/H5TX-DJSA].

II
THE STATUTORY LABOR DISPUTE EXEMPTION

WWE wrestlers themselves have cited the costs of health insurance, travel, and their treatment while injured as reasons for supporting unionization.[69] Following the pressure to deactivate her Twitch account, Thea Budgen announced her support for unionization in a tweet posted almost simultaneously with the announcement of her release from WWE.[70] As these wrestlers recognize, unionization and collective bargaining would help them to address many of their grievances. However, antitrust liability threatens to derail any concerted action by WWE wrestlers. Fortunately for wrestlers interested in organizing, a new conception of the statutory labor dispute exemption—the exception to antitrust laws traditionally applied only to employees—offers protection from antitrust action.

A. The Origins of the Statutory Labor Dispute Exemption

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade."[71] The main impetus behind the Sherman Act was the increasing concentration of corporate power in trusts and monopolies at the end of the twentieth century.[72] However, in the decades immediately following its passage, the Supreme Court invoked the Act to target the activities of organized labor.[73] In response to the Court's use of the Sherman Act to crush the efforts of organized labor,[74] Congress passed the Clayton Act of 1914.[75] Section 6 of the Clayton Act, as amended, states:

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[69] *See, e.g.*, VENTURA, *supra* note 1, at 105–06 (citing the cost of health insurance as the motivating factor for his push to unionize); Art of Wrestling Podcast, *supra* note 57 ("I would like to see them get some sort of a union for the boys and girls, that way I know they're serious about protecting them from concussions and other things."); Tim Gill, *In the WWE, Wrestlers Say Labor Abuses Are Everywhere*, JACOBIN (Oct. 13, 2022) (quoting wrestlers who cite the cost of travel as well as the need for better physical and mental health protections as the impetus to unionize) https://jacobin.com/2022/10/wwe-vince-mcmahon-wrestling-unions-health [https://perma.cc/Z3UV-YSK2].

[70] Powell, *supra* note 36.

[71] Sherman Antitrust Act of 1890, 15 U.S.C. § 1.

[72] *See, e.g.*, Estlund & Liebman, *supra* note 15, at 374.

[73] *See, e.g.*, Loewe v. Lawlor, 208 U.S. 274, 283 (1908).

[74] *See* Estlund & Liebman, *supra* note 15, at 374–75.

[75] Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27.

> The labor of a human being is not an article of commerce and that nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor … organizations, instituted for the purposes of mutual help, … or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.[76]

Despite the explicit language of Section 6, the Court found in *Duplex Printing v. Deering* that the Act "merely put[] into statutory form … the law as it stood before."[77] Thus, the Act that American Federation of Labor leader Samuel Gompers initially hailed as "labor's Magna Carta" failed to protect labor activity from antitrust action.[78]

In response to the continued issuance of injunctions against labor groups by federal courts and pressure from organized labor,[79] Congress passed the Norris-LaGuardia Act of 1932.[80] The Norris-LaGuardia Act prohibited federal courts from issuing injunctions against a broad list of activities arising out of a "labor dispute."[81] In an early case interpreting the Norris-LaGuardia Act, *Milk Wagon Drivers Union v. Lake Valley Farm Products*, the Court considered a petition to enjoin the picketing activities of a union of milk delivery drivers.[82] The Court held that, given Congress's explicit rejection of *Duplex Printing* in the passage of the Norris-LaGuardia Act, federal courts lacked jurisdiction to grant injunctions in cases arising from a labor dispute, even where a labor group may have committed a violation of the Sherman Act.[83]

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[76] *Id.* § 17.

[77] Duplex Printing Press Co. v. Deering, 254 U.S. 443, 470 (1921).

[78] Estlund & Liebman, *supra* note 15, at 375.

[79] *See, e.g.*, Burlington N. R. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429, 438 (1987) ("The Norris-LaGuardia Act responded directly to the construction of the Clayton Act in *Duplex*, and to the pattern of injunctions entered by federal judges.").

[80] Norris-LaGuardia Act, 29 U.S.C. §§ 101–115.

[81] *Id.*

[82] Milk Wagon Drivers Union v. Lake Valley Farm Prods., 311 U.S. 91, 94–96 (1940).

[83] *See id.* at 102–03.

