

**THE CONSENT BURDEN IN CONSUMER AND
DIGITAL MARKETS**

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ABSTRACT

Consent has become central to the governance of consumer markets in general and digital markets in particular. But consumer consent is arguably empty, and it enables and legitimizes digital surveillance and other consumer exploitations. This Article argues that traditional law-and-economics views on consent hide a crucial aspect: consent shifts considerable burdens — to collect and process information, to make informed decisions, and eventually to be liable for adverse results — to individuals and away from firms. This burden-shifting technique is deployed under the guise of empowering individuals to control their lives. Ironically, the use of consent (either by market mechanisms or by regulatory regimes) often has the opposite effect of disempowering and burdening individuals, leaving them with little control or recourse. Consequently, what consent mechanisms often achieve is delegating unchecked regulatory powers to firms.

This Article introduces the *consent burden*, a novel framework for analyzing consumer and digital markets, providing a comprehensive account of both the *ex ante* and the *ex post* burdens that consent mechanisms impose on individuals. The consent burden framework accounts for informational and decisional burdens, as well as for questions of liability and rights assertion through the courts. After laying the conceptual foundations, this Article finds that the consent burden can be used as a single metric for analyzing the rights/power allocation in the market. When the consent burden is high, firms are likely too powerful and the regulator has likely intervened too little or ineffectively (even if it seems otherwise).

This Article then draws an analogy between the consent burden imposed on individuals and the regulatory burden imposed on firms. It calls regulators to account for the consent burden when designing regulation, similar to how they routinely account for the regulatory burden.

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Finally, this Article proposes a diagnostic process to evaluate the consent burden of a proposed regulatory regime. Accounting for the consent burden will increase the effectiveness of regulation and will benefit consumers.

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I. INTRODUCTION

Consent is a uniquely important mechanism. Some have even likened it to “magic.”¹ In numerous legal, social, and moral settings, a simple “I agree” seamlessly transforms prohibited behavior into permitted, regulated behavior.² The widespread adoption of consent as a

1. See, e.g., Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 121 (1996).

2. *Id.* at 123 (“[C]onsent turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography.”).

means to justify choices and conduct³ reflects the adoption of individualism, autonomy, agency, and liberty as controlling values across countless regimes and circumstances. Consent is needed for innumerable everyday interactions and transactions, and its importance is also evident from extensive moral philosophy, law, ethics, and medical literatures about its meaning and validity.⁴

This Article focuses on the role of consent in consumer markets. Traditional law-and-economics approaches hold consent, operating as private ordering through vehicles such as contract or property, to be an efficient and desirable means of control over markets. A consent regime is expected to discipline firms through consumers' ability to switch, exit, and replace a supplier or a good by the mere redirection of their power to consent. It therefore enables market competition and represents a bottom-up governance solution via private rights, presumed to internalize incentives and minimize governance costs.⁵ Consent is also simple to understand as a concept and easy to apply as a mechanism; we think we know it when we see it.

Because consent is a reaction to a set of facts, by adopting a consent regime we usually also adopt a requirement that firms disclose information and provide greater transparency to the public. The theory behind mechanisms of consent coupled with disclosure (disclosure-and-consent) is that if firms are required to provide information about their products and services on the basis of which individuals would give better-informed consent, then by little we achieve a lot and there is no need for extensive top-down government intervention (e.g., direct command-and-control regulation).⁶ Consent therefore provides intervention without intervention, "self-regulation," and a leave-it-to-the-

3. See generally DERYCK BEYLEVELD & ROGER BROWNSWORD, CONSENT IN THE LAW 59–89 (2007) (discussing the role of consent in various legal settings).

4. See, e.g., Joanna Demaree-Cotton & Roseanna Sommers, *Autonomy and the Folk Concept of Valid Consent*, 224 COGNITION, July 2022, at 1–2. See, e.g., NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 1–4 (2019); BEYLEVELD & BROWNSWORD, *supra* note 3, at 15–23.

5. See, e.g., Julie E. Cohen, *How (Not) To Write a Privacy Law*, KNIGHT INST. ESSAY SERIES 2, 5 (Mar. 23, 2021) [hereinafter Cohen, *Privacy Law*], <https://knightcolumbia.org/content/how-not-to-write-a-privacy-law> [<https://perma.cc/M5DV-URYU>] ("Organizing a regulatory regime around individual control rights [based on consent] imports a governance structure that is atomistic and post hoc The assumption that bottom-up governance driven by self-interested rights assertion will actually work derives from long-held, nearly automatic ways of thinking about property rights as mechanisms for collective ordering."); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S453–56 (2002); Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1125 (1997); see also Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 481–85, 490 (1998) (discussing and critiquing the role of consumer consent in the context of markets for copyright to digital works).

6. See, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 189 (2008) ("An important and highly libertarian step would be an improvement in the process of feedback to consumers

market type of solution.⁷ By creating greater transparency,⁸ disclosure-and-consent regimes are also assumed to promote accountability, procedural fairness, and other democratic values.⁹

Consent represents the ability of one to freely choose for oneself. In the market setting, this is premised on the assumption that collective ordering could be achieved through private rights and the rational choices individuals make.¹⁰ These conceptions about consent generate its legal and moral legitimacy. Using consent to regulate behavior invites — indeed, assumes — autonomy and agency of individuals, values that are at the core philosophy of liberal democracies and their economies.¹¹

This Article maps and then challenges the prominence of consent in consumer markets. The market-governing regimes of contracts, torts, and regulation are typically considered distinct. The Article's first contribution is therefore in observing and uncovering that consent is a pervasive principle in markets — a common thread among seemingly different legal regimes — and that consent in contracts, torts, and regulation has similar results for consumers.¹² In both contract law and tort

through better information and disclosure. Such strategies can improve the operation of markets and government alike, and are also far less expensive, and less intrusive, than the command-and-control approaches that national legislatures have so often favored.”)

7. See, e.g., M. Ryan Calo, *Against Notice Skepticism in Privacy (and Elsewhere)*, 87 NOTRE DAME L. REV. 1027, 1028 (2012); Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 2–3 (2014).

8. See, e.g., Paul M. Schwartz, *Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence*, 52 STAN. L. REV. 1559, 1561–62 (2000) (identifying transparency as a component of the notice-and-consent regime in privacy law); FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE, at i (2012), <http://ftc.gov/os/2012/03/120326privacyreport.pdf> [<https://perma.cc/KK3M-SAWJ>] [hereinafter FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY] (stating that the goals of privacy notices are to “[m]ake information collection and use practices transparent” and provide consumers with “the ability to make decisions about their data at a relevant time and context”).

9. See, e.g., Daniel Susser, *Notice After Notice-and-Consent: Why Privacy Disclosures Are Valuable Even If Consent Frameworks Aren't*, 9 J. INFO. POL'Y 37, 38, 50, 52–56 (2019) (arguing that the transparency notices provide is important even if consent mechanisms fail); see also Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1308 (2008) (“Automated systems must be designed with transparency and accountability as their primary objectives, so as to prevent inadvertent and procedurally defective rulemaking.”); Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 26–27 (2014) (exploring the importance of transparency for the public and for individuals in the context of automated scoring systems).

10. See David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 3 (2014) (explaining that capitalism “denote[s] a range of related socioeconomic systems in which private contracting through markets is used as a means of collective ordering among persons differing in their initial resource endowments — and thus in a range of important agentive capacities”).

11. See, e.g., BEYLEVELD & BROWNSWORD, *supra* note 3, at 237 (“In such societies, where the culture of consumerism prevails, we find that ‘informed consent requirements are often seen not only as necessary but also as sufficient for ethical justification.’” (quoting ONORA O’NEILL, AUTONOMY AND TRUST IN BIOETHICS 47 (2002))).

12. See *infra* Part II.

law, consent has long played a part as a central policy lever.¹³ But trends in consumer and digital markets have made consent even more ubiquitous; it no longer only operates in the realm of market-oriented private law. Consent has become a dominant part of *public* law and regulation. Regulators have been increasingly using consent as the control valve for various markets by choosing information-based regulatory schemes, with the logic that firms' disclosure of pertinent information about a product or service will facilitate consumer choice and informed consent.¹⁴ As consent is a low-cost, low-intervention control mechanism, this type of regulation has become the go-to strategy for many regulators.¹⁵ These regulation-created consent mechanisms range from ordinary disclosure law and "nudge" default mechanisms, which are based on various opt-out consent regimes,¹⁶ to regulation that explicitly requires opt-in consent.¹⁷ I call these consent-based regulations command-and-consent, as a deviation from the classic, direct, "command-and-control" model.¹⁸ Whereas in command-and-control the regulator provides bright-line rules and limitations to determine what conduct is permitted or prohibited, in command-and-consent the heart of the control mechanism lies in the process of asking for and giving consent, and the conduct to which consent is being asked for is

13. See *infra* Section II.A.

14. See *id.*

15. See, e.g., Calo, *supra* note 7, at 1027 ("The requirement to provide notice is a very common method of regulation."); Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1092 (2007) ("There are dozens, possibly hundreds, of regulatory schemes that use disclosure in whole or in part to accomplish their purposes."); William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1707 (1999) ("Enthusiasm for mandatory disclosure laws is reaching fever pitch."); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 658–65 (2011) (providing examples of mandatory disclosure); THALER & SUNSTEIN, *supra* note 6, at 188–93 (same); MARGARET RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 217–42 (2012) (explaining generally how the United States has a preference for disclosure regimes); Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1349–50 (2011) [hereinafter Sunstein, *Empirically Informed Regulation*] (noting that some social scientists have suggested disclosure requirements as a way to achieve "appropriate design of effective, low-cost, choice-preserving approaches to regulatory problems").

16. See, e.g., California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.120 (West 2023) (the CCPA's opt-out of sale or sharing of personal information) [hereinafter CCPA].

17. See, e.g., Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. 164.522 (HHS's privacy regulations, which implement section 264(c) of HIPAA, and include the HIPAA Privacy Rule's opt-in consent mechanism); Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), art. 7, 2016 O.J. (L 119) 1, 37 (European GDPR's data protection opt-in consent mechanism) [hereinafter GDPR].

18. Some instances of this type of regulation are often referred to as "disclosure law," focusing on how *firms* experience the regulation, i.e., the requirement that firms disclose information. See, e.g., Dalley, *supra* note 15, at 1092. But "disclosure" terminology ignores the fact that the actual control valve provided by regulation is to be operationalized by consumers — whether consumers will consent to the transaction for which information is provided.

not closely limited, i.e., what the consumer agrees to determines what conduct is permitted.

Indeed, the range of markets to which consent is central is substantial and varied. They range from online, digital markets where one clicks “I agree” to privacy policies, terms and conditions, and software licenses to markets for physical products like cars that may come with fine-print terms and conditions and even privacy policies¹⁹ to markets for medical and financial services and even to the rental market.²⁰ This variety includes both markets where the regulator has abstained from direct regulation, thereby relying on contractual or tort-based consent to discipline firms, and markets where regulators chose a command-and-consent regime, thereby utilizing consent as the control valve of an information-based regulatory scheme.

This Article focuses on digital markets and the information economy as a prime test case.²¹ In digital markets, consent is especially dominant as a form of control regime and has become indispensable to the very structure and operation of the market.²² The prevalent business model animating digital markets relies on a multi-sided structure: on the consumer-facing side a service or product is provided for a zero²³

19. See, e.g., Privacy Notice, TOYOTA (Jan. 1, 2023), <https://www.toyota.com/privacyvts> [<https://perma.cc/TVB4-AKAR>] (“Your vehicle’s *Safety Connect* feature . . . uses your vehicle’s Location Data . . . to determine where your vehicle needs assistance, your Vehicle Information (such as your vehicle’s model, year, and VIN) to verify your vehicle type, your Vehicle Health Data (odometer readings) to assist if you submit a claim with your insurer, your Account Information (such as your name, address, phone number, email address, etc.) to verify your account, and your Voice Recordings (when you call our Response Center) for quality assurance.”).

20. See, e.g., *infra* note 183. For more examples of disclosure-and-consent regimes, see sources *supra* note 15.

21. Digital markets include markets for online search, social networks and social media, mobile apps, websites, and other digital services or goods. See, e.g., Filippo Lancieri & Patricia Morita Sakowski, *Competition in Digital Markets: A Review of Expert Reports*, 26 STAN. J.L. BUS. & FIN. 65, 74 (2021).

22. See, e.g., Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 WASH. U. L. REV. 1461, 1463 (2019) [hereinafter Richards & Hartzog, *Pathologies*] (“Consent is the foundation of the relationships we have with search engines, social networks, commercial web sites, and any one of the dozens of other digitally mediated businesses we interact with regularly.”); Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 434 (2016); Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1880 (2013) [hereinafter Solove, *Consent Dilemma*].

23. Zero cash (“for free”) is a common price in digital markets: while consumers pay nothing or little in terms of money, they pay a heftier price in terms of data and extent of surveillance. See MARKET STRUCTURE AND ANTITRUST SUBCOMMITTEE REPORT, *in* STIGLER COMM. ON DIGIT. PLATFORMS, STIGLER CTR. FOR THE STUDY OF THE ECON. & THE STATE 1, 30 (2019), <https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report> [<https://perma.cc/RWV9-KRL5>]. Importantly though, even subscription-based services that one pays for, like YouTube TV, Amazon Prime, and Netflix, collect and process personal information for monetization. See, e.g., GIRARD KELLY, JEFF GRAHAM, JILL BRONFMAN & STEVE GARTON, COMMON SENSE, PRIVACY OF STREAMING APPS AND DEVICES: WATCHING TV THAT WATCHES US 2 (2021), https://www.common-sensemedia.org/sites/default/files/research/report/privacy_of_streaming_apps_and_devices-

or low cash price and the consumer is tracked and surveilled for their personal information, while on the business-facing side such personal information is monetized.²⁴ This market structure and the justification for the collection, use, and monetization of personal information are often based on consent.²⁵ Consumers are held to have consented to terms and conditions and privacy policies drafted by the firms that track, surveil, and profit from the use of personal information, profiling, and targeting.²⁶ As I explore below, consent is central to both American and European governance regimes in digital markets,²⁷ making consent not only a cornerstone of the digital business model but also a predominant governance tool.²⁸

final.pdf [https://perma.cc/M59Z-GQGU] (“Many viewers know that free streaming apps are most likely selling their personal information, but most viewers may not know that most paid subscription streaming apps are also selling users’ data. Even more expensive streaming plans with ‘no ads’ or ‘limited ads’ still collect viewing data from use of the app to track and serve users advertisements on other apps and services across the internet. Also, data brokers buy and sell users’ data and share it with other companies for data recombination purposes.”).

24. See, e.g., Chris Hoofnagle, *Facebook and Google Are the New Data Brokers*, DIGIT. LIFE INITIATIVE (Jan. 5, 2021), <https://www.dli.tech.cornell.edu/post/facebook-and-google-are-the-new-data-brokers> [https://perma.cc/3YRQ-VYR4]; Joseph Turow & Chris Jay Hoofnagle, *Mark Zuckerberg’s Delusion of Consumer Consent*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/opinion/zuckerberg-facebook-ads.html> [https://perma.cc/AK44-F4Q9]; Aziz Z. Huq, *The Public Trust in Data*, 110 GEO. L.J. 333, 344 (2021); Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist’s Journey Towards Pervasive Surveillance in Spite of Consumers’ Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 40–43 (2019) [hereinafter Srinivasan, *Facebook*]; Dina Srinivasan, *Why Google Dominates Advertising Markets: Competition Policy Should Lean on the Principles of Financial Market Regulation*, 24 STAN. TECH. L. REV. 55, 58–63 (2020).