Milk Wagon Drivers, like the text of the Norris-LaGuardia Act itself, concerned the ability of federal courts to enjoin labor activities. However, in 1941 the Court adopted a broader interpretation of the Norris-LaGuardia Act in *United States v. Hutcheson*.[84] *Hutcheson* concerned not an injunction but the criminal prosecution of a carpenters' union for Sherman Act violations arising from their striking and picketing activities.[85] The Court stated that the Norris-LaGuardia Act, properly read together with the Clayton Act, created a "harmonizing text" defining labor's exemption from antitrust liability.[86] The Act "reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the [Norris-LaGuardia] Act" and removed "all such allowed conduct from the taint of being 'violations of any law of the United States,' including the Sherman Law."[87] Thus, so long as a labor group "acts in its self-interest and does not combine with non-labor groups," the Norris-LaGuardia Act protects concerted action by labor groups from the reach of the Sherman Act.[88]

B. Independent Contractors Under the Statutory Labor Dispute Exemption

1. The Historical Consensus

The general scope of labor's statutory exemption from antitrust liability defined in *Hutcheson* persists to this day.[89] Immunity from the Sherman Act extends to activities that are undertaken by "bona fide" labor organizations, occur in the context of a labor dispute, promote the organization's self-interest, and do not include combinations with a non-labor group.[90] None of the requirements for application of the statutory exemption hinge on the employment classification of the workers involved in a labor dispute. Nevertheless, courts have interpreted the statutory exemption not to extend to the actions of independent contractors.[91] In *Columbia River Packers Association v. Hinton*, a case decided only a year after

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[84] United States v. Hutcheson, 312 U.S. 219 (1941).

[85] *See id.* at 227–28.

[86] *Id.* at 231.

[87] *Id.* at 236.

[88] *Id.* at 232.

[89] *See, e.g.*, Susan Schwochau, *The Labor Exemptions to Antitrust Law: An Overview*, 21 J. LAB. RSCH. 535, 544 (2000).

[90] *E.g., id.* at 545.

[91] *See, e.g., id.* at 545-46.

Hutcheson, the Court considered whether the exemption protected the Pacific Coast Fishermen's Union, an association of independent contractor fishermen, against an injunction sought by a fish processing and canning company.[92] The union had engaged in a boycott against the company following the company's refusal to enter into an agreement to buy fish exclusively from union members.[93] The Court determined that the fisherman, who owned and leased their own boats and sold their catch to processors, were not workers at all but "independent businessmen" engaged in a dispute "over the sale of commodities."[94] Thus, the Court reversed the circuit court's finding that the exemption applied, for as "however broad" the statutory definition of a labor dispute may be, it did not "include controversies upon which the employer-employee relationship has no bearing."[95]

Columbia River Packers presented the Court with a straightforward test case of the bounds of the definition of a "labor dispute" for purposes of the statutory labor exemption. The fishermen were "independent businessmen" engaged in the sale of goods, not workers engaged in the sale of labor.[96] Thus, the Court could exclude the fishermen from the reach of the exemption without answering directly whether the exemption might apply to independent contractors who were engaged in labor for wages. The Court repeated this reasoning in *L.A. Meat and Provision Drivers Union, Local 626 v. United States*.[97] *L.A. Meat* concerned the activities of a union of independent contractor "grease peddlers," middlemen who purchased grease from restaurants and sold it to processors.[98] The peddlers had joined the Meat and Provision Drivers Union, used strikes and boycotts to obtain higher purchase prices from processors, and agreed not to compete with each other for business.[99] In the district court action, the peddlers admitted to entering into a conspiracy in restraint of trade in violation of the Sherman Act and

[92] Columbia River Packers Ass'n v. Hinton, 315 U.S 143, *passim* (1942).
[93] *Id.* at 145.
[94] *Id.* at 145, 147.
[95] *Id.* at 146–47.
[96] *Id. passim.*
[97] *See* L.A. Meat and Provision Drivers Union, Local 626 v. United States, 371 U.S. 94 (1962).
[98] *Id.* at 95–97.
[99] *Id.* at 97.

consented to an injunction against them.[100] However, they challenged a provision of the injunction that required them to terminate their union membership.[101] In upholding the injunction, the Court again focused on the fact that the independent contractors functioned as "sellers of commodities," rendering them ineligible for the statutory labor exemption.[102] However, the Court explicitly stated that independent contractors might be protected under the labor exemption for joining in the collective activities of a union where they engaged in competition for jobs and wages with the union members.[103] Further, in his concurrence, Justice Goldberg commented that the Court was not passing judgment on whether the grease peddlers might properly join among themselves to improve their working conditions.[104]

In the cases decided since *Columbia River Packers*, courts have answered the question left open by Justice Goldberg by focusing the inquiry on whether, as the Court in *Columbia River Packers* stated, the "employer-employee relationship [forms] the matrix of the controversy."[105] Most instructive of this approach is the Fourth Circuit's decision in *Taylor v. Local No. 7.*[106] In *Taylor*, a group of horse owners and trainers brought action against two unions of horseshoers, alleging that the horseshoers were engaged in a group boycott and price fixing in violation of the Sherman Act.[107] The *Taylor* court interpreted *Columbia River Packers*, as well as *Milk Wagon Drivers*, to stand for the rule that the labor exemption applied only when the parties stood in the relationship of employer and employee or when an employment relationship otherwise formed the "matrix of the controversy."[108] Thus, the Fourth Circuit read the earlier case law as creating an almost categorical exclusion of independent contractors from the coverage of the statutory labor

[100] *Id.* at 95–96.
[101] *Id.* at 96.
[102] *Id.* at 102.
[103] *Id.* at 103.
[104] *Id.* at 105 (Goldberg, J., concurring).
[105] Columbia River Packers Ass'n v. Hinton, 315 U.S 143, 147 (1942). *See, e.g.*, H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 720-21 (1981); Am. Fed'n of Musicians of U.S. & Can. v. Carroll, 391 U.S. 99, 105-06 (1968).
[106] Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers of U.S. & Can., 353 F.2d 593 (4th Cir. 1965).
[107] *Id.* at 594–95.
[108] *Id.* at 606.

exemption. As such, the Court then considered whether the horseshoers were employees or independent contractors under the common law and concluded that, because they were properly classified as independent contractors, their collective action was subject to antitrust action.[109]

In *Taylor*, the Fourth Circuit described the horseshoers not as sellers of commodities but as individuals performing services for hire.[110] The court thus extended the rule from *Columbia River Packers* to cover individuals whom the court "plainly consider[ed] workers."[111] The critical distinction for the court in determining the applicability of statutory labor exemption was not whether the horseshoers were workers at all, as in *Columbia River Packers*, but what kind of workers they were: employees or independent contractors.

The approach adopted in *Taylor* is emblematic of the interpretation of the labor exemption to which the courts have historically adhered. Although the parties to a labor dispute need not stand in the proximate relation of employer and employee for the exemption to apply, the employer-employee relationship must form the "matrix of the controversy."[112] Independent contractors have been considered "labor" groups, and thus parties to a labor dispute exempted from antitrust action under the Norris-LaGuardia Act, only when they were in competition with workers classified as employees.[113] Outside of this exception, independent contractors have consistently been excluded from the labor dispute

[109] *Id.* at 596–602, 605-06.

[110] *Id. passim.*

[111] Paul, *supra* note 14, at 1031.

[112] Columbia River Packers Ass'n v. Hinton, 315 U.S 143, 147 (1942). *See also* Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 703 (1982) (quoting *Columbia River Packers*).

[113] *See* Am. Fed'n of Musicians of U.S. & Can. v. Carroll, 391 U.S. 99, 106 (1968) (finding that independent contractor band leaders constituted a "labor group" for purposes of the statutory labor exemption due to the "presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors").

exemption.[114] Lawyers and academics have generally treated the exclusion of independent contractors as categorical.[115]

2. Independent Contractors Revisited

Despite the general assumption that the statutory exemption does not protect the actions of independent contractors, this view is not grounded in the text of either the Clayton Act or the Norris-LaGuardia Act, the statutory foundations of the exemption[116] Neither law ties the exemption to "employee" status under federal labor law.[117] Both acts predate the NLRA, passed in 1935, which provided the first federal statutory definition of "employee" outside of the railroad industry.[118] The centrality of employee status to the applicability of federal labor law protections stems from the 1947 Taft-Hartley Act, which explicitly excluded "independent contractors" from the protections of the NLRA.[119] However, Taft-Hartley did not amend the Clayton Act or Norris-LaGuardia Act or change the statutory labor exemption.[120] Further, although the Norris-LaGuardia Act contains references to "employees" and "employment," the Court has recognized that the term "employment" had a broader meaning in the early twentieth century, which included the work of independent contractors.[121] Thus, there is nothing in the text

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[114] *See, e.g.*, L.A. Meat & Provision Drivers Union, v. United States, 371 U.S. 94, 101 (1962); United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 463–464 (1949); *Taylor*, 353 F.2d at 606; Spence v. Se. Alaska Pilots' Ass'n, 789 F. Supp. 1007, 1012 (D. Alaska 1990) ("A party seeking refuge in the statutory exemption must be a bona fide labor organization and not independent contractors.").