25. See, e.g., Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 158 (2017) (describing how “[p]latforms in particular have structured their information-collection activities around broad presumptive consent . . . in ways that make user enrollment seamless and near-automatic”); Oren Bar-Gill & Omri Ben-Shahar, *Rethinking Nudge: An Information-Costs Theory of Default Rules*, 88 U. CHI. L. REV. 531, 580–84 (2021); Kevin E. Davis & Florencia Marotta-Wurgler, *Contracting for Personal Data*, 94 N.Y.U. L. REV. 662, 663 (2019); Calo, *supra* note 7, at 1028; Julie E. Cohen, *The Biopolitical Public Domain: The Legal Construction of the Surveillance Economy*, 31 PHIL. TECH. 213, 219–220 (2018); see also David Singh Grewal, *The Legal Constitution of Capitalism*, in AFTER PIKETTY 471, 474 (Heather Boushey et al. eds., 2017) (stating that “the decline of inequality based on status in no way precluded a dramatic rise in economic inequality produced through formally consensual contractual relations”).

26. See, e.g., Chris Jay Hoofnagle, Aniket Kesari & Aaron Perzanowski, *The Tethered Economy*, 87 GEO. WASH. L. REV. 783, 795 (2019) [hereinafter Hoofnagle et al., *Tethered Economy*] (footnote omitted) (“Over the last 20 years, courts have embraced a trend towards notice-based contracting . . . [C]ourts bind consumers to license provisions, terms of use, and privacy policies on the basis of constructive notice . . . And, while this trend first took hold in cases dealing with software, it has profoundly influenced the way courts approach contract formation for all manner of goods and services.”).

27. See *infra* Sections II.B, III.B.

28. See Priscilla M. Regan, *Fifty-Plus Years of Information Privacy Policy-Making: The More Things Change, The More They Remain The Same*, in RESEARCH HANDBOOK ON INFORMATION POLICY 159, 159, 163 (Alistair S. Duff ed., 2021) (highlighting that thus far, no matter how compelling the case for better regulation for privacy and information rights has become, industry and government interests remain on top, with persisting self-regulation and consent frameworks); Ari Ezra Waldman, *The New Privacy Law*, 55 U.C. DAVIS L. REV.

Given the pervasiveness of consent in consumer markets as well as its centrality in digital markets, the remaining question is whether consent works as intended. To answer this question, I introduce a new framework for analyzing consumer markets: the *consent burden* framework, which is this Article's second contribution. Part II develops the new consent burden framework. It defines the consent burden and explores how it unfolds in two temporal segments: *ex ante* and *ex post* burdens. *Ex ante* burdens are the informational and decision-making burdens imposed prior and leading to the moment of consenting. They stem from significant information asymmetries, combined with bounded rationality and limited attention spans.²⁹ *Ex post* burdens are the legal and rights-derogating burdens associated with the status of having consented. They stem from holding individuals accountable for their empty consent³⁰ to nonnegotiable contracts, consequently constraining their rights and remedies. This constraint is part exogenous, emanating from the law, and part endogenous, arising from internal mental commitments.³¹ Part II illuminates why consent could be a failed governance solution based on the same criteria on which it is premised to be a good governance solution. The identification and explication of the consent burden provides a synthesis of diverse literatures and a theoretical foundation for understanding the tilted power balance that consent may create in markets.

In digital markets specifically, consent has proven inadequate for dealing with the individual and societal harms of the information economy and especially for realigning firms' systemically misaligned incentives.³² In fact, rather than disciplining the darker side of the market where personal information is exploited, the use of consent *facilitates*

ONLINE 19, 30 (2021) [hereinafter Waldman, *New Privacy Law*] (“[N]otice-and-consent was originally developed as a way to stave off potentially more robust regulation that could threaten the industry’s innovation imperative.”); *see also* JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 58 (2019).

29. *See infra* Section II.C.

30. That is, consent that is rarely informed or intentional. *See infra* Part II.

31. *See infra* Section II.D.

32. *See* Lina M. Kahn & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 520 (2019) (“What happens when the service provider and the customer lack this shared understanding of the core terms of their relationship? . . . Most Facebook users[] . . . rely on the platform to communicate with other Facebook users As a rule, it appears that Facebook users tend to be deeply ignorant of the ways the company serves (or disserves) them This is not just an unusually stark asymmetry of information. It is an elaborate system of social control whose terms are more imposed than chosen.”); Nathaniel Persily, *Facebook Hides Data Showing It Harms Users. Outside Scholars Need Access.*, WASH. POST (Oct. 5, 2021, 7:20 AM), <https://www.washingtonpost.com/outlook/2021/10/05/facebook-research-data-haugen-congress-regulation/> [<https://perma.cc/F2HD-S8C5>]; Statement of Francis Haugen: *Hearing Before the Subcomm. on Consumer Prot., Prod. Safety & Data Sec. of the S. Comm. on Com., Sci. & Transp.*, 117th Cong. (2021) [hereinafter Statement of Francis Haugen], <https://www.commerce.senate.gov/services/files/FC8A558E-824E-4914-BEDB-3A7B1190BD49> [<https://perma.cc/U3HN-JPYT>].

it.³³ Similar to the law-and-economics account of consent more generally,³⁴ privacy law has typically regarded consent as a manifestation of autonomy and control over one's information.³⁵ Neither account of consent addresses or solves its core problem: empty consent continues to be the most prevalent form of consent in markets,³⁶ rendering consent a vehicle that legitimizes digital surveillance and other exploitations. While privacy theory and scholarship have mostly moved away from the individual control conceptualization,³⁷ privacy laws have not, and the popularity of consent regimes in digital markets has the additional side effect of entrenching consent as the proper solution, despite its failure.³⁸

This Article's third contribution is in locating the role of regulation in lowering or increasing the consent burden. Part III finds that there is mostly an inverse relationship between the consent burden and the level of regulation in a market, with the consent burden being higher in markets with a lower level of regulation. But surprisingly, there is an exception to this rule in what this Article calls command-and-consent regulation. In that type of regulation, regulators typically do not reduce the consent burden and may even increase it, potentially making command-and-consent ineffective, if not damaging for consumers. Part III thus reveals that although regulation is typically considered burdensome for firms and beneficial for consumers, some regulations are in fact burdensome for consumers and firms alike, even when they purport to benefit consumers. Appreciating the inverse-relationship rule and its

33. See, e.g., Ari Ezra Waldman, *Privacy, Practice, and Performance*, 110 CALIF. L. REV. 1221, 1256–57 (2022) [hereinafter Waldman, *Privacy, Practice, and Performance*].

34. See *supra* notes 5–9 and accompanying text.

35. Alan Westin is considered to have pioneered the privacy-as-control theory. See ALAN WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (conceiving of privacy as a right to decide when, how, and to whom an individual discloses information). Several decades before Westin, Warren and Brandeis famously coined that privacy is the right of the individual to decide when “to be let alone” and to control the existence of one's public representations. See Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193, 198, 218 (1890).

36. See *infra* Part II.

37. For critiques on the privacy-as-control approach, see, for example, Cohen, *Privacy Law*, *supra* note 5, at 4–5; COHEN, *supra* note 28, at 262–63; Woodrow Hartzog, *The Case Against Idealising Control*, 4 EUR. DATA PROT. L. REV. 423, 425–32 (2018); Waldman, *Privacy, Practice, and Performance*, *supra* note 33, at 1227–28; Waldman, *New Privacy Law*, *supra* note 28, at 38; Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1660–64 (1999); Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1930 (2013); Solove, *Consent Dilemma*, *supra* note 22, at 1880–81; Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 818–34 (2000); Anita L. Allen, *Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm*, 32 CONN. L. REV. 861, 862 (2000); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423–26 (2000). See also ARI EZRA WALDMAN, *PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE* 69–71 (2018) (discussing how privacy facilitates social interaction); NEIL RICHARDS, *WHY PRIVACY MATTERS* 39 (2022) (arguing that “‘privacy’ is fundamentally about power”).

38. See Waldman, *Privacy, Practice, and Performance*, *supra* note 33, at 1224; Waldman, *New Privacy Law*, *supra* note 28, at 23.

exception, the consent burden can be used as a single but comprehensive metric for analyzing the allocation of rights and power in consumer markets and how much a regulator has effectively intervened to correct market failures. When the consent burden is high, firms are likely too powerful, and the regulator has likely intervened too little or ineffectively (even if it seems otherwise).

This Article's fourth contribution is in providing a novel way forward. Part IV first draws an analogy between the regulatory burden imposed on firms and the consent burden imposed on individuals and proposes that regulators and lawmakers account for the consent burden when designing and implementing regulation, the same way they routinely account for the regulatory burden. Thus far, the consent burden has largely been invisible to regulators. But the regulatory burden has long been considered by them. In fact, I show how the consent burden was *increased* over time due to regulators' wishes to reduce the regulatory burden. This one-sidedness should be corrected. I argue that if regulators consider the consent burden similarly to how they consider the regulatory burden, it will lead to significantly better regulation of consumer and digital markets.

Part IV further proposes a method for regulators to use in order to evaluate the consent burden that would develop under a given regime.³⁹ I propose a diagnostic process, *consent burden review*, that assesses the consent burden as a systemic issue through a set of questions. The core of the diagnostic process is understanding the following: What harmful firm behavior do regulators seek to limit? Does the proposed regime put consent in the problematic role of limiting such harmful behavior (a role in which consent repeatedly fails)? If so, why do we expect consumers would consent to harmful firm behavior? And what are the foreseeable effects of the proposed regime after "deducting" limitations that could be circumvented by consumer consent?

Consent burden review will help regulators identify whether using a consent-based regime in a specific market is a good idea or whether it is likely to fail as a means of market governance because it leaves too much power in the hands of firms. Adopting the consent burden framework and consent burden review will lead to better regulation and more balanced markets in the digital era. I hope this Article is a first step.

II. DEFINING THE CONSENT BURDEN

I define the term consent burden as the costs and harms, i.e., burdens, that are imposed on individuals due to the use of consent as a mechanism to control firms' behavior in markets. I divide the consent burden into two parts. First, *ex ante* burdens are the informational and

39. See *infra* Section IV.B.

decision-making burdens imposed prior and leading to the moment of consenting. Second, ex post burdens are the legal and rights-derogating burdens associated with having consented. While the consent burden framework is general and applicable to many consumer markets, this Article focuses on privacy in digital markets and the information economy. Before diving into the analysis of ex ante and ex post burdens, I first define consent in markets and explore its important role in multiple control strategies. Subsequently, in Section II.B, I set the stage for the analysis of digital markets.

A. Variations of Consent as a Control Strategy in Markets

Consent is not of one variety, and it is a pervasive principle in markets. In contract law, consent is traditionally a cooperative-collaborative vehicle for the allocation of rights among equal parties via a contract. In tort law, consent is often a means to differentiate between legitimate and illegitimate behavior.⁴⁰ One way to think about the different varieties of consent in markets is within the more formal understanding of the menu of market control strategies. There are four such strategies: (1) market competition; (2) courts adjudicating private disputes; (3) regulation, i.e., public enforcement of policy through specific legislation or rules, usually by a dedicated regulator; and (4) the state's ownership and complete control over the market.⁴¹ These strategies can be put on a sliding scale of the state growing powers in one direction and firms' growing powers in the opposite direction.⁴² These strategies are of course not mutually exclusive; market discipline, courts, and regulation frequently operate in parallel.⁴³

What is notable here is that consent cuts across all main market governance strategies: consent is foundational to market competition (the first strategy), which essentially relies on contractual consent. Additionally, courts administer control through the enforcement of contractual consent and the development of common law torts (e.g., the privacy torts) where consent, or lack thereof, is either a significant component or an affirmative defense (the second strategy).

But while we usually think of consent as the main tool of market-based, autonomy-centered, social-control regimes, i.e., not top-down regulation, consent and regulation are no longer as distinct as they may

40. Such is the case of torts like trespass and the four privacy torts, where having received consent can mean the difference between being deemed a tortfeasor and facing no liability. See *infra* text accompanying note 62 and Section II.D.1.

41. Andrei Shleifer, *Understanding Regulation*, 11 EUR. FIN. MGMT. 439, 442–43 (2005); Simeon Djankov, Edward Glaeser, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The New Comparative Economics*, 31 J. COMP. ECON. 595, 601 (2003).

42. Shleifer, *supra* note 41, at 443.

43. There are also intermediate strategies, such as private litigation to enforce public regulatory rules. *Id.* at 442.

appear. A current key implementation of consent as market governance is regulating through consent (the third strategy). The archetypic regulatory regime, command-and-control, commands firms to follow hard rules about their conduct — what firms can, cannot, or must do.⁴⁴ Other forms of classic regulation may be less direct than commands but still substantively engage with firm conduct, like regimes that use economic instruments to create financial incentives for a desired behavior⁴⁵ or shift liability rules.⁴⁶ But increasingly, regulators use consent as the centerpiece of regulation. In such cases, instead of the typical command-and-control model with bright-line rules of yes and no (or other regulatory models substantively directing or incentivizing behavior), regulators create a framework of what can be described as command-and-consent. In command-and-consent, the heart of the control solution lies in the process of asking for and giving consent, and the conduct to which consent is being asked for is not closely limited. Command-and-consent is procedural rather than substantive, focused on formalizing the processes of information disclosure and consent-giving. This type of regulation might require firms to disclose certain information that they would not have disclosed otherwise, but without more this type of regulation does not institute meaningful limitations on firm behavior. I provide further analysis of command-and-consent in Part III.

In addition to its pervasiveness across the menu of market control strategies, consent varies in levels of activity. Consent is a choice but often a passive one, made in reaction to external information, offerings, and forces. Thus, consent covers a spectrum of passivity versus activity, from passively not opting out (consenting by default) to actively opting in (consenting despite the default, including by waiving one's rights) and several shades in between.⁴⁷ For example, an option to opt out could be merely implicit (as many online terms and conditions say, "If you do not consent to the terms, you should not use the product/service") or explicit (like in the California Consumer Privacy Act

44. See, e.g., ANTHONY I. OGDEN, REGULATION: LEGAL FORM AND ECONOMIC THEORY 245 (1994).

45. For example, through charges, taxes, subsidies, and tradeable emission/property rights. See, e.g., *id.* at 245–56.

46. See, e.g., STEPHEN BREYER, REGULATION AND ITS REFORM 174–81 (1982); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1110, 1127 (1972).

47. Chris Jay Hoofnagle, *Designing for Consent*, 7 J. EUR. CONSUMER & MKT. L. 162, 162 (2018) [hereinafter Hoofnagle, *Designing for Consent*] (footnotes omitted) ("In opt-in consent, the consumer must take some affirmative action, even a very subtle one, to accept a collection or use of data. In opt-out, the consumer must take action to object to data collection or use, thus placing the burden on the consumer to act. The third approach typically goes unmentioned: 'no opt.' That is, situations where the consumer has no ability to object to information practices."); see also Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1071–91 (1999) (exploring the many difficulties consumers face in opt-out mechanisms).

(“CCPA”) opt-out from selling one’s information).⁴⁸ An opt-in can be more relaxed and “slippery” (if the opt-in process makes it very easy to “consent”)⁴⁹ or more demanding. The consent burden framework applies throughout this spectrum.