[115] *See, e.g.*, Brief of the U.S. Department of Justice as Amicus Curiae in Support of Neither Party at 4, Atlanta Opera, Inc. and Make-up Artists & Hairstylists Union, Local 798, 372 NLRB No. 95 (No. 10-RC-276292) (N.L.R.B. 2023) ("[C]ourts have historically held that [the statutory and non-statutory labor] exemptions only protect *employees* and their unions, not independent contractors. By contrast, concerted action by independent contractors traditionally has been subject to antitrust scrutiny."); Katherine E. Hollist, *Time to Be Grown-Ups About Video Gaming: The Rising Esports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 839 (2015) (treating the ban as absolute).

[116] *See* Estreicher Amicus Brief, *supra* note 23, at 5.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 6; Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-197 (1947).

[120] Estreicher Amicus Brief, *supra* note 23, at 6–7.

[121] *See* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539–40 (2019) ("Back then, dictionaries tended to treat 'employment' more or less as a synonym for 'work.' Nor did they distinguish

of the laws from which the statutory labor dispute exemption is derived that bars its application to independent contractors. In fact, as noted above, the Clayton Act declared in broad terms that the "labor of a human being is not an article of commerce" for purposes of federal antitrust law.[122]

In a recent decision, the First Circuit embraced a broader understanding of the scope of the statutory labor dispute exemption and its applicability to independent contractors. The case, *Confederación Hípica*, concerned the actions of an association of jockeys in Puerto Rico.[123] The jockeys, independent contractors, formed two associations to protest their low mount fees, the amount a jockey is paid for each race, as well as pre-race weigh-in procedures and the conduct of racing officials.[124] After negotiations with horse owners failed, one of the associations, Jinetes, organized a three-day work stoppage.[125] A group of horse owners and the owner of the racetrack then sued Jinetes and the jockeys, as well as their spouses, alleging that they had engaged in a group boycott in violation of the Sherman Act.[126] The district court found that the jockey's independent contractor status precluded them from the labor dispute exemption.[127] The court then awarded summary judgment against the jockeys, enjoined the work stoppage, and imposed over $1 million in damages.[128]

On appeal, the First Circuit rejected the district court's categorical approach, stating that "whether or not the jockeys are independent contractors does not by itself determine whether this dispute is within the labor-dispute exemption."[129] The court noted that, by the text of the Norris-LaGuardia Act, a labor dispute may exist "regardless of whether or not the disputants stand in the proximate relation

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between different kinds of work or workers: All work was treated as employment, whether or not the common law criteria for a master-servant relationship happened to be satisfied.").

[122] Clayton Antitrust Act of 1914, 15 U.S.C. § 17.

[123] Confederación Hípica De P.R., Inc. v. Confederación De Jinetes Puertorriqueños, Inc., 30 F.4th 306, passim (1st Cir. 2022).

[124] *Id*. at 311.

[125] *Id.*

[126] *Id.*

[127] *Id.* at 312.

[128] *Id.*

[129] *Id.* at 315.

of employer and employee."[130] Citing *Columbia River Packers*, the court held that the critical question was "not whether the jockeys are independent contractors or laborers but whether what is at issue is compensation for their labor."[131] Without answering whether the jockeys were properly classified as independent contractors, the court found that the dispute could qualify for the labor dispute exemption because what was at issue was "wages for labor" rather than "prices for goods."[132]

Having established that the jockeys were eligible for the labor dispute exemption notwithstanding their classification status, the court then considered the applicability of the labor dispute exemption to the jockeys' actions under the traditional four-part test. The exemption applies to "conduct arising (1) out of the actions of a labor organization and undertaken (2) during a labor dispute, (3) unilaterally, and (4) out of the self-interest of the labor organization."[133] The jockeys' association, which advocated for the jockeys' terms of employment, was a labor organization.[134] The controversy at issue was a "core labor dispute" as the jockeys sought "higher wages and safer working conditions."[135] The final two conditions were not in dispute.[136] Finding that the elements of the test were satisfied, the First Circuit held that the labor dispute exemption applied.[137]

III
THE PROMISE OF *Confederación Hípica* FOR PROFESSIONAL WRESTLERS

The First Circuit held in *Confederación Hípica* that the wage–price distinction, not the classification status of the workers engaged in collective action, is the "key question" in determining whether a dispute may fall within the

[130] *Id.* at 314 (quoting 29 U.S.C. § 113(c)). This phrase, though seemingly promising to independent contractors, was likely initially intended to extend the protections afforded by the Act to include secondary and sympathetic actions. Estlund & Liebman, *supra* note 15, at 379 n.43.

[131] *Confederación Hípica*, 30 F.4th at 314.

[132] *Id.* at 315.

[133] *Id.* at 313 (citing H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 714–15 (1981)).