B. Setting the Stage: Variations of Consent in Digital Markets

Although the literature has underscored the differences between the regulatory models that the United States and the European Union have adopted for digital markets and the information economy,⁵⁰ both are centered around consent. Both regimes are rooted in the code of Fair Information Practice Principles (“FIPPs”) dating back to 1973, long before the inception of digital markets.⁵¹ The FIPPs were restated several times, and a widely-adopted set of FIPPs spearheaded the individual control and consent-based approach to digital privacy, relying on procedural protections such as notice (disclosure) and consent.⁵² Both the

48. See California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.120 (West 2023).

49. See, e.g., Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1202 (2013) (footnote omitted) (exploring several examples, like the slippery opt-in to waiving shareholders’ default rights: “[A]lmost all states by default allow shareholders to collect damages from the firm’s directors if those directors fail to perform their duties with care. To minimize their potential liability, directors have successfully inserted a provision waiving shareholders’ default rights to collect damages into 99 of the top Fortune 100 companies’ articles of incorporation.”); Lauren E. Willis, *Why Not Privacy by Default*, 29 BERKELEY TECH. L.J. 61, 82–84 (2014) [hereinafter Willis, *Privacy*].

50. See, e.g., Woodrow Hartzog & Neil Richards, *Privacy’s Constitutional Moment and the Limits of Data Protection*, 61 B.C. L. REV. 1687, 1690 (2020) [hereinafter Hartzog & Richards, *Constitutional Moment*]; Meg Leta Jones & Margot E. Kaminski, *An American’s Guide to the GDPR*, 98 DENV. L. REV. 93, 94–97 (2020); Paul M. Schwartz, *The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures*, 126 HARV. L. REV. 1966, 1966 (2013) (“The European Commission’s release in late January 2012 of its proposed ‘General Data Protection Regulation’ . . . provides a perfect juncture to assess the ongoing EU-U.S. privacy collision.”); Paul M. Schwartz & Daniel J. Solove, *Reconciling Personal Information in the United States and European Union*, 102 CALIF. L. REV. 877, 878–81 (2014) (discussing the divergence between U.S. and EU privacy laws); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1155 (2004) (“[W]e are in the midst of significant privacy conflicts between the United States and the countries of Western Europe . . .”).

51. The original FIPPs (also called Fair Information Practices, or “FIPs”) were part of an influential U.S. report exploring entities’ use of computational automated methods to collect and use personal information. See U.S. DEP’T OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS, at ix–xxi (1973); see also KENNETH A. BAMBERGER & DEIRDRE K. MULLIGAN, *PRIVACY ON THE GROUND* 21–22 (2015); COLIN J. BENNETT, *REGULATING PRIVACY* 96–101 (1992); Paul M. Schwartz, *Beyond Lessig’s Code for Internet Privacy: Cyberspace Filters, Privacy Control, and Fair Information Practices*, 2000 WIS. L. REV. 743, 779.

52. See, e.g., Solove, *Consent Dilemma*, *supra* note 22, at 1882; Daniel J. Solove & Paul M. Schwartz, *ALI Data Privacy: Overview and Black Letter Text*, 68 UCLA L. REV. 1252, 1262–63 (2022) [hereinafter *ALI Data Privacy*]; Fred H. Cate, *The Failure of Fair Information Practice Principles*, in CONSUMER PROTECTION IN THE AGE OF THE ‘INFORMATION

American and the European privacy and data protection regimes follow this approach, essentially making digital markets a decentralized, individual medium where the legal focus is on personal choices as they translate into acts of consent, rather than substantive limitations on firm behavior.⁵³

In the United States, privacy law is the main source of information rights,⁵⁴ and it is made up of fragmented federal and state regimes,⁵⁵ utilizing various mechanisms of FIPPs-based consent.⁵⁶ Federal law mostly leaves digital markets in a state of market ordering (“self-regulation”),⁵⁷ relying on contractual consent.⁵⁸ While the Federal Trade Commission (“FTC”) is not a dedicated privacy regulator, since 1998 it has maintained that breaking promises made in privacy disclosures against consumers’ consent constitutes “unfair or deceptive acts or practices in or affecting commerce” in violation of § 5 of the FTC Act.⁵⁹ The FTC’s enforcement policy is therefore similarly based on

ECONOMY’ 343, 353–54 (Jane K. Winn ed., 2006); Woodrow Hartzog, *The Inadequate, Invaluable Fair Information Practices*, 76 MD. L. REV. 952, 954–55, 959 (2017); Hartzog & Richards, *Constitutional Moment*, *supra* note 50, at 1700–01.

53. See Waldman, *New Privacy Law*, *supra* note 28, at 22, 27–30; see also Cohen, *Privacy Law*, *supra* note 5, at 5; COHEN, *supra* note 28, at 262.

54. Other areas of law such as intellectual property and trade secrecy control aspects of information rights allocation. See, e.g., Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460, 1515 (2020) [hereinafter Kapczynski, *Informational Capitalism*]; Amy Kapczynski, *The Public History of Trade Secrets*, 55 U.C. DAVIS L. REV. 1367, 1370–71 (2022) [hereinafter Kapczynski, *Trade Secrets*].

55. See Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 592 (2021).

56. See, e.g., Solove, *Consent Dilemma*, *supra* note 22, at 1883–84 (“Two of the most important components of privacy self-management are [first] informing individuals about the data collected and used about them (notice) and [second] allowing them to decide whether they accept such collection and uses (choice). These components of the FIPPs are widely embraced in the United States”); see also Solove & Schwartz, *ALI Data Privacy*, *supra* note 52, at 1263 (“[A] scaled-down version of the FIPPs have often been embodied in U.S. laws: namely, the notice-and-choice approach.”).

57. See, e.g., Dennis D. Hirsch, *The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation?*, 34 SEATTLE U. L. REV. 439, 440 (2011).

58. See Davis & Marotta-Wurgler, *supra* note 25, at 663; Neil Richards & Woodrow Hartzog, *A Duty of Loyalty for Privacy Law*, 99 WASH. U. L. REV. 961, 970 (2021); Viljoen, *supra* note 55, at 592; Hoofnagle, *Designing for Consent*, *supra* note 47, at 162–67; see also COHEN, *supra* note 28, at 44 (“The particular form of the access-for-data contract extended to users — a boilerplate terms-of-use agreement not open to negotiation — asserts a nonnegotiable authority over the conditions of access that operates in the background of even the most generative information-economy service Boilerplate agreements are contractual in form but mandatory in operation, and so are a powerful tool both for private ordering of behavior and for private reordering of even the most bedrock legal rights and obligations.”).

59. See 15 U.S.C. § 45(a)(1) (2018); FED. TRADE COMM’N, *PRIVACY ONLINE: A REPORT TO CONGRESS* 7, 13 (1998), <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf> [<https://perma.cc/6DSK-9T6Q>]; Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 585 (2014). States have instituted similar consumer protection laws, with state attorney general offices enforcing them and other state privacy laws. See Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 754 (2016).

notice-and-consent principles.⁶⁰ Under this regulatory approach, firms' terms and the conduct they represent are not substantively scrutinized; instead, the main question is whether consumers have "consented" to whatever is in the terms.⁶¹

The privacy torts (and other privacy-applicable torts like trespass) are similar to the contractual approach in that they too require lack of consent to be properly claimed.⁶² There are also federal sector-specific privacy laws regulating particular kinds of data, like consumer credit data, health and financial information, educational information, and children's personal information.⁶³ These laws are similarly built around consent mechanisms.⁶⁴ While there was a recent flurry of regulatory activity on issues of consumer privacy in some states, much of it still relies on mechanisms of consent. The California Consumer Privacy Act ("CCPA") and its amendment, the California Privacy Rights Act ("CPRA"), rely on notice-and-consent mechanisms,⁶⁵ as do many other

60. See CHRIS JAY HOOFNAGLE, *FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY* 153–55 (2016); Solove & Hartzog, *supra* note 59, at 598–99, 604; see also FED. TRADE COMM'N, *INTERNET OF THINGS: PRIVACY & SECURITY IN A CONNECTED WORLD*, at v (2015), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf> [<https://perma.cc/E4JA-ZBY4>]; Chris Jay Hoofnagle, *US Regulatory Values and Privacy Consequences*, 2 EUR. DATA PROT. L. REV. 169, 170 (2016) ("The FTC does not protect privacy as a normative value Simply put, the FTC has difficulty justifying privacy cases unless some economic harm can be found. This means that dignity-based privacy issues cannot be remedied unless they are tethered to an economic interest."); Chris Jay Hoofnagle, *The Federal Trade Commission's Inner Privacy Struggle*, in *THE CAMBRIDGE HANDBOOK OF CONSUMER PRIVACY* 168, 168–83 (Evan Selinger et al. eds., 2018).

61. See, e.g., Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 444–45 (2016); FED. TRADE COMM'N, *PROTECTING CONSUMER PRIVACY*, *supra* note 8, at 48–60; Woodrow Hartzog, *The New Price to Play: Are Passive Online Media Users Bound by Terms of Use?*, 15 COMM'N L. & POL'Y 405, 432 (2010); Waldman, *New Privacy Law*, *supra* note 28, at 22; Viljoen, *supra* note 55, at 593–94; RICHARDS, *supra* note 37, at 90–91. But see Chris Jay Hoofnagle, *FTC Regulation of Cybersecurity and Surveillance*, in *THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW* 708, 723 (David Gray & Stephen E. Henderson eds., 2017) (discussing how for certain wiretapping and surveillance activities, the FTC imposed higher-quality consent requirements, which likely made these activities more difficult, perhaps even impossible, to implement).

62. See RESTATEMENT (SECOND) OF TORTS §§ 652B, 652C, 652D, 652E (AM. L. INST. 1977). Some of the torts require lack of consent (e.g., appropriation of name or likeness) and in others, showing consent could be a defense. See William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 392, 401–02, 419 (1960) (discussing consent in the context of intrusion upon seclusion; consent in the context of appropriation of name or likeness; and consent as a defense: "Chief among the available defenses is that of the plaintiff's consent to the invasion, which will bar his recovery as in the case of any other tort").

63. See, e.g., Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681; Health Insurance Portability and Accountability Act, 45 C.F.R. § 164.520 (2018); Gramm-Leach-Bliley Act, 12 C.F.R. § 1016.5 (2022); Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501–06 (respectively).

64. See Viljoen, *supra* note 55, at 594–95. Based on the notice-and-consent model, these federal laws require prominent privacy disclosures that are meant to provide information that will facilitate consumers' decisions. *Id.*

65. The CCPA generally allows firms to process personal information by default so long as they provide a notice on their data practices and a clear option for consumers to opt out of

state laws, as well as state and federal proposals, bills, and ballot initiatives.⁶⁶ The recent bi-partisan Congressional proposal for a comprehensive federal privacy regulation is no exception, following the current regulatory trends of consent, individual rights, and internal compliance frameworks.⁶⁷

FIPPs and consent are deeply embedded in the European regime as well.⁶⁸ Consent was a central part of the EU Directive that preceded the General Data Protection Regulation (“GDPR”),⁶⁹ and it remains central to the GDPR and to the related ePrivacy EU Directive.⁷⁰ Section III.B analyzes the centrality of consent in the GDPR and its implications.

having their personal information sold or shared (but not collected). California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 1798.110–20. On November 3, 2020, California voted to amend the CCPA and expand privacy rights by passing the CPRA, which became effective in January 2023. The CPRA similarly retains the centrality of notice-and-consent. See California Privacy Rights Act of 2020 §§ 2.G–H, https://oag.ca.gov/system/files/initiative/s/pdfs/19-0021A1%20%28Consumer%20Privacy%20-%20Version%203%29_1.pdf [<https://perma.cc/P7CF-3Y3R>]; see also California Online Privacy Protection Act, CAL. BUS. & PROF. CODE § 22575 (requiring commercial websites and online services collecting information on California residents to provide a detailed privacy policy).

66. See, e.g., Virginia Consumer Data Protection Act, VA. CODE ANN. §§ 59.1-575–85; Colorado Privacy Act, COLO. REV. STAT. §§ 6-1-1301–13; Illinois Biometric Information Privacy Act, 740 ILL. COMP. STAT. 14/1–14/30; Connecticut Personal Data Privacy and Online Monitoring Public Act No. 22-15; Utah Consumer Privacy Act, UTAH CODE ANN. §§ 13-61-101–404; IOWA CODE ANN. § 715D; see also Waldman, *New Privacy Law*, *supra* note 28, at 21–22, 30; Cohen, *Privacy Law*, *supra* note 5, at 4–5.

67. See American Data Privacy and Protection Act, H.R. 8152, 117th Cong. (2022); JONATHAN M. GAFFNEY, ERIC N. HOLMES & CHRIS D. LINEBAUGH, CONG. RSCH. SERV., LSB10776, OVERVIEW OF THE AMERICAN DATA PRIVACY AND PROTECTION ACT, H.R. 8152 (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10776> [<https://perma.cc/366G-Q4P9>]; Allison Grande, *House Leaders Vow To Push Data Privacy Bill over Finish Line*, LAW360 (March 1, 2023, 10:26 PM), <https://www.law360.com/articles/1580836/house-leaders-vow-to-push-data-privacy-bill-over-finish-line> [<https://perma.cc/BY7C-C83L>] (noting that while legislative action on the ADPPA had not been completed in the 117th Congress, the ADPPA was reintroduced in the 118th Congress); see also Waldman, *New Privacy Law*, *supra* note 28, at 22–35, 23 (describing these new privacy laws and their trends as being part of a second wave of regulation focused on internal compliance, control rights, and consent mechanisms rather than on merely notice but arguing that the differences between the first and second waves, “though notable, neither materially shift privacy law’s political economy nor meaningfully limit the information economy’s data-extractive business model. Different, yes; substantive, no.” (citing Anupam Chander, Margot E. Kaminski & William McGeeveran, *Catalyzing Privacy Law*, 105 MINN. L. REV. 1733, 1737 (2021))); Ari Ezra Waldman, *Outsourcing Privacy*, 96 NOTRE DAME L. REV. REFLECTION 194, 195 (2021) (discussing the trend in privacy law toward “managerialism” and arguing that the trend undermines privacy law’s ability to rein in excessive corporate data extraction).

68. See Solove & Schwartz, *ALL Data Privacy*, *supra* note 52, at 1263 (“The EU Data Protection Directive and GDPR are grounded on the FIPPs”); see also Cate, *supra* note 52, at 360; Solove, *Consent Dilemma*, *supra* note 22, at 1897; Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 255–56 (2011).

69. See Cate, *supra* note 52, at 358–60; Solove, *Consent Dilemma*, *supra* note 22, at 1897 & n. 76.

70. See, e.g., Richards & Hartzog, *Pathologies*, *supra* note 22, at 1472–73; see also Directive (EC) 2002/58 of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on Privacy and Electronic Communications), 2002 O.J.

C. Ex Ante Burdens: The Burdens of Consenting

What does it take to make a decision? One needs relevant information and to exert decisional mental resources. Undoubtedly, making decisions requires resources: first, it requires understanding what information is needed to facilitate a decision and attaining it. We will cover this aspect of decision-making in Section II.C.1 on informational ex ante burdens. Following the attainment of information, one needs to process it to make a decision, an activity that requires some amount of time and mental decisional resources. We will cover this aspect of decision-making in Section II.C.2 on decisional ex ante burdens. These activities — informational and decisional — may develop in parallel and seep into one another, but for the purpose of canvassing the challenges of consent and the makings of the consent burden, we will discuss them separately.

The following analysis applies to all forms of consent utilized in the control of markets, no matter their source — contractual, tort-based, or regulation-based.

1. Informational Ex Ante Burdens

A decision to consent comes as a reaction to information about the market activity to which consent is sought, e.g., buying a secondhand car. Some information might be disclosed by the person asking for consent, such as the seller's price. But often the information initially provided is insufficient and more information is needed for consent to be informed and rational, e.g., information that enables price comparison among different sellers.⁷¹ Obtaining additional information can be simple and cheap or complicated and costly, contingent on the issue at hand. Obtaining perfect information is often impossible. It is on the individual to discern what information is needed for them to reach a decision, how much of it is needed, whether they can possibly acquire it, whether acquiring information is worth their while and cost, and whether, if acquired, they can comprehend the information.⁷² This set of considerations can be distilled into questions about:

- (1) information quantity,

(L 201) 37, amended by Council Directive 2009/136, 2009 O.J. (L 337) 11 (EC) [hereinafter ePrivacy Directive].

71. See, e.g., George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 213 (1961); Joseph Stiglitz, *The Revolution of Information Economics: The Past and the Future*, in *THE STATE OF ECONOMICS, THE STATE OF THE WORLD* 101, 101–04 (Kaushik Basu et al. eds., 2020).

72. See, e.g., OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 79–93 (2014) (discussing literacy and numeracy problems affecting decision-making).

- (2) information quality,
- (3) autonomous information attainability, and
- (4) complexity of asked-for consent.

In analyzing the *ex ante* informational burden, I assume consumer rationality. However, I argue that even under the best of assumptions, the available information in some consumer markets — and certainly in digital markets — is insufficient to make rational information-based decisions (and not rationally ignorant decisions). To be clear, I do not ultimately suggest that the solution is improving information disclosures. Instead, I argue that under current conditions, this insufficiency represents a chronic information asymmetry that can be solved only by lowering the consent burden via public policy.⁷³

Let us see how the informational burden manifests in digital markets. The firm asking for consent provides information in a notice about data practices (colloquially: a privacy policy). Take Facebook, for example. On their main page titled “Privacy Basics,” the welcoming lines are, “You have control over who sees what you share on Facebook. That way, you’re free to express yourself the way you want.”⁷⁴ Next, in “Top Topics,” there are links to more information about “How do I choose who can see photos and other things I post on Facebook?,” “Who can see my reactions and comments on other people’s posts?,” and “How can I stop someone who’s bothering me?”⁷⁵ From this carefully curated list of topics, it appears the only privacy threats to Facebook users are other Facebook users. Surprisingly, Facebook never even hints at its methodic and expansive surveillance, exploitation, and monetization of personal information.⁷⁶ This strategic choice of words persists under the tab “You’re In Charge,” where under the title “Advertising,” the subtitle reads, “Find out how to control the ads you’re shown *so they’re more useful to you*,”⁷⁷ — in other words, please help us surveil you better.

We can now apply the four questions listed above to Facebook’s proffered information. First, consider the problem of information quantity. Facebook offers piecemeal information through a rabbit hole of titles, subtitles, short scribbles, buttons, and links to more pages (which include links to even more pages) — an overload of information — and all of it is not even the formal Facebook Privacy Policy. In fact, on yet

73. *See infra* Part IV.

74. *Privacy Basics*, FACEBOOK, <https://www.facebook.com/about/basics> [<https://perma.cc/M3TS-4M8B>].

75. *Id.* (under “Top Topics”). Additional similar topics are, “How can I see what my profile looks like to someone else?,” “Who can see a photo I post on Facebook when someone else is tagged in it?,” and “Can other people see my list of friends when they visit my profile?” *Id.*

76. *See, e.g.,* Srinivasan, *Facebook*, *supra* note 24, at 41–43.

77. *Privacy Basics*, *supra* note 74 (emphasis added) (under “You’re In Charge”).

another page titled “Facebook’s Privacy Principles,”⁷⁸ Facebook proclaims: “While our Data Policy describes our practices in detail, we go beyond this to give you even more information.”⁷⁹ Facebook’s Privacy Policy document alone contains over 10,000 words;⁸⁰ abounds with links sending the reader to additional information, documents, and web pages (including a separate, over 2,000-word “Cookies Policy”⁸¹); and can be changed at any time Facebook so chooses.⁸² Meta, the parent company of Facebook, is notorious for providing a haystack of information.⁸³ This information overload cannot be read and processed by lay people⁸⁴ and is impractical for decision-making. Moreover, the informational overload in any discrete case contributes to a much larger problem of overall information volume. Disclosure and consent do not

78. *Facebook’s Privacy Principles*, FACEBOOK, <https://www.facebook.com/about/basics/privacy-principles> [<https://perma.cc/T7D6-NSGV>].

79. *Id.* (under the title, “We help people understand how their data is used”).

80. *Privacy Policy*, META, <https://www.facebook.com/privacy/policy> [<https://perma.cc/4NF8-KMKK>].

81. *Cookies Policy*, FACEBOOK, <https://mbasic.facebook.com/policies/cookies> [<https://perma.cc/42V7-QVQW>].

82. *See* ARI EZRA WALDMAN, *INDUSTRY UNBOUND: THE INSIDE STORY OF PRIVACY, DATA, AND CORPORATE POWER* 59 (2021) (“Facebook has even argued that its own privacy promises are meaningless because notice-and-consent empowers only Facebook to define the privacy rights of its users.”); *Privacy Policy*, *supra* note 80 (“How will you know the policy has changed?”).

83. In September 2021, the Irish DPA fined WhatsApp 225 million euros for noncompliance with its transparency obligations under the GDPR in part due to a lack of clarity in its privacy policy. WhatsApp and Facebook were considered a single economic unit for the purposes of the decision. *See* In the matter of WhatsApp Ireland Ltd., Decision of the Data Protection Commission (IN-18-12-2, 2021) (Ir.), https://edpb.europa.eu/system/files/2021-09/dpc_final_decision_redacted_for_issue_to_edpb_01-09-21_en.pdf [<https://perma.cc/H4QZ-ZF2V>].

84. *See, e.g.*, Bakos et al., *supra* note 7, at 3–4 (finding that incredibly few retail software buyers even examine the license agreement before purchase); Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s “Principles of the Law of Software Contracts,”* 78 U. CHI. L. REV. 165, 168 (2011) (finding that requiring online software buyers to click on an “I agree” box did not meaningfully increase readership of license agreements); Michael Simkovic & Meirav Furth-Matzkin, *Proportional Contracts*, 107 IOWA L. REV. 229, 233 (2021) (arguing that consumer attention is a scarce resource that is being depleted by the informational overload in consumer markets and as a result of standard form contracts, which leads to the “breaking” of the market for contractual terms); Solon Barocas & Helen Nissenbaum, *Big Data’s End Run Around Anonymity and Consent*, in *PRIVACY, BIG DATA, AND THE PUBLIC GOOD: FRAMEWORKS FOR ENGAGEMENT* 44, 57 (Julia Lane et al. eds., 2014) (summarizing findings that almost no one reads or understands privacy policies); *see also* Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J.L. & POL’Y FOR INFO. SOC’Y 543, 563–64 (2008) (estimating the national opportunity cost for the time to read online privacy policies at \$781 billion); Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, *“Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 4 (2015); BEN-SHAHAR & SCHNEIDER, *supra* note 72, at 22–25; Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 546–48, 566, 582 (2014). Studies further show that simplification of disclosed terms does not help to solve this problem. *See, e.g.*, Omri Ben-Shahar & Adam Chilton, *Simplification of Privacy Disclosures: An Experimental Test*, 45 J. LEGAL STUD. S41, S65–66 (2016).

scale well; while they can sometimes be effective in one-on-one transactions, individuals lack resources to review this amount of information for the purpose of decision-making at the scale required by every website, application, and software with which they interact.⁸⁵ Unsurprisingly, performance in cognitive tasks declines as attention drops.⁸⁶ For these reasons, the amount and complexity of information suggests that consumers will choose rational ignorance over getting into the weeds of the information.⁸⁷

A second problem is information quality. Some of the information Facebook provides (arguably, the easiest to reach) obscures highly important facts about Facebook's own exploitations of personal information and the risks Facebook creates. Facebook is not alone. Disclosures are often put in confusing or deliberately indeterminate terms and are routinely misunderstood by readers. Even if people were to read the entirety of privacy disclosures, most likely they would not be able to understand what will be done with their personal information.⁸⁸ Even experts find privacy policies to be misleading.⁸⁹ To complicate matters, disclosures in digital markets can be changed at any time.⁹⁰ And digital markets qualitatively exacerbate the problem of information quality. Data-intensive technology is incredibly complex and in a state of constant flux, and it is not very explainable.⁹¹ Given that firms strive to glean unexpected insights from their big-data analysis —

85. See Solove, *Consent Dilemma*, *supra* note 22, at 1888–89; Richards & Hartzog, *Pathologies*, *supra* note 22, at 1466.

86. See Simkovic & Furth-Matzkin, *supra* note 84, at 231.

87. See Richard A. Epstein, *Contract, Not Regulation: UCITA and High-Tech Consumers Meet Their Consumer Protection Critics*, in CONSUMER PROTECTION IN THE AGE OF THE "INFORMATION ECONOMY" 205, 227 (Jane K. Winn ed., 2006) ("[I]t seems clear that most consumers — of whom I am proudly one — never bother to read these terms anyhow: we . . . adopt a strategy of 'rational ignorance' to economize on the use of our time."); Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 294–95 (1990) [hereinafter Katz, *Game Theory*]; Avery Katz, *Your Terms or Mine? The Duty to Read the Fine Print in Contracts*, 21 RAND J. ECON. 518, 520 (1990) [hereinafter Katz, *Duty to Read*]; Adam B. Badawi, *Rationality's Reach*, 112 MICH. L. REV. 993, 994 (2014); Omri Ben-Shahar, *The Myth of the 'Opportunity to Read' in Contract Law*, 5 EUR. REV. CONT. L. 1, 15 (2009).

88. See, e.g., George R. Milne, Mary J. Culnan & Henry Greene, *A Longitudinal Assessment of Online Privacy Notice Readability*, 25 J. PUB. POL'Y & MKTG. 238, 243, 245 (2006); Alessandro Acquisti & Jens Grossklags, *Privacy and Rationality: A Survey*, in PRIVACY AND TECHNOLOGIES OF IDENTITY 15, 17 (Katherine J. Strandburg et al. eds., 2006); Joel R. Reidenberg, N. Cameron Russell, Alexander J. Callen, Sophia Qasir & Thomas B. Norton, *Privacy Harms and the Effectiveness of the Notice and Choice Framework*, 11 I/S: J.L. & POL'Y FOR INFO. SOC'Y 485, 488–89 (2015); RADIN, *supra* note 15, at 12 (a list of the reasons why individuals do not read fine print and would not understand it if they did read it); BEN-SHAHAR & SCHNEIDER, *supra* note 72, at 73–75 (similar list).

89. Joel R. Reidenberg et al., *Disagreeable Privacy Policies: Mismatches between Meaning and Users' Understanding*, 30 BERKELEY TECH. L.J. 39, 83–84 (2015).

90. See *supra* note 82 and accompanying text.

91. See Barocas & Nissenbaum, *supra* note 84, at 59; BAMBERGER & MULLIGAN, *supra* note 51, at 24.

drawing inferences from seemingly disparate pieces of information — it is doubtful that a static legal disclosure (at a single point in time) can meaningfully convey enough about future implications for informed consent.⁹² There are additional compounding factors, like the third-party problem⁹³ and cross-user impact,⁹⁴ that are critical known unknowns. There is also a risk that firms surreptitiously enforce their terms and conditions on an unequal basis, favoring some groups while disfavoring others.⁹⁵ And importantly, firms have business and legal incentives to conceal their true data practices — their datafied⁹⁶ “secret sauce.”⁹⁷ Ultimately, the nature of the information economy and information technologies does not lend itself to explainability or transparency and thus results in insufficient quality of information available to the public.⁹⁸

Another risk relating to information quality is outright manipulation of the disclosed information, including by omission.⁹⁹ We can

92. See Barocas & Nissenbaum, *supra* note 84, at 58–59.

93. Even if we accept consent-as-control, it is severely undermined — both normatively and positively — by third-party data brokers with whom individuals do not have a relationship. See, e.g., Ari Ezra Waldman, *Cognitive Biases, Dark Patterns, and the ‘Privacy Paradox,’* 31 CURRENT OPINION PSYCH. 105, 106 (2020) [hereinafter Waldman, *Cognitive Biases*] (“There is also an entire industry of data brokers that collects vast amounts of data on individuals in secret and without consent. The Federal Trade Commission . . . found that one data broker’s ‘databases contain information about 700 million consumers worldwide with over 3000 data segments for nearly every U.S. consumer’ and ‘[m]uch of this activity takes place without consumers’ knowledge.”); Huq, *supra* note 24, at 346; HOOFNAGLE, *supra* note 60, at 146–47 (describing how “[l]egislation to rein in these companies has been politically impossible to enact, in part because so many large businesses — and politicians themselves — use information brokers to amass data on people”).

94. Consent-as-control is also undermined by the unescapable and uncontrolled impact of users on one another. See, e.g., Solon Barocas & Karen Levy, *Privacy Dependencies*, 95 WASH. L. REV. 555, 556–58 (2020).

95. Manisha Padi, *Contractual Inequality*, 120 MICH. L. REV. 825, 826–28 (2022); see also Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69, 73–75 (2019) (discussing how firms’ occasional leniency in enforcing standard form contracts may also have harmful qualities); Lisa Bernstein & Hagay Volvovsky, *Not What You Wanted to Know: The Real Deal and the Paper Deal in Consumer Contracts — Comment on the Work of Florencia Marotta-Wurgler*, 12 JERUSALEM REV. LEGAL STUD. 128, 129 (2015) (calling to move from studying consumer contracts through the terms of the “paper deal” to looking at the terms of the “real deal,” i.e., how sellers behave considering the various forces that may constrain their behavior, including, but not limited to, the written agreement).

96. Defined as “the transformation of all kinds of information into machine readable, mergeable[,] and linkable form.” Linnet Taylor, Luciano Floridi & Bart van der Sloot, *Introduction: A New Perspective on Privacy*, in GROUP PRIVACY: NEW CHALLENGES OF DATA TECHNOLOGIES 1, 3 (Linnet Taylor et al. eds., 2017).

97. The data and algorithms held by firms are claimed to be proprietary. See, e.g., Kapczynski, *Informational Capitalism*, *supra* note 54, at 1515; Kapczynski, *Trade Secrets*, *supra* note 54, at 1370–71.

98. Ayelet Gordon-Tapiero, Alexandra Wood & Katrina Ligett, *The Case for Establishing a Collective Perspective to Address the Harms of Platform Personalization*, VAND. J. ENT. & TECH. L. (forthcoming) (manuscript at 8–10) (on file with author).