[134] *Id.* at 314.

[135] *Confederación Hípica*, 30 F.4th at 314.

[136] *Id.*

[137] *Id.*

statutory exemption.[138] The court's approach is a promising sign for independent contractors. In fact, in a recent policy statement citing *Confederación Hípica*, the FTC announced that it would refrain from "enforcement or policy efforts that might undermine the ability of gig workers to organize."[139] What courts are likely to take away from *Confederación Hípica* is less clear. Outside of rejecting the categorical approach, the court offered little clarity as to how the wage–price distinction should be applied.[140] At its broadest, the distinction between wages and prices might mirror that between selling goods and selling services.[141] However, such a broad interpretation would seem to afford antitrust protection to concerted rate setting by professionals, such as dentists and lawyers, which the Court has previously deemed horizontal price fixing.[142] Further, important to the Court's decision in *Columbia River Packers*, on which the First Circuit relied, was the fact that the fisherman there owned or leased their own boats and acted as "independent businessmen, free from such controls as an employer might exercise."[143] Thus, the extent of the workers' investment and amount of independent control over their work, two factors in the common law agency test,[144] are important considerations in deciding whether a controversy is over wages or prices.[145] However, given the First Circuit's rejection of employment classification status being determinant of

[138] *See id.*

[139] FTC, POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK 6 n.68 (2022), 2022 WL 4366118.

[140] *See* Jack Samuel, Case Comment, Confederación Hípica v. Confederación De Jinetes Puertorriqueños, N.Y.U. L. REV. 2–3 (2023), https://www.nyulawreview.org/wp-content/uploads/2023/04/Case-Comment_Confederacio%CC%81nHi%CC%81pica-6.pdf [https://perma.cc/ET53-DBEZ].

[141] The First Circuit provided some suggestion that this might be the correct interpretation in a footnote distinguishing *Taylor* as a case involving "not just labor but also a product," referring to the horseshoes themselves. *Confederación Hípica*, 30 F.4th at 315 n.3. The court went on to distinguish *Taylor* on the facts as inapplicable to a "labor-only case." *Id.*

[142] *See* FTC v. Indep. Fed'n of Dentists, 476 U.S. 447 (1986) (regarding dentists); FTC v. Super. Ct. Trial Laws. Ass'n, 493 U.S. 411 (1990) (regarding lawyers); *see also* Samuel, *supra* note 140, at 9 n.48 (arguing that this interpretation would be both overinclusive of these groups as well as potentially underinclusive of some manufacturing workers).

[143] Columbia River Packers Ass'n v. Hinton, 315 U.S 143, 147 (1942).

[144] *See* RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

[145] *See* Samuel, *supra* note 140, at 9.

the applicability of the labor dispute exemption, the wage–price distinction must represent something different than the common law test.

A narrower definition of the bounds of the First Circuit's holding can be found in the work of Professors Cynthia Estlund and Wilma Liebman prior to *Confederación Hípica*.[146] Estlund and Liebman interpret the statutory labor exemption as creating a tripartite scheme of "employees", "independent workers," and "genuine[] independent contractors."[147] The latter two groups are distinguished from each other by whether they are primarily engaged in "selling their own labor" or in "selling goods *or services* produced with significant capital inputs or the labor of others."[148] Independent workers, defined by the activity of selling their labor, would be protected from antitrust liability for their concerted activities while remaining unprotected under federal labor law.[149] Estlund and Liebman's scheme thus ties together *Confederación Hípica*'s wage–price distinction with *Columbia River Packers*' focus on goods and labor while solving for the broader interpretation's problem of over-inclusivity. Further, the focus on independent investment as the distinguishing characteristic of those individuals selling services outside of the reach of the labor dispute exemption is consistent with the Court's precedent.[150]

Under the scheme posited by Estlund and Liebman, WWE wrestlers are a paradigm example of "independent workers." First, professional wrestlers are plainly workers engaged in the sale of labor, and not goods, for a price. The work of professional wrestlers consists of their in-ring performance as well as their work in promotional segments. Further, the WWE, not its wrestlers, is responsible for the "significant capital inputs" associated with wrestlers' work. Although wrestlers bear a portion of their travel costs, the WWE pays for wrestlers' training, venue

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[146] *See* Estlund & Liebman, *supra* note 15, at 378–380.

[147] *Id.*

[148] *Id.* at 380 (emphasis added).