99. For a few examples, see Andy Greenberg, *Security News This Week: DuckDuckGo Isn’t as Private as You Think*, WIRED (May 28, 2022, 9:00 AM), <https://www.wired.com/story/duckduckgo-microsoft-twitter-ft-bush-assassination-whatsapp/> [<https://perma.cc/9EYW->

think of information quality manipulation in the following way: If drug labels disclosed only potential benefits and not potential risks (warnings), we would not consider them to be of sufficient quality for decision-making. When risks are significant and can deliberately be avoided, the disclosure ought to include them to guide behavior. One historical example of this tension is warning labels on cigarette packs and the tobacco industry's role in withholding information about health risks from the public and discrediting scientific evidence.¹⁰⁰ Notably, even when the industry is a well-regulated one (which is not the case for the information industry), there remains the problem of information asymmetry between the regulated and the regulator: firms often know more about the risks they create than the regulator does, and they can withhold information for their own benefit, disregarding the risks to the public.¹⁰¹ When an industry is *not* well regulated, a fortiori it is easy to imagine that it will manipulate or hide information about the risks it creates. There is initial evidence of the harms social media creates, but it is based mostly on anecdotal information — disclosed against firms'

3G3F] (discussing the recent scandal regarding DuckDuckGo's secret carve-out for Microsoft's surveillance); Kenneth A. Bamberger, Serge Egelman, Catherine Han, Amit Elazari Bar On & Irwin Reyes, *Can You Pay for Privacy? Consumer Expectations and the Behavior of Free and Paid Apps*, 35 BERKELEY TECH. L.J. 327, 327–28 (2020) (revealing that paid apps often access and share the same personal information as their free versions, with the consequence that consumers' decision to pay for apps to avoid privacy costs could be futile, and worse, there are no obvious cues for consumers to determine when an app's paid version offers better privacy protections than its free version); see also Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 574 (2012) (arguing that even simple disclosures like restaurant grades can be inaccurate and misleading); Oren Bar-Gill, David Schkade & Cass R. Sunstein, *Drawing False Inferences from Mandated Disclosures*, 3 BEHAV. PUB. POL'Y 209, 209–10 (2019) (explaining that consumers may draw false inferences from mandated disclosures); Oren Bar-Gill, *Smart Disclosure: Promise and Perils*, 5 BEHAV. PUB. POL'Y 238, 243–46 (2021) (same); Tal Z. Zarsky, *Serious Notice: A Celebration, Discussion, and Recognition of Joel Reidenberg's Work on Privacy Notices and Disclosures*, 90 FORDHAM L. REV. 1457 (2022) (discussing the prospect of privacy labeling and grading to provide improved disclosures to consumers, the problems and risks in labeling and grading, and proposed solutions); Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503, 506 (2020) (“Widespread non-readership leaves consumers open to exploitation by underhanded firms. When consumers do not read their contracts, unscrupulous sellers can exaggerate or lie outright about their products and services while contradicting, qualifying, or disclaiming these assertions in the fine print.”).

100. See Allan M. Brandt, *Inventing Conflicts of Interest: A History of Tobacco Industry Tactics*, 102 AM. J. PUB. HEALTH 63, 63–64 (2012); Robert N. Proctor, “*Everyone Knew but No One Had Proof*”: Tobacco Industry Use of Medical History Expertise in US Courts, 1990–2002, 15 TOBACCO CONTROL iv117, iv117–18 (2006).

101. The recent revelations about the oil company ExxonMobil demonstrate this problem as well. See Oliver Milman, *Revealed: Exxon Made “Breathtakingly” Accurate Climate Predictions in 1970s and 80s*, GUARDIAN (Jan. 12, 2023, 2:00 PM), <https://www.theguardian.com/business/2023/jan/12/exxon-climate-change-global-warming-research> [https://perma.cc/FY8W-4ZT5] (“The oil giant Exxon privately ‘predicted global warming correctly and skillfully [sic]’ only to then spend decades publicly rubbishing such science in order to protect its core business . . .”).

intentions — and conjectures, not on robust and comprehensive information, which is available only from inside the firm.¹⁰² As a result, neither regulators nor the public know enough about the dangers, risks, and harms that are (or can be) caused by the information economy. Information about dangers, risks, and harms is crucial for decision-making both on an individual and on a collective policymaking level, and we simply do not have it. Additionally, whenever information quality is lacking, an “informed minority” attaining, processing, and sharing the essence of the information with the public — an argument sometimes raised to support disclosures — is not going to be so informed and able to inform others.¹⁰³

A third problem is that of autonomous information attainability. In the example of buying a secondhand car, important information comes from price comparison among sellers that the consumer can perform on their own. The question here is whether the individual can reasonably complement or compensate for the lack of pertinent information provided by the firm. If yes, then the previous problem of information quality could be solved with “self-help” information search, provided that the expected benefits from additional information outweigh the costs of the search. In the information economy, however, such independent search is infeasible. The reality is that nobody but firms — mostly platforms like Facebook and Google — knows the full picture of informational risks and harms to individuals and society.¹⁰⁴ We could conclude that sometimes individuals do not have perfect information and some

102. See, e.g., Statement of Francis Haugen, *supra* note 32; Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, *GUARDIAN* (Mar. 17, 2018, 6:03 PM), <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> [<https://perma.cc/VY67-49ZW>] (revealing the Cambridge Analytica scandal); Vinu Goel, *Facebook Tinkers With Users' Emotions in News Feed Experiment, Stirring Outcry*, *N.Y. TIMES* (June 29, 2014), <https://www.nytimes.com/2014/06/30/technology/facebook-tinkers-with-users-emotions-in-news-feed-experiment-stirring-outcry.html> [<https://perma.cc/RM83-S5YV>] (discussing the revelation Facebook made in 2014 that it had conducted a psychological experiment in which it manipulated the feed of over half a million randomly selected users and thereby impacted their emotions). Additionally, research in psychology has found evidence of harms caused by social media use. See, e.g., Melissa G. Hunt, Rachel Marx, Courtney Lipson & Jordyn Young, *No More FOMO: Limiting Social Media Decreases Loneliness and Depression*, 37 *J. SOC. & CLINICAL PSYCH.* 751, 767 (2018) (“[O]urs is the first study to establish a clear causal link between decreasing social media use, and improvements in loneliness and depression. It is ironic, but perhaps not surprising, that reducing social media, which promised to help us connect with others, actually helps people feel less lonely and depressed.”).

103. See, e.g., Bakos et al., *supra* note 7, at 5 (suggesting that an “informed minority” is unlikely to prevent sellers from inserting one-sided terms into standardized agreements); see also Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 *U. PA. L. REV.* 630, 655 (1979) (arguing that as long as a minority of consumers engages with the content of agreements, we could expect firms to behave competitively).

104. See Gordon-Tapiero et al., *supra* note 98 (manuscript at 9).

risks remain unknown and that is fine. Yet the risks created by the information economy *are* known, just only to the firms that create the risks in the first place, and this information is neither shared with the public nor otherwise attainable. This is the heart of the information asymmetry between firms and individuals in digital markets.¹⁰⁵

A fourth problem is the complexity of asked-for consent. Problems with information quantity, quality, and autonomous information attainability are relevant separately to each dimension of asked-for consent and are compounded with each additional dimension.¹⁰⁶ Sometimes consent is sought only for a unidimensional question like price. But additional dimensions involved in asked-for consent — like quality, service, short-term effects, long-term effects, and attached legal rights and obligations (e.g., licensing or assignment of intellectual property, or mandatory arbitration clauses) — increase the consent burden. In digital markets, consent is a multidimensional bundle of (negative) sticks relating to a complex set of commercial and legal terms that span various rights and remedies, mostly so that the consumer will waive them.¹⁰⁷ The bigger the dimensional complexity of asked-for consent, the higher the consent burden.

In digital markets, individuals receive too much information from firms, too little of which is of the quality that can support informed consent, and they cannot compensate for the informational insufficiency and inadequacy due to chronic information asymmetry. These problems are exacerbated by the multidimensional nature of asked-for consent in digital markets. The informational *ex ante* burden in digital markets, therefore, is unreasonable, and the potential of disclosure to facilitate rational informed consent seems very low. In fact, the informational *ex ante* burden dictates (under both rational choice theory¹⁰⁸ and behavioral economics models¹⁰⁹) that firms will offer the least favorable terms the law possibly allows, rightly assuming consumers do not read terms and disclosures and are uninformed, with the risks from

105. See Caleb S. Fuller, *Is the Market for Digital Privacy a Failure?*, 180 PUB. CHOICE 353, 354 (2019) (“The possibility of asymmetric information between consumers and producers offers a distinct, yet complementary, explanation for why digital firms rely so heavily on information collection. Information may be over-collected relative to the case of perfectly informed browsers.”).

106. See OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* 1–2 (2012) (discussing complexity in consumer contracts).

107. In digital markets, consent is a bundle of many sticks — e.g., privacy, warranty disclaimer, intellectual property rights, and arbitration clauses.

108. See Katz, *Game Theory*, *supra* note 87, at 288–89; Badawi, *supra* note 87, at 998.

109. See *infra* Section II.C.2.

not reading being internalized by consumers.¹¹⁰ This dynamic can potentially cause significant welfare losses.¹¹¹

2. Decisional Ex Ante Burdens

A decision to consent comes from processing information and weighing potential benefits against potential costs of the market activity in question. Following the attainment of information (assuming one can attain relevant information), one needs to process it to make a decision, an activity that requires some amount of time and mental resources. The amount of resources required is contingent on the quantity, quality, and complexity of the information on the one hand and on one's own personal preferences and circumstances on the other. Consenting as a form of decision-making seems like an archetypic representation of autonomy and free will, but studies have repeatedly and decidedly shown that people are not good at making rational decisions, i.e., choosing in line with their own best interests.¹¹² Findings from behavioral decision-making research suggest that people often fail to choose optimally, either because they fail to predict which option will best benefit them or because they fail to base their choice on their prediction or because of a combination of both.¹¹³ These findings suggest that people need to invest *more* mental resources if they want to overcome the documented biases and failings of the mind instead of relying on heuristics and mental shortcuts that may disserve them. Consenting takes its toll and comes with a set of decisional burdens.

But unfortunately, these decisional consent burdens are not isolated or occasional. In a competitive market environment, the well-documented irrationality of people is exacerbated and in fact systematized

110. See Katz, *Game Theory*, *supra* note 87, at 288–89; Badawi, *supra* note 87, at 998; see also Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 703 (2007) (finding that most end-user license agreements had about five terms that were more pro-seller than the default rules contained in the Uniform Commercial Code (“UCC”)); Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665, 1670–73 (2012) (studying the impact of uneven bargaining power and information asymmetries on contractual nonprice terms).

111. See Badawi, *supra* note 87, at 998 (“This means that there are likely to be higher-quality contract terms that consumers would be willing to pay for, but reading costs stand in the way of parties striking these bargains.”).

112. See Christopher K. Hsee & Reid Hastie, *Decision and Experience: Why Don't We Choose What Makes Us Happy?*, 10 TRENDS COGNITIVE SCI. 31, 31 (2006). For classic behavioral economics writings about bounded rationality, see generally Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955); HERBERT A. SIMON, MODELS OF BOUNDED RATIONALITY 291–94 (1982); Daniel Kahneman & Amos Tversky, *Judgments of and by Representativeness*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 84–98 (Daniel Kahneman et al. eds., 1982); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

113. Hsee & Hastie, *supra* note 112, at 31, 33.

and entrenched into the backbone of the economy. According to behavioral economics, consumer markets are often shaped by an interaction between market forces and consumer psychology,¹¹⁴ and primarily through two avenues: First, consumers' decisions are impacted by their systematic misperceptions;¹¹⁵ and second, firms design their "products, contracts, and prices in response to these misperceptions."¹¹⁶ Behavioral economics explains how market forces create a race to the bottom by requiring firms to react to consumer psychology. A firm that ignores consumers' cognitive biases will lose the competition — for example, it will sell less or face greater costs than its competitors — meaning that over time, profitable firms in the market will be those that have adjusted their products, contracts, and prices to optimally respond to consumer psychology.¹¹⁷ Common adjustments include contract complexity and cost deferral,¹¹⁸ which contribute to the informational problems of complexity, quantity, and quality analyzed in the previous Section.

The market's systematic abuse of consumer biases is not a new phenomenon, and it places an additional burden on consumers in a consent regime.¹¹⁹ Thus, consumers face not only an internal struggle about how to spend time and resources to make decisions and overcome their personal miscalculations but also an external struggle with firms about how much time and resources they will have to spend and what psychological barriers they will need to overcome. Under these circumstances, instead of a collaborative environment where producers try to meet the needs of consumers, firms become consumers' adversaries. But while in "analog" consumer markets the exploitation of consumer biases could be quite easily separated from the products sold to consumers, that is no longer the case in digital markets. "If you are not paying for the product, you are the product" has become a common

114. BAR-GILL, *supra* note 106, at 6. For literature exploring the interaction between consumer psychology and market forces, see, for example, GEORGE A. AKERLOF & ROBERT J. SHILLER, PHISHING FOR PHOOLS 1–11 (2015); MICHAEL S. BARR, SENDHIL MULLAINATHAN & ELDAR SHAFIR, BEHAVIORALLY INFORMED FINANCIAL SERVICES REGULATION 2–3 (2008); RAN SPIEGLER, BOUNDED RATIONALITY AND INDUSTRIAL ORGANIZATION 1–8 (2011); Oren Bar-Gill, *Consumer Transactions*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 465–71 (Eyal Zamir & Doron Teichman eds., 2014).

115. BAR-GILL, *supra* note 106, at 7–9.

116. BAR-GILL, *supra* note 106, at 7–8; see also Ari Ezra Waldman, *A Statistical Analysis of Privacy Policy Design*, 93 NOTRE DAME L. REV. ONLINE 159, 161 (2018) (reporting a survey where respondents were asked to choose among websites that would better protect their privacy, finding that "[m]any survey respondents seemed to make their privacy decisions based on design rather than substance").

117. See BAR-GILL, *supra* note 106, at 16.

118. *Id.* at 8.

119. See generally *id.* (discussing firms' abuse of consumer biases in the cellular, credit card, and mortgage markets); Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197 (2008) (same, in financial markets); Shmuel I. Becher & Tal Z. Zarsky, *Seduction by Disclosure: Comments on Seduction by Contract*, 9 JERUSALEM REV. LEGAL STUD. 72 (2014) (critically analyzing disclosure as a solution to consumer biases).

catchphrase of our time for this reason.¹²⁰ The information economy leverages consumers' biases and misperceptions to impact consumers' attention, perceptions, and their willingness to share data and spend money — collectively, the product.¹²¹ This dynamic of persuasion and manipulation is well-documented: firms in digital markets use a host of “dark patterns” and other unscrupulous design ruses to skew and nudge decision-making in ways that benefit them.¹²² Thus, in digital markets, an already heavy decisional consent burden has risen to unprecedented levels.

When focusing specifically on questions of privacy, studies show that individuals do not make rational disclosure decisions online; cognitive biases derail their decision-making.¹²³ For example, individuals disproportionately rely on the first available information — like what other people have disclosed — when they make their own disclosure decisions (“anchoring”).¹²⁴ Another bias-creating effect is “framing.”

120. See, e.g., Scott Goodson, *If You're Not Paying for It, You Become the Product*, FORBES (Mar. 5, 2012, 12:34 PM), <https://www.forbes.com/sites/marketsshare/2012/03/05/if-youre-not-paying-for-it-you-become-the-product/?sh=434013a15d6e> [<https://perma.cc/L272-Y3RA>].

121. See generally TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2016) (exploring various ways by which firms attract and exploit consumer attention); JAMES WILLIAMS, STAND OUT OF OUR LIGHT: FREEDOM AND RESISTANCE IN THE ATTENTION ECONOMY 48 (2018) (exploring the risks of the digital attention economy to autonomy and democracy, highlighting that consumers/citizens became the product: “If we accept this broader view of attention as something akin to the operation of the human will, . . . then it’s hard to avoid viewing the attention economy as a project that ultimately targets and shapes the foundations of our politics. It is not merely the user, but indeed the citizen, who is the product.”).

122. See, e.g., Arvind Narayanan, Arunesh Mathur, Marshini Chetty & Mihir Kshirsagar, *Dark Patterns: Past, Present, and Future*, 63 COMM’NS ACM 42, 46 (2020); Arunesh Mathur et al., *Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*, 3 PROC. ACM ON HUM.-COMPUT. INTERACTION 1, 2 (2019); Waldman, *Cognitive Biases*, *supra* note 93, at 107; Jamie Luguri & Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43, 43 (2021); Lauren E. Willis, *Deception by Design*, 34 HARV. J.L. & TECH. 115, 116–17 (2020).