[149] *Id.*

[150] *See* United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 463–464 (1949) (holding that the concerted actions of a group of stitching contractors were not protected from antitrust action under the statutory labor dispute exemption as "[t]he stitching contractor, although he furnishes chiefly labor, also utilizes the labor through machines and has his rentals, capital costs, overhead and profits.").

rentals, production costs, equipment, and advertising.[151] The WWE's investment dwarfs that of its wrestlers.[152] Thus, professional wrestlers can be distinguished from the fishermen in *Columbia River Packers*, who owned or leased their own boats,[153] and the stitching contractors at issue in *Women's Sportswear*, who owned the machines on which they did their work and the workshops in which they worked.[154] The Court deemed the fisherman and stitching contractors "independent businessmen"[155] and "entrepreneurs."[156] Estlund and Liebman would likely call them "genuine[] independent contractors."[157] WWE wrestlers, by the nature of their work and the amount of their independent investment, are independent workers.

The amount of control that the WWE maintains over wrestlers' work further identifies them as workers who should be included in the statutory labor exemption under *Confederación Hípica*.[158] The WWE's standard booking contract includes under the heading "Wrestler's Obligations" that the "[w]restler agrees that all matches shall be finished in accordance with the Promoter's direction."[159] In practice, the WWE's control over wrestlers' work extends far beyond just who wins or loses a match. WWE management determines the time, location, and

[151] *See* Guerrero Contract, *supra* note 31, § 8; *cf.* Columbia River Packers Ass'n v. Hinton, 315 U.S 143, 144–145 (1942) ("The fishermen own or lease fishing boats . . . and carry on their business as independent entrepreneurs.").

[152] *See* Jamie Sharp, *Pinned Down: Labor Law and Professional Wrestling – Part II: Workers in the Billion Dollar Pro-Wrestling Industry*, 23 ENT. & SPORTS LAW. 16, 24 (2006); *cf.* Sec'y of Lab., U.S. Dep't of Lab. v. Lauritzen, 835 F.2d 1529, 1537 (7th Cir. 1987) (holding that where farm workers provided their own gloves, and the employer provided the farm equipment, land, seed, fertilizers, and living quarters, their work was not independent of the employer); Hopkins v. Cornerstone Am., 545 F.3d 338, 344 (5th Cir. 2008) (comparing each worker's individual investment to their employer's overall investment in the business).

[153] *Columbia River Packers*, 315 U.S. at 144–45.

[154] *Women's Sportswear*, 335 U.S. at 463–64.

[155] *Columbia River Packers*, 315 U.S. at 147.

[156] *Women's Sportswear*, 335 U.S. at 464.

[157] Estlund & Liebman, *supra* note 15, at 380.

[158] Although Estlund and Liebman do not focus on degree of control as a factor in their scheme, the First Circuit's focus on it by way of reliance on *Columbia River Packers* warrants its inclusion. *See* Confederación Hípica De P.R., Inc. v. Confederación De Jinetes Puertorriqueños, Inc., 30 F.4th 306, 314 (1st Cir. 2022); *Columbia River Packers*, 315 U.S. at 147 ([The fishermen] operate as independent businessmen, free from such controls as an employer might exercise.").

[159] Guerrero Contract, *supra* note 31, § 9.6.

duration of wrestlers' work.[160] In the complaint of a 2008 lawsuit filed by a group of former WWE wrestlers, the wrestlers alleged that the WWE "exercised total control over all aspects of the wrestlers' employment."[161] Specifically, the plaintiffs alleged that WWE's control covered wrestlers' training program, opponents and "tag team" partners, costumes and hairstyles, stage personas and mannerisms, and even the specific dialogue wrestlers use in pre- and post-match "boasting and badmouthing."[162]

In-ring performance is not entirely scripted, with wrestlers maintaining some creative license to dictate moves during a match, a practice known in the industry as "calling spots."[163] Additionally, WWE's most prominent wrestlers and longtime veterans of the profession often provide input regarding the presentation of their characters.[164] However, WWE management maintains final creative control.[165] As the district court in the 2008 lawsuit noted in its Memorandum of Decision on Motion to Dismiss, WWE matches are "scripted [and] choreographed by agents of [the WWE] and executed by wrestlers assigned by [the WWE] which directs and controls wrestlers' conduct and the outcome."[166]

One of the most controversial episodes in the WWE's history, the "Montreal Screwjob," demonstrates just how resistant the WWE has been to ceding creative control to its talent. In 1997, then Champion Bret Hart decided to leave WWE for its rival company, World Championship Wrestling (WCW).[167] Hart's contract included a clause that granted him creative control over his character for the final six months of his tenure with the WWE.[168] Exercising this control, Hart refused to lose his championship title to in-ring and real-life rival Shawn

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[160] *Id*. § 8.3.