123. See, e.g., Alessandro Acquisti & Jens Grossklags, *What Can Behavioral Economics Teach Us About Privacy?*, in DIGITAL PRIVACY: THEORY, TECHNOLOGIES AND PRACTICES 363, 370–73 (Alessandro Acquisti et al. eds., 2008); Alessandro Acquisti, Laura Brandimarte & George Loewenstein, *Privacy and Human Behavior in the Age of Information*, 347 SCIENCE 509, 512 (2015); Alessandro Acquisti, *Privacy in Electronic Commerce and the Economics of Immediate Gratification*, 2004 PROC. FIFTH ACM CONF. ON ELEC. COM. 21, 22; see also James A. Mourey & Ari Ezra Waldman, *Past the Privacy Paradox: The Importance of Privacy Changes as a Function of Control and Complexity*, 5 J. ASS’N CONSUMER RSCH. 162, 177–78 (2020) (providing evidence that one’s subjective importance of privacy varies as a function of who controls the management of privacy and the perceived difficulty of managing privacy).

124. See Waldman, *Cognitive Biases*, *supra* note 93, at 106; Daphne Chang, Erin L. Krupka, Eytan Adar & Alessandro Acquisti, *Engineering Information Disclosure: Norm Shaping Designs*, CHI ’16: PROC. 2016 CHI CONF. ON HUM. FACTORS COMPUTING SYS. 587 (finding that showing people a set of images biased toward more revealing figures significantly increased the probability that they divulge personal information and that they advise others to do the same).

When firms positively frame a privacy policy (or their product or service) as more protective of privacy, it makes consumers more inclined to disclose personal information.¹²⁵ This explains Facebook's strategic wording analyzed above.¹²⁶ Firms also use negative framing to achieve a similar effect, for example telling consumers that "if [they] *don't* allow cookies, website functionality will be diminished."¹²⁷ Individuals also have an irrational tendency to over appreciate immediate consequences of a decision and underappreciate its future consequences ("hyperbolic discounting").¹²⁸ Disclosure of personal information is often immediately rewarded with convenience, access, or social engagement, while the risks or harms of disclosure are delayed and inadequately discounted at the moment of disclosure.¹²⁹ When the risks or harms materialize, it is already too late.¹³⁰ Attempts to overcome some of these biases by simplifying privacy disclosures and settings were not found to help.¹³¹

As we discussed in the previous Section, even under a "rationalistic" paradigm there are significant informational deficiencies that challenge individuals' rational privacy decision-making. Privacy decision-making involves inherent factual ambiguities: the nature of "privacy" is context-dependent and so are circumstances of disclosure;¹³² there is a lack of pertinent information and obscurity around data processing;¹³³ there is an overload of distracting information;¹³⁴ and privacy harms are often not self-evident or intuitive and can take time to

125. See Waldman, *Cognitive Biases*, *supra* note 93, at 106; Idris Adjerid, Alessandro Acquisti, Laura Brandimarte & George Loewenstein, *Sleights of Privacy: Framing, Disclosures, and the Limits of Transparency*, SOUPS '13: PROC. NINTH SYMP. ON USABLE PRIV. & SEC. 1, 2 (2013); Laura Brandimarte, Alessandro Acquisti & George Loewenstein, *Misplaced Confidences: Privacy and the Control Paradox*, 4 SOC. PSYCH. & PERSONALITY SCI. 340, 340 (2012).

126. See *supra* notes 74–82 and accompanying text.

127. Waldman, *Cognitive Biases*, *supra* note 93, at 106.

128. *Id.*

129. *Id.*

130. *Id.*

131. Alessandro Acquisti, Idris Adjerid & Laura Brandimarte, *Gone in 15 Seconds: The Limits of Privacy Transparency and Control*, 11 IEEE SEC. & PRIV. 72, 72 (2013) (footnote omitted) ("Researchers have long known about problems with confusing privacy settings or complex privacy policies. However, recent studies suggest that even simpler or more usable privacy controls and notices might fail to improve users' decision-making.").

132. See, e.g., HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2009) (arguing that privacy is contextual and information should be protected in relation to the various norms that govern distinct social contexts); Leslie K. John, Alessandro Acquisti & George Loewenstein, *Strangers on a Plane: Context-Dependent Willingness to Divulge Sensitive Information*, 37 J. CONSUMER RSCH. 858, 859 (2011); Alessandro Acquisti, Leslie K. John & George Loewenstein, *The Impact of Relative Standards on the Propensity to Disclose*, 49 J. MKTG. RSCH. 160 (2012); Bernardo A. Huberman, Eytan Adar & Leslie R. Fine, *Valuating Privacy*, 3 IEEE SEC. & PRIV. 22, 22 (2005).

133. See information quality discussion, *supra* Section II.C.1.

134. See information quantity discussion, *supra* Section II.C.1.

develop (a deferred cost of a sort).¹³⁵ Furthermore, privacy harms may arise or worsen due to the continuous accumulation of information by firms.¹³⁶ Estimating one’s potential harms from data aggregation over an undefined period of time is difficult, as is evaluating benefits versus costs in exposing an additional increment of personal data — particularly in the absence of information about current, continuing, or future derivative uses.

Of course, both cognitive challenges and informational deficiencies become an uphill battle when firms *intend* to mislead, using “dark patterns” that are designed to mislead consumers, a common practice nowadays.¹³⁷ Under these circumstances it becomes difficult to weigh costs and benefits when making privacy decisions, yielding an unreasonably high decisional consent burden in digital markets.

D. Ex Post Burdens: The Burdens of Having Consented

The second part of the consent burden materializes *ex post*, after a person is held to have consented to a market activity, and it encompasses the burdens that are associated with consent as a legal construct. An individual’s consent communicates an intention to transfer rights and obligations.¹³⁸ Consent thereby renders permissible what was before impermissible, creating *ex nihilo* obligations (assuming it is not outside of the boundaries of the law, e.g., under the unconscionability doctrine). When a person consents to the actions of another, they are held accountable for their consent and consequently their legal status changes. They now have an obligation they did not have before — to uphold that which they consented to — and this obligation constrains their rights and potential legal remedies. This constraint is part exogenous, emanating from the law — either contract law, tort law, or command-and-consent regulation — and part endogenous, arising from an internal mental commitment, with both parts contributing to the *ex post* consent burden.

1. Exogenous Ex Post Burdens

Metaphorically speaking, consent is a double-edged legal sword. Traditional law and economics theory holds consent to be the sword of

135. See Solove, *Consent Dilemma*, *supra* note 22, at 1890; Ryan Calo, *Privacy Harm Exceptionalism*, 12 *COLO. TECH. L.J.* 361, 361–62 (2014); Katherine J. Strandburg, *Free Fall: The Online Market’s Consumer Preference Disconnect*, 2013 *U. CHI. LEGAL F.* 95, 96.

136. See Solove, *Consent Dilemma*, *supra* note 22, at 1889–90.

137. See *supra* notes 119–22 and accompanying text.

138. Elizabeth Edenberg & Meg Leta Jones, *Analyzing the Legal Roots and Moral Core of Digital Consent*, 21 *NEW MEDIA & SOC’Y* 1804, 1805 (2019); see also Elettra Bietti, *Consent as a Free Pass: Platform Power and the Limits of the Informational Turn*, 40 *PACE L. REV.* 310, 317 (2020).

the individual against all others: it treats consent as an embodiment of autonomy and freedom of choice that facilitates democratic and competitive processes, and a solution to bad conduct by firms — in essence, a consumer power.¹³⁹ But the reality is that consent is often a sword used by firms against individuals. Relying on consent’s ex ante burdens (nobody reads or understands the fine print), firms have over the past several decades turned consent against many consumer rights. This conduct has effectively deleted those consumer rights with a mere “click of a button” as consumers accept depriving boilerplate terms, in what has been described as normative and democratic degradations.¹⁴⁰ Contract law’s “duty to read” doctrine has contributed to that effect: it imposes on consumers (as any other contracting party) an obligation to read and understand contracts.¹⁴¹ Courts apply the doctrine to consumer contracts, effectively binding consumers to unread and often exploitative boilerplate terms.¹⁴²

Depriving boilerplate terms are one expression of the ex post consent burden. This Section explores more fully the ways in which firms have taken advantage of the ex post consent burden and highlights two important points: the consent burden is not just a contract law problem, and it is not contained only in transactional stages. First, this problem also exists in tort law (e.g., the four privacy torts, trespass of chattels, and conversion) and under command-and-consent regulation. Because consent is embedded in the regulation of markets in a multi-strategic way — namely, as a material component of contract law, tort law, and command-and-consent regulation — it potentially creates ex post burdens in all three areas of law.

Second, firms wield the consent sword not only in the market arena in transactional stages but also in court. Beyond offering the least favorable terms to consumers, as we explored in Section II.C, industry enforces and entrenches its power over consumers in court by arguing that consumers cannot complain because they have “consented.” This Section explores how firms’ strategic use of consent mechanisms leads to cost-shifting and liability-shifting from firms to individuals: in a

139. See, e.g., *supra* notes 5–10 and accompanying text.

140. See RADIN, *supra* note 15, at 8 (describing how firms create “alternative legal universes” by drafting depriving contractual clauses on mandatory arbitration, choice of law and forum, limitation of liability, warranty disclaimers, default billing processes, and waivers of intellectual property and privacy rights); *id.* at 15–17 (describing resulting normative and democratic degradations); see also Waldman, *Privacy, Practice, and Performance*, *supra* note 33, at 1256–57; Julie E. Cohen, *Information Privacy Litigation as Bellwether for Institutional Change*, 66 DEPAUL L. REV. 535, 557–61 (2017); Hoofnagle et al., *Tethered Economy*, *supra* note 26, at 795–96.

141. See Katz, *Duty to Read*, *supra* note 87, at 518; John D. Calamari, *Duty to Read — A Changing Concept*, 43 FORDHAM L. REV. 341, 341–42 (1974); Charles L. Knapp, *Is There a “Duty to Read”?*, 66 HASTINGS L.J. 1083, 1088–89 (2015); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2255 (2019).

142. See *supra* note 138; Simkovic & Furth-Matzkin, *supra* note 84, at 239.

post-consent state, under the approach firms generally take it is the individual who bears the risk for many potential harms and damages, even though it is not the individual who created the risk in the first place.

In this regard, the content and boundaries of consent matter a lot. Consent to an “open-ended check” is markedly worse than narrow consent to limited conduct. The more dimensions to asked-for consent, the higher the stakes and the greater the resulting *ex post* consent burden.¹⁴³ Moreover, consenting to certain terms, like mandatory arbitration clauses, can significantly alter the way markets work.¹⁴⁴ Because courts are indispensable to facilitating and maintaining market competition and consumer rights, shifting disputes away from courts may lead to a decrease in the rule of law and less oversight over firms’ behavior.¹⁴⁵

a. The Multi-Strategic Nature of the Ex Post Consent Burden

I first examine how the *ex post* consent burden manifests not only in contract law but also in tort law and command-and-consent regulation, using privacy in digital markets as a test case. As consent became a crucial component of how scholars, regulators, and judges conceptualize “privacy,” it was baked into the legal definition of the right to privacy across various contexts. Consequently, when plaintiffs suffer privacy injuries and go to court, they often need to show that they did not “consent” to the conduct of firms, regardless of whether their legal claims are contractual,¹⁴⁶ are tort-based,¹⁴⁷ or stem from specific federal or state regulation.

For example, in the well-known and early case *In re JetBlue Airways Privacy Litigation*,¹⁴⁸ the class of plaintiffs argued that the airline

143. For a discussion on dimensional complexity in the context of *ex ante* burdens, see Section II.C.1.

144. RADIN, *supra* note 15, at 4–6, 8.

145. See, e.g., Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600, 607–08, 632–35 (2020) (suggesting that the use of contractual clauses compelling arbitration may have diminished the number of cases being adjudicated in court and, consequently, depressed the development of publicly available law in this area).

146. See, e.g., Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REG. 45, 49 (2019) (finding that it is more likely than not that a privacy policy will be considered a contract by a court, “by a ratio of less than three to one,” though this finding is based on a small sample of cases collected between 2004 and 2015); Omri Ben-Shahar & Lior Jacob Strahilevitz, *Contracting over Privacy: Introduction*, 45 J. LEGAL STUD. S1, S6 (2016) (“Many lawsuits for violations of privacy rights turn on the question of whether consumers truly consented to the standard-form contract terms that purport to grant the business the right to engage in its data practices.”).

147. See, e.g., *id.* at S6–S7 (“[A] prominent view [holds] that such [privacy consent] rules must come from the doctrine of informed consent in tort law . . .”).

148. 379 F. Supp. 2d 299 (E.D.N.Y. 2005).

had breached their privacy by disclosing the plaintiffs' personal information to third parties *without their consent*, (i) on common law contractual grounds, alleging that JetBlue's privacy policy constituted a "self-imposed contractual obligation" that JetBlue breached;¹⁴⁹ (ii) on tort-law grounds, alleging that JetBlue's conduct amounted to trespass of chattels;¹⁵⁰ and (iii) on regulatory grounds, alleging that JetBlue's conduct violated Section 2702 of the Electronic Communications Privacy Act of 1986¹⁵¹ by "divulging stored passenger communications without the passengers' authorization or consent."¹⁵²

This is a repeating pattern: plaintiffs often need to show they have not "consented" under either one of these three areas of the law or all of them (contracts, torts, and specific regulation) in order to maintain a claim of privacy injury.¹⁵³ Given the *ex ante* consent burdens we explored, this *ex post* requirement seems fantastic and completely detached from the reality of the market. Even when courts end up deciding that firms were in the wrong because they acted without consent,¹⁵⁴ this *ex post* finding — and the courts' focus on whether firms were acting with consent — gives credence and legitimacy to the assumption that consent is even capable of regulating the behavior of firms in digital markets. Additionally, because of the challenging *ex ante* burdens, including such phenomena as the no-reading problem,¹⁵⁵ nothing is stopping firms from drafting their fine print and privacy policies in a careful enough manner to block any future claims (under a "consent" paradigm).¹⁵⁶

149. *Id.* at 316–17.

150. *Id.* at 327.

151. 18 U.S.C. § 2702 (1986).

152. *In re JetBlue*, 379 F. Supp. 2d at 306.

153. See *infra* notes 157–82; see also WALDMAN, *supra* note 82, at 59 ("Big tech companies like Microsoft, Apple, Facebook, Google, and Amazon have submitted hundreds of motions to dismiss and motions for summary judgment on privacy-related claims against them based, at least in part, on user consent . . .").

154. See, e.g., *McCoy v. Alphabet, Inc.*, No. 20-cv-05427, 2021 WL 405816 (N.D. Cal. Feb. 2, 2021). There, plaintiffs sued Google for collecting their personal data from non-Google apps on Android smartphones to gain a (non-)competitive edge in the market against its rivals. *Id.* at *1. Google asserted "an overarching argument that the Complaint should be dismissed in its entirety because Defendant disclosed its data collection practices in its Privacy Policy, and Plaintiff consented to that policy." *Id.* at *4. Judge van Keulen rejected this argument, holding that Facebook's privacy policy was "susceptible to more than one interpretation" and therefore consent was not established. *Id.* at *6 (quoting *In re Facebook, Inc. Consumer Privacy User Profile Litig.*, 402 F. Supp. 3d 767, 789 (N.D. Cal. 2019)).