[161] Complaint at 2, Levy v. World Wrestling Ent., Inc., 2009 WL 455258 (D. Conn. Feb. 23, 2009) (No. 3:08–01289), 2008 WL 5707884.

[162] *Id*. at 2-3.

[163] Cowley, *supra* note 10, at 155–58.

[164] *Id*.

[165] *Id.*

[166] Levy v. World Wrestling Ent., Inc., 2009 WL 255258, *1 (D. Conn. Feb. 23, 2009).

[167] Jimmy Traina, *It's the 25th Anniversary of the Most Significant Moment in Pro Wrestling History*, SPORTS ILLUSTRATED (Nov. 9, 2022), https://www.si.com/extra-mustard/2022/11/09/montreal-screwjob-anniversary-bret-hart-vince-mcmahon-shawn-michaels [https://perma.cc/E25Y-SV3R].

[168] *Id.*

Michaels.[169] Despite Hart's refusal and contractual creative control, then-WWE CEO Vince McMahon orchestrated a "double-cross" in which, in a championship match between Michaels and Hart, the referee indicated that Hart had submitted and called for the bell.[170] Thus, Michaels won the championship, and WWE management ensured its desired outcome.

The extent of the rule established in *Confederación Hípica* is uncertain. The horse owners unsuccessfully filed a petition for a writ of certiorari from the Supreme Court.[171] Nevertheless, even under a narrow conception of the First Circuit's decision, WWE wrestlers should be eligible for the statutory labor dispute exemption. Wrestlers furnish the WWE with their labor, in which the WWE makes a significant investment and over which the WWE maintains immense control. Further, application of the statutory labor dispute exemption to WWE wrestlers would be consistent not only with *Confederación Hípica* but also with the purpose of the exemption itself. As the Supreme Court has recognized, there is an "inherent tension between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment."[172] The Norris-LaGuardia Act was intended to resolve this tension in favor of encouraging collective bargaining.[173] As the First Circuit explained in *Confederación Hípica*,

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[169] *Id.*

[170] *Id.*

[171] Petition for a Writ of Certiorari, Confederación Hípica De P.R., Inc. v. Confederación De Jinetes Puertorriqueños, Inc., 143 S. Ct. 631 (2023) (mem.) (No. 22-327), 2022 WL 5543022.

[172] H. A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 713 (1981).

[173] The preamble of the Norris LaGuardia Act made this purpose clear:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore … it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing … and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

although antitrust law generally forbids competitors from colluding to increase prices, "[w]hen the price is a laborer's wage, . . . a different set of rules apply. That must be so, lest antitrust law waylay ordinary collective bargaining."[174] Wrestlers, as laborers for a wage, should qualify for a "different set of rules" than independent entrepreneurs. Absent an extension of the statutory labor dispute exemption, the threat of antitrust liability will continue to cabin the ability of wrestlers to bargain collectively for the changes that they desire.[175]

CONCLUSION

In the specialized jargon of professional wrestling, the word "work" has a variety of usages. A wrestler looking to soften up his opponent's joints for a later submission is said to be "working the elbow." Fans praise exciting, action-oriented wrestlers for their "high work rate." While the public often refer to professional wrestling as "fake," the wrestlers themselves prefer to describe it as "worked." Often the highest praise one wrestler can give another is the understated acknowledgment that a wrestler is a "good worker."

Professional wrestling's linguistic fascination with "work," per one anthropological account of the sport, "reinforces awareness of labor relations between promoter and employee and reflects professional wrestling's blue-collar roots."[176] This succinct summation not only misstates wrestlers' employment classification but also elides the complexities of the role of labor in professional wrestling. In fact, working class consciousness and labor solidarity in professional wrestling have been invoked more often for on-screen effect than backstage impact. For example, in 1999, the WWE featured a storyline involving a "mock

29 U.S.C. § 102.

[174] Confederación Hípica De P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 312 (1st Cir. 2022).

[175] Although some high-profile wrestlers may have substantial bargaining power, most wrestlers are at a severe disadvantage when bargaining with the WWE as individuals. *See* Karen Corteen, *In Plain Sight – Examining the Harms of Professional Wrestling as State-Corporate Crime*, 4 J. CRIMINOLOGICAL RSCH., POL'Y & PRAC. 46, 54 (2018) ("[A]s several lawyers have noted, wrestler contracts reflect the promoter's superior power to dictate the contract's terms and conditions.").