155. See *supra* notes 84–87 and accompanying text.

156. See, e.g., *Hammerling v. Google LLC*, 615 F. Supp. 3d 1069, 1095 (N.D. Cal. 2022). On facts almost identical to those in the *McCoy* case, *supra* note 154, Judge Breyer dismissed plaintiff's breach of contract claims, holding that "[a]lthough the Court agrees with *McCoy* that Google plausibly lacked consent, the Court respectfully disagrees that this means Google plausibly breached a contract. The question is whether Google breached anything that it promised, not whether Google did anything it did not promise. . . . Plaintiffs argue that Google 'expressly promised to disclose all the data it collected and for what purposes.' . . . However, the Privacy Policy states only that 'the activity information [Google] collect[s] may include

b. How the Consent Sword Is Wielded by Firms in Court

Second, I examine how firms have used consent in court to undermine consumer claims. In the information economy, as Waldman notes, “wherever consent is operable[,] . . . it is both a weapon of data extraction and a shield against accountability.”¹⁵⁷ Under the data industry paradigm, consumer consent to the entirety of tech platforms’ data practices is involuntarily assumed when using any portion of their services, shifting the responsibility for adverse results to consumers themselves.¹⁵⁸ In other words, consumers go to court claiming they have not consented to firms’ conduct, and firms’ respond by claiming the exact opposite, that consumers’ “consent” is precisely what legitimizes firms’ conduct.

Let us see how the consent sword is being wielded by Facebook. In 2019, as Facebook attempted to dismiss a lawsuit for its part in the Cambridge Analytica scandal and its unlawful sharing of user data, the company’s attorney boldly argued before Judge Chhabria that “[t]here is no privacy interest” in the information users share over Facebook¹⁵⁹ and that “Facebook does not consider . . . [the sharing of personal information with third parties] to be actionable.”¹⁶⁰ Why? Because users consented to Facebook’s terms and conditions¹⁶¹ and “this [was] not[] . . . forced or coerced sharing. This [was] sharing with the consent and knowledge of users.”¹⁶² Arguing that the court should accept that Facebook’s users consented to “layered disclosures, in combination”¹⁶³ that took an experienced judge “hundreds of hours” to read and understand,¹⁶⁴ the attorney quipped that the law does not “treat Facebook users as imbeciles.”¹⁶⁵ And brazenly recharacterizing Facebook’s lengthy and “layered” privacy policy as short and simply privacy-negating, the attorney said, “[m]y point, though, is that having been told ‘There is no expectation of privacy,’ you can’t cry foul.”¹⁶⁶

[a]ctivity on third-party sites and apps that use [Google’s] services,” and thus the fact that Google collected further information did not violate the policy. *Id.*

157. Waldman, *Privacy, Practice, and Performance*, *supra* note 33, at 1257.

158. *See id.* at 1258.

159. Transcript of Proceedings at 7, *In re Facebook, Inc. Consumer Priv. User Profile Litig.*, 402 F. Supp. 3d 767 (N.D. Cal. 2019) (No. 18-MD-02843); *see also* Waldman, *Privacy, Practice, and Performance*, *supra* note 33, at 1257.

160. *Id.* at 15.

161. *Id.* at 12–13. Facebook also argued that “under centuries of common law,” sharing information with friends on social media “negate[s] any reasonable expectation of privacy.” *Id.* at 7.

162. *Id.* at 51.

163. *Id.* at 30.

164. *Id.* at 36.

165. *Id.* at 34–35.

166. *Id.* at 34.

This is not an isolated example. In *Campbell v. Facebook*,¹⁶⁷ Facebook was sued for scanning and collecting data from users' private messages on the platform, but it argued that users lacked standing to sue because they had "consented."¹⁶⁸ In *Smith v. Facebook*,¹⁶⁹ the company was sued for tracking its users everywhere they went on the Internet — in particular, when they visited healthcare websites — and for collecting sensitive personal data that it could sell to advertisers or use in targeted advertising.¹⁷⁰ Facebook argued extensively that because users "consented," they were barred from suing and Facebook was allowed to track them anywhere they go on the Internet.¹⁷¹ In *Patel v. Facebook*,¹⁷² Facebook was sued for its collection and use of facial biometric information.¹⁷³ The company argued that plaintiffs were not harmed and therefore lacked standing to sue because they "knew exactly what data Facebook was collecting, for what purpose, and how to opt out of Tag Suggestions."¹⁷⁴ The refuge Facebook took in user "consent" to its data policy was so profound that it overcame (in Facebook's mind) the fact that it did not comply with specific requirements under the Illinois Biometric Information Privacy Act.¹⁷⁵

In the recently settled *In re Facebook, Inc. Internet Tracking Litigation*,¹⁷⁶ Facebook yet again used "consent" to legitimize its conduct. In a ten-year-long case in which Facebook was sued for its covert, omnipresent surveillance of users, intercepting their Internet communications and activity after they were logged out of their accounts,¹⁷⁷ Facebook argued that it had "consent" under federal and California wiretapping laws because "Facebook only received a copy of the referer

167. 951 F.3d 1106 (9th Cir. 2020).

168. *Id.* at 1119.

169. 745 F. App'x 8 (9th Cir. 2018).

170. *Id.* at 2.

171. Appellee's Brief at 16–21, *Smith*, 745 F. App'x 8 (No. 17-16206). In a similar fashion, Google moved to dismiss all claims about unauthorized use of cookie tracking and unlawful interception of user data by arguing that "both Plaintiffs and the websites they communicated with provided their consent to Google . . . when they sent a GET request . . . so that they could browse websites containing Google ads." Answering Brief of Defendant-Appellee at 36–37, *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, No. 13-4300, 2014 WL 1413954 (3d Cir. 2014).

172. 932 F.3d 1264 (9th Cir. 2019).

173. *Id.* at 1267.

174. Appellant's Brief at 33, *Patel*, 932 F.3d 1264 (No. 18-15982).

175. *See id.* at 31–33; *Patel*, 932 F.3d at 1269, 1271, 1274–75; *In re Facebook Biometric Info. Priv. Litig.*, 326 F.R.D. 535, 545–47 (N.D. Cal. 2018), *aff'd sub nom*, *Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019).

176. 956 F.3d 589 (9th Cir. 2020); Bonnie Eslinger, *Facebook's \$90M Deal to End Privacy Lawsuit Gets Early OK*, LAW360 (March 31, 2022, 6:42 PM), <https://www.law360.com/articles/1479626> [<https://perma.cc/D2D6-U7BS>].

177. *In re Facebook Internet Tracking Litig.*, 140 F. Supp. 3d 922, 927–28 (N.D. Cal. 2015).

[sic] URL because [users'] browsers sent it to Facebook.”¹⁷⁸ Facebook went further, noting that “Plaintiffs’ assertion that they were unaware that their computers were sending referrer URLs to Facebook is irrelevant.”¹⁷⁹

The common theme of Facebook’s court arguments is the following: you do not have privacy because we said (somewhere in our fine print) that you do not have privacy, and by saying it we made it happen, because you will consent (and have consented) to anything we say. That is quite an unabashed position given Facebook’s proffered information and representations about its privacy-preserving features, which we reviewed above.¹⁸⁰ It demonstrates how consent is being wielded not for but against consumers, and why consent can be problematic not only as a decision-making means because it creates *ex ante* burdens but also because it creates *ex post* legal burdens. While the *ex post* consent sword may or may not be successful in terms of the end decision of the court,¹⁸¹ many cases end up in settlement without reaching a final judgment.¹⁸² Either way, this line of attack poses a challenge for consumers, resulting in potential (if successful) and guaranteed (in litigation) cost- and liability-shifting from firms to consumers and thwarting consumers’ ability to assert their rights in court.

2. Endogenous Ex Post Burdens

There is another quite troubling *ex post* effect of a consent regime. Empirical scholarship of recent years demonstrates that consent processes create an inhibiting psychological effect: people who have consented to unlawful terms in the fine print — without reading them beforehand and despite being given false representations prior to transacting — believe that they cannot exercise or litigate their lawful rights

178. Defendant Facebook, Inc.’s Motion to Dismiss Plaintiffs’ Second Amended Consolidated Class Action Complaint at 14, *In re* Facebook Internet Tracking Litig., 263 F. Supp. 3d 836 (N.D. Cal. 2017) (No. 12-md-02314).

179. *Id.*

180. See *supra* notes 74–77 and accompanying text.

181. For a discussion of how two judges on the same court considering almost identical facts can reach different outcomes on the question of consent to a privacy policy and the implications for the plaintiff’s case, see *supra* notes 154, 156.

182. According to Westlaw Litigation Analytics, which provides statistics covering the past five years (2018–2023), almost fifty percent of Data Privacy cases filed in federal courts get dismissed (“uncontested dismissal”), and about thirty percent of cases are settled. Seven percent of cases reach a dispositive motion, fewer than one percent reach a verdict, fifteen percent of cases are “docketed elsewhere,” and six percent of cases fall under “other.” Westlaw Precision, *Data Privacy*, THOMSON REUTERS, [https://1.next.westlaw.com/Analytics/Profiler?docGUID=Intellectual%20Property%20%26%20Technology%20%7C%3E%7C%20Data%20Privacy&contentType=casetype&view=partyOutcomeReport&dataOrchGUID=a3a2a0f85a6644e387d2e157b26ab268&transitionType=LegalLitigation&contextData=\(sc.Default\)#/casetype/Intellectual%20Property%20%26%20Technology%20%7C%3E%7C%20Data%20Privacy/partyOutcomeReport](https://1.next.westlaw.com/Analytics/Profiler?docGUID=Intellectual%20Property%20%26%20Technology%20%7C%3E%7C%20Data%20Privacy&contentType=casetype&view=partyOutcomeReport&dataOrchGUID=a3a2a0f85a6644e387d2e157b26ab268&transitionType=LegalLitigation&contextData=(sc.Default)#/casetype/Intellectual%20Property%20%26%20Technology%20%7C%3E%7C%20Data%20Privacy/partyOutcomeReport) [https://perma.cc/5NGZ-XU94].

and that they are bound by their consent to the fine print nonetheless.¹⁸³ These findings reveal that consent to the fine print psychologically discourages consumers from complaining, taking legal action, or publicizing what had happened (to reputationally harm unscrupulous firms) — and the fact that a firm used deceptive tactics prior to obtaining consumers' consent has little effect on consumers' beliefs about the obligatory strength of their consent.¹⁸⁴ Moreover, informing consumers about consumer protection laws does not completely offset this psychological effect.¹⁸⁵ This internal mental commitment to uphold consent — even when it is unfounded, empty, or patently unlawful — is added on top of the already challenging exogenous ex post burdens that are built into the legal system.

III. HOW IS THE CONSENT BURDEN AFFECTED BY REGULATION?

Building on the new conceptualization of consent's shortcomings as burdens, this Part adopts a wider lens, investigating the effect regulation has on the consent burden. The analysis finds that there is mostly an *inverse relationship* between the consent burden and the level of regulation in a market, with the consent burden being higher in markets with a lower level of regulation. But surprisingly, the analysis also finds that there is an exception to this rule: what this Article calls command-

183. See Furth-Matzkin & Sommers, *supra* note 99, at 508–10; see also Roseanna Sommers, *Contract Schemas*, 17 ANN. REV. L. SOC. SCI. 293, 298 (2021); Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 ALA. L. REV. 1031, 1035–36, 1058 (2019) (showing that tenants are significantly less likely to complain, search for online information, or take action against a defiant landlord after reading a contract containing unenforceable contract terms); Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1, 38–40 (2017) (showing that tenants consult their leases when a rental problem arises but often refrain from taking action or complaining even though these leases frequently contain unenforceable clauses).

184. See Furth-Matzkin & Sommers, *supra* note 99, at 516–17 & nn.58–61; Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 GEO. L.J. 5, 12–15 (2011); see also Shmuel I. Becher, Yuval Feldman & Meirav Furth-Matzkin, *Toxic Promises*, 63 B.C. L. REV. 753, 759 (2022); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 148–49 (2017); Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1297–98 (2015); Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843, 853 (2012); Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1747–49 (2014). Indeed, we cannot be certain that consumers' internal views about unlawful terms to which they have consented (endogenous ex post burdens) are completely detached from the caselaw (exogenous ex post burdens). Consumers could be influenced by their perceptions of what courts will decide, and they could also be intimidated by the thought of going to court and enduring the costs involved in that process. However, this body of research indicates that there is at least a part of consumers' internal views that stems from consumers' inherent formalism, or mental commitment, toward consent and contracts.

185. Furth-Matzkin & Sommers, *supra* note 99, at 508–09.

and-consent regulation. Unlike substantive regulation, command-and-consent regulation does not reduce the consent burden; it may even increase it. Adopting command-and-consent regulation may lead to the following dynamic: while at first glance it looks like the regulator has intervened to help consumers, the intervention leaves firms with a similar amount of power compared to no intervention at all (i.e., only market-based control).¹⁸⁶ Appreciating the rule (inverse relationship) and its exception (command-and-consent), the consent burden can be used as a single but comprehensive metric for analyzing the allocation of rights and power in consumer markets and how much a regulator has really intervened in the market. When the consent burden is high, firms are likely too powerful and the regulator has likely intervened too little, or ineffectively. In some cases, the intervention might even have the opposite effect of entrenching the harmful behavior instead of preventing it.

A. An Inverse Relationship Between the Consent Burden and Regulation

Under more classic models of regulation, the regulator controls firm behavior by imposing prohibitions and proscriptions, i.e., direct (command-and-control) regulation, shifting liability rules, or curbing harmful behavior through economic instruments that provide incentives for the desired behavior.¹⁸⁷ The more a regulatory regime does so the higher the level of regulation in the market. The means can be varied, but importantly, the result of this kind of regulation is that certain potentially or previously permitted behavior is barred or significantly de-incentivized. As the scope of possible firm behavior shrinks, the scope of firm conduct to which consumers may consent shrinks as well. What regulation does not cover is left to individual consent (under market conditions), and what regulation covers is not. In other words, what regulation does not cover is a vacant space for firms to fill with extra-regulatory power.¹⁸⁸ Importantly, as discussed in Part II, the more dimensions to asked-for consent (the fewer dimensions covered by regulation) like price, quality, long-term effects (e.g., long-term privacy ramifications or vendor lock-in), and the more attached legal obligations and waivers, the bigger the scope of the consent burden. A high level of regulation eases the burden by eliminating or limiting some of these potential dimensions.

186. See Karen Yeung, *Government by Publicity Management: Sunlight or Spin?*, 1 PUB. L. 360, 367–68 (2005).

187. See *supra* notes 43–46 and accompanying text.

188. See, e.g., Hoofnagle et al., *Tethered Economy*, *supra* note 26, at 796 (“While some courts have started to push back[,] . . . the trend in recent decades is to allow firms to create private legislation through license terms and other documents.”).

Thus, there is an inverse relationship: increased regulation reduces the need of an individual market participant to obtain and process information before making an informed rational decision, which yields a lower ex ante informational burden. The reason is that the more a market is regulated, the more dimensions of the transaction are pre-determined by regulation, which in effect eases or removes the individual's need to know. The opposite is also true: the less a market is regulated, the more room there is for firms' unrestricted offerings and related potential individual choice. This increases the individual's need to know and be informed in more areas and thus yields a higher ex ante informational burden. As the ex ante informational burden increases (or decreases), so does the ex ante decisional burden.