[176] Laurence de Garis, *The "Logic" of Professional Wrestling*, in STEEL CHAIR TO THE HEAD: THE PLEASURE AND PAIN OF PROFESSIONAL WRESTLING 192, 199 (Nicholas Sammond ed., 2005).

labor uprising" by a group of wrestlers who formed a faction called "the Union" to oppose the on-screen mistreatment of wrestlers by the WWE-management-aligned group known as "the Corporation."[177] The labor movement was scripted and, after a few weeks, died out entirely.[178]

The on-screen "Union" aside, there has been no serious effort for unionization in the WWE since Ventura's failed attempt in 1986.[179] The First Circuit's extension of the statutory labor dispute exemption to independent contractors provides a promising opportunity for WWE wrestlers to organize while claiming protection from antitrust liability. Of course, so long as they remain independent contractors, WWE wrestlers will not be protected from retaliation for their organizing actions under Section 7 of the NLRA.[180] However, there are reasons to be optimistic about the ability of WWE wrestlers to organize effectively. First, the market for professional wrestlers' labor is at its most competitive in twenty years. All Elite Wrestling (AEW) has emerged as the first viable competitor to WWE since WWE's former rival, WCW, went bankrupt in 2001.[181] WWE may be more inclined to negotiate with wrestlers given the increased competition for their labor. Further, AEW's contracts are generally less restrictive, even allowing their wrestlers to appear for independent promotions.[182] Second, although Vince McMahon remains a large shareholder in TKO Group Holdings, WWE's parent company, his level of day-to-day control seems to have declined.[183] The elevation of former wrestler Paul Levesque, professionally known as "Triple H," as Chief Content Officer may make WWE management more sympathetic, or at least less

[177] SHOEMAKER, *supra* note 26, at 342.

[178] *Id.*

[179] *Id.* at 344.

[180] *See, e.g.*, Cowley, *supra* note 10, at 170.

[181] Bill Hanstock, *For the First Time in 20 Years, WWE Has a Legit Competitor*, POLYGON (Oct. 7, 2021, 10:00 AM), https://www.polygon.com/2021/10/7/22709241/all-elite-wrestling-wwe-competitor [https://perma.cc/Q4GH-D9GK].

[182] *See* Matthew Wilkinson, *5 Ways AEW Contracts Are Different Than WWE Contracts (& 5 Ways They're the Same)*, SPORTSTER (Feb. 16, 2023), https://www.thesportster.com/wwe-aew-contracts-differences-similarities/#difference-aew-39-s-tiered-deals [https://perma.cc/5F6Z-YLDJ].

[183] *See* Sam Fels, *Vince McMahon Lost out to 1 of the Few People More Powerful Than Him*, DEADSPIN (Oct. 18, 2023), https://deadspin.com/vince-mcmahon-ari-emanuel-dana-white-wwe-ufc-tko-1850938517 [https://perma.cc/BZP8-FRYZ].

openly hostile, to the demands of its workers. For example, Levesque has since rescinded the ban on Twitch streaming that McMahon had imposed.[184] Lastly, in 2020, SAG-AFTRA's then-President Gabrielle Carteris issued a statement that the union would be reaching out to wrestlers and that it was "committed to doing what we can to help professional wrestlers secure the protections they deserve."[185]

Providing a practical roadmap to the unionization of WWE wrestlers is outside the scope of this paper.[186] The main purpose of this discussion has been to demonstrate that, following *Confederación Hípica*, WWE wrestlers' status as independent contractors should not be determinative of their eligibility for the statutory labor dispute exemption. Instead, as workers engaged in the sale of their labor to an employer who controls their work and provides the necessary capital investment, WWE wrestlers should be able organize and engage in collective action over the terms of their employment without facing antitrust liability. With the specter of antitrust action lifted, even absent classification as employees, there is one fewer barrier to the formation of a union in the WWE as more than an on-screen storyline.

[184] Subhojeet Mukherjee, *Triple H Nixes Vince McMahon's Controversial Third Party 'Twitch' Ban*, RINGSIDE NEWS (Aug. 18, 2022), https://www.ringsidenews.com/2022/08/18/triple-h-nixes-vince-mcmahons-controversial-third-party-twitch-ban/ [https://perma.cc/4FNQ-4G82].

[185] Nick Hausman, *SAG-AFTRA President Gabrielle Carteris On Pro Wrestlers Possibly Joining The Union*, WRESTLING INC. (Nov. 16, 2020, 9:51 AM), https://www.wrestlinginc.com/news/2020/11/exclusive-sagaftra-president-gabrielle-carites-on-pro-676989/ [https://perma.cc/8VYV-GZDU].

[186] For organizing advice for professional wrestlers, *see* Powell, *supra* note 36.