An example of this inverse relationship is the following scenario. A person needs medical assistance and goes to the doctor. The doctor checks the patient's symptoms, evaluates their condition, and based on their professional knowledge suggests taking a certain prescription drug. The market for pharmaceuticals is highly regulated. The patient does not need to survey drugs on their own; the doctor, a gatekeeper for the consumption of prescription drugs, does that for them. Further, the specific drug that the doctor then prescribes has already been vetted and approved by the U.S. Food & Drug Administration ("FDA") based on extensive medical trials. While the patient still needs to evaluate the drug's potential benefits and risks before consenting to take the drug, there is a significant amount of professional information that is not part of the patient's decision-making process, as it was already processed for the patient by the FDA and the doctor. Therefore, the patient needs to acquire far less information than they would have but for the regulation. In other words, regulation lowers the patient's consent burden.¹⁸⁹

Let us zoom in on FDA authority. The FDA is the market's gatekeeper — it regulates drugs' safety, effectiveness, and quality — and it thereby materially reduces a patient's consent burden. It is helpful to recognize that the FDA did not always exist. At the turn of the twentieth century, no federal regulation protected the public from dangerous drugs or limited anyone from selling anything as a drug: "It was a menacing marketplace filled with products such as William Radam's Microbe Killer and Benjamin Bye's Soothing Balmy Oils to cure cancer Products like these were, at minimum, useless remedies that picked the pocket of the user, but they could also be downright

189. I am not suggesting that the patient's consent burden is low in absolute terms. Some medications, for example, involve considerable risks and consenting to taking them could be a difficult choice. But the patient's consent burden is lower relative to the alternative decision-making process sans regulation.

harmful.”¹⁹⁰ The first federal drug law was passed in 1906,¹⁹¹ but it lacked crucial features.¹⁹² Following a defeat for government enforcement in the Supreme Court in 1911,¹⁹³ the law was changed in 1912.¹⁹⁴ But the revised law was still materially lacking, and the government would lose again trying to enforce the law against dangerous and fraudulent sale of drugs.¹⁹⁵

It was not until 1938 that revised legislation was passed,¹⁹⁶ following the death of 107 people from a poisonous ingredient in Elixir Sulfanilamide, a chemical similar to antifreeze now used in cars.¹⁹⁷ Only then did Congress introduce the requirement that manufacturers demonstrate a drug’s safety before it could be marketed.¹⁹⁸ And it was not until 1962, following the thalidomide crisis in Europe,¹⁹⁹ that manufacturers were required to prove not only safety but also efficacy and to do so using well-controlled studies — a “revolutionary requirement” at the time.²⁰⁰ This is recent history, and the lesson still applies today. Individuals cannot be expected to figure out on their own which drugs are safe, effective, and relevant to their condition. Relying solely on “consent” mechanisms would achieve little in regulating firm behavior and incentivizing the production of good drugs. Absent FDA regulation, the consent burden on each patient would be unreasonably high, essentially impeding any rational fact-based decision-making.

There are many other examples of the inverse relationship in different markets, where a higher level of regulatory intervention reduces the consent burden. These include regulating ground and air traffic, automobile safety (e.g., seatbelts and air bags), food safety, workplace

190. Michelle Meadows, *Promoting Safe and Effective Drugs for 100 Years*, 40 FDA CONSUMER, Jan.–Feb. 2006, at 15 (quoting John Swann, Ph.D., historian of the FDA, as he described the market).

191. Pure Food and Drugs Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) (repealed 1938).

192. Meadows, *supra* note 190, at 16.

193. *United States v. Johnson*, 221 U.S. 488 (1911) (holding that the Pure Food and Drugs Act did not permit the government to seize medicine misleadingly labeled as a cure for cancer).

194. Meadows, *supra* note 190, at 16.

195. *Id.* at 16–17.

196. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399i (1938).

197. Meadows, *supra* note 190, 16–17.

198. *Id.* at 17.

199. *Id.* (“Thalidomide had been marketed as a sleeping pill by the German firm Chemie Grunenthal, and was associated with the birth of thousands of malformed babies in Western Europe.”).

200. *Id.*; *see also id.* (“In the years before 1962, Senator Estes Kefauver had held hearings on drug costs, the sorry state of science supporting drug effectiveness, and the fantastic claims made in labeling and advertising,” Temple says. “Well-known clinical pharmacologists explained the difference between well-controlled studies and the typical drug study. With the FD&C Act “in play” because of thalidomide, Congress had the opportunity to make major changes.”).

conditions, and the prohibition on insider trading in financial markets, to name just a few.²⁰¹ As economist Andrei Shleifer puts it:

[T]oday we live in a . . . more regulated society, and . . . as consumers we are generally happy with most of the regulations that protect us. We are happier knowing that trains and airplanes are safe than savouring the thought of a fortune which our loved ones would collect in a trial should we die in a fiery crash [I]nvestors prefer a level-playing-regulated field to the prospect of loss recovery through litigation [Our theory should] recognize[] the benefits of public involvement in at least some activities²⁰²

For the ex post consent burden, the inverse relationship means that the higher the level of regulation, the less the individual can be asked to consent to and thus the scope of consenting to harmful conduct decreases. In our medical example, the fact that the patient consented to use the drug does not absolve the doctor's liability if they prescribed the wrong drug for the patient's condition, nor does it absolve the drug manufacturer's liability if the drug was lacking or harmful in some respect.

The inverse relationship also suggests an opposite scenario, where the consent burden is increased due to a lower level of regulatory intervention. One example is markets for social media and online search, which involve the dual problems of privacy and content moderation. We have explored how privacy and rights in personal information are not substantively regulated in digital markets but rather "contracted for" under terms unfavorable to consumers using presumed "consent" arrangements.²⁰³ The practical effect is that swaths of information flow from individuals to firms, for firms' mostly unhindered use and manipulation. In social media and search markets, this informational lawlessness is complemented and intensified by Section 230 of the Communications Decency Act,²⁰⁴ which absolves firms of liability for

201. Modern public economics and the relative growth of regulation across markets are to a great extent based on the public interest theory of regulation. Also called the "helping hand" theory, this theory supposes first that unrestricted markets often fail due to monopoly power or negative externalities and second that governments can correct these market failures through top-down social planning. Shleifer, *supra* note 41, at 439–42. *See generally* ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920) (developing the public interest theory of regulation, and arguing that negative externalities could be corrected by imposing a tax ("Pigouvian tax")).

202. Shleifer, *supra* note 41, at 441–42 (citations omitted).

203. *See supra* Part II.

204. 47 U.S.C. § 230.

their main use of such information: pushing (others’) content and serving (others’) ads.²⁰⁵ Since the consent burden in these markets is insurmountable, as Part II reveals, “consensual” arrangements fail to provide significant control over firms. This lacking regulatory environment invites harms and costs to individuals and society, and indeed such harms and costs have been increasingly documented in recent years.²⁰⁶

B. An Exception to the Rule: Command-and-Consent Regulation

While a high level of regulation is typically the cure for an excessive consent burden, not all regulations equally produce oversight over firms’ behavior and reduce the consent burden. There are regulations that produce a high consent burden or that fail to lower it. These generally belong to the command-and-consent type of regulation.

An example of this scenario is the regulatory regime established by Europe’s General Data Protection Regulation (“GDPR”).²⁰⁷ While consent was already an important part of GDPR’s predecessor (the 1995 EU Directive),²⁰⁸ the GDPR, adopted in 2016 and made effective in 2018, doubled down on consent,²⁰⁹ reinforcing and adding to the requirements for valid consent.²¹⁰ Under the GDPR, firms are required to show they have a legal basis for any data collection and processing they perform, and the language of the regulation suggests that consent is the

205. See, e.g., *Calise v. Meta Platforms, Inc.*, No. 21-cv-06186, 2022 WL 1240860 (N.D. Cal. Apr. 27, 2022); see also Danielle K. Citron, *How to Fix Section 230*, B.U. L. REV. (forthcoming).

206. See Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 800 (2022); Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737, 739 (2018).

207. As the GDPR is quite complex, in terms of both law “on the books” and enforcement “on the ground,” I limit my analysis of the GDPR to how it increases the consent burden.

208. Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, arts. 2(h), 7(a), 1995 O.J. (L 281) 31, 39–40 [hereinafter Directive]; see also Cate, *supra* note 52, at 360.

209. To crudely quantify some of this effect, the Directive uses the term “consent” twelve times, Directive, *supra* note 208, while the GDPR uses the term seventy-two times, GDPR, *supra* note 17. For the GDPR’s increased focus on consent, see, for example, Woodrow Hartzog & Neil Richards, *There’s a Lot To Like About the Senate Privacy Bill, if It’s Not Watered Down*, HILL (Dec. 6, 2019, 11:00 AM), <https://thehill.com/opinion/technology/472892-theres-a-lot-to-like-about-the-senate-privacy-bill-if-its-not-watered> [<https://perma.cc/BHV4-XRRG>] (“Unfortunately, though, COPRA also takes on many of the same shortcomings of existing data protection frameworks such as the GDPR that over-leverage concepts of consent, notice and choice.”); Meera Narendra, *#PrivSecNY: Tim Wu on GDPR and Data Privacy Practices in the US*, PRIVSEC REP. (Nov. 18, 2019), <https://web.archive.org/web/20210120064915/https://gdpr.report/news/2019/11/18/privsecny-tim-wu-on-gdpr-and-data-privacy-practices-in-the-us/> (“I don’t think that GDPR is the right model for the United States. I think it’s overly consent-driven and doesn’t change enough.”); Hartzog & Richards, *Constitutional Moment*, *supra* note 50, at 1719, 1727–28 (2020); Ari Ezra Waldman, *Privacy Law’s False Promise*, 97 WASH. U. L. REV. 773, 795 (2020).

210. See GDPR, *supra* note 17, art. 4(11) (defining consent), art. 7 (describing the conditions necessary for consent to be valid). For the right to withdraw consent, see *id.* art. 7(3).

gold standard: “In order for processing to be lawful, personal data should be processed on the basis of the *consent* of the data subject concerned *or some other legitimate basis, laid down by law . . .*”²¹¹ And out of the five other legal bases in GDPR’s closed list, one other is also consent based: the presence of a contract with, or the request of, the data subject.²¹²

Further, and increasingly raising the consent burden on data subjects, the GDPR requires that consent to data processing “be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject’s agreement Silence, pre-ticked boxes or inactivity should not therefore constitute consent When the processing has multiple purposes, consent should be given for all of them.”²¹³ Much ink was spilled on the GDPR’s creation of an overwhelming wave of consent requests and pop-ups, resulting in user fatigue and desensitization to privacy concerns.²¹⁴ In response to the fortification of consent under the GDPR, some scholars have even suggested that “[t]he GDPR requires high-quality consent, on par with important life decisions, such as consent to

211. *See id.* recital 40 (emphasis added), art. 6(1)(a).

212. *See id.* art. 6(1)(b) (“[P]rocessing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.”); *id.* recital 44 (“Processing should be lawful where it is necessary in the context of a contract or the intention to enter into a contract.”). *But see* Press Release, European Data Protection Board, Facebook and Instagram Decisions: “Important Impact on Use of Personal Data for Behavioural Advertising” (Jan. 12, 2023), https://edpb.europa.eu/news/news/2023/facebook-and-instagram-decisions-important-impact-use-personal-data-behavioural_en [<https://perma.cc/7TEZ-7FAL>]. The European Data Protection Board (“EDPB”) describes its recent binding dispute resolution decisions and subsequent decisions by the Irish Data Protection Authority adopting such EDPB decisions finding that Facebook’s and Instagram’s processing of personal information for behavioral advertising in reliance on Article 6(1)(b) was done unlawfully. *Id.* The decisions hold that instead of using the legal basis of necessity for the performance of a contract with a data subject, Meta should have used specific consent. *Id.* Meta was fined €210 million in the Facebook decision and €180 million in the Instagram decision. *Id.*

213. GDPR, *supra* note 17, recital 32, art. 4(11); *see also* EUR. DATA PROT. BD., GUIDELINES 05/2020 ON CONSENT UNDER REGULATION 2016/679 12 (2020), https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf [<https://perma.cc/RLQ4-CW7B>].

214. *See, e.g.,* Kate Fazzini, *Europe’s Sweeping Privacy Rule Was Supposed To Change the Internet, but So Far It’s Mostly Created Frustration for Users, Companies, and Regulators*, CNBC (May 5, 2019, 6:00 AM), <https://www.cnbc.com/2019/05/04/gdpr-has-frustrated-users-and-regulators.html> [<https://perma.cc/D5A5-8NGB>] (“Among some consumers, GDPR is perhaps best known as a bothersome series of rapid-fire, pop-up privacy notices.”); Jack Schofield, *What Should I Do About All the GDPR Pop-Ups on Websites?*, GUARDIAN (July 5, 2018, 11:01 AM) <https://www.theguardian.com/technology/askjack/2018/jul/05/what-should-i-do-about-all-the-gdpr-pop-ups-on-websites> [<https://perma.cc/5BED-XGPU>] (“Because of GDPR, it feels as though my internet access — my access to information — is now more restricted. I am constantly being interrupted by pop-ups that want me to agree to the website’s privacy policy, use of my data and so on, in order to ‘personalise my experience’. [Sic] After recent revelations about unauthorised use of personal data, I’m wary of agreeing without checking what their proposals are, but I often just close the page because there are too many options and it’s too much of a bother.”).

medical treatment.”²¹⁵ But requiring such high-quality consent for every website, software, or application used daily amounts to an extremely high consent burden. And this excessive consent burden applies under the GDPR for “regular” personal data, as well as for particularly sensitive personal data (such as about race or ethnic origin)²¹⁶ and data used for automated processing and profiling.²¹⁷

In apparent self-awareness, the GDPR requires that the request for consent be “clear, concise and not unnecessarily disruptive to the use of the service for which it is provided.”²¹⁸ These requirements attest to the severity of the consent burden, but they do not lift or diminish it, for it is not the clarity of the request for consent that alone creates the consent burden.²¹⁹ There is also a measure of self-contradiction in requiring granular consent to a highly complex issue and in parallel requiring that the request for consent be simple and not disruptive. As we explored in Part II, the consent burden results from the combination of *ex ante* (informational and decisional) and *ex post* (exogenous and endogenous) burdens. I posit that the way the market is currently structured, the consent burden cannot be ameliorated without changes to regulation itself, and these changes must react to the real inability of people to make voluntary and fact-based decisions in this space. Regulation that is based on consent is doomed to fail while allowing the existing harms of digital markets such as online search and social media to continue.²²⁰

Some scholars have suggested that it is a myth that the GDPR is solely focused on consent and that in any event, consent under the GDPR is more robust than its American counterpart.²²¹ This argument can be understood in a couple of ways. First, it can be understood as

215. Chris Jay Hoofnagle, Bart van der Sloot & Frederik Zuiderveen Borgesius, *The European Union General Data Protection Regulation: What It Is and What It Means*, 28 INFO. & COMM’NS TECH. L. 65, 68 (2019).

216. *See* GDPR, *supra* note 17, recital 51, art. 9.

217. *See id.* at recital 71, art. 22.

218. *Id.* recital 32; *see also id.* recitals 39, 42, 58, 60, arts. 7(2), 12(1), 12(7).

219. Furthermore, empirical studies show that the GDPR did not improve and might even have decreased the readability of privacy policies. *See, e.g.*, Shmuel I. Becher & Uri Benoliel, *Law in Books and Law in Action: The Readability of Privacy Policies and the GDPR*, in 9 CONSUMER LAW AND ECONOMICS, ECONOMIC ANALYSIS OF LAW IN EUROPEAN LEGAL SCHOLARSHIP 197 (Klaus Mathis & Avishalom Tor eds., 2021) (finding that the improvement in the readability score of privacy policies since the GDPR came into effect has been “rather scant and slow”); Gregor Dorfleitner, Lars Hornuf & Julia Kreppmeier, *Promise not Fulfilled: FinTech, Data Privacy, and the GDPR*, in 9359 CESIFO WORKING PAPERS 1, 3 (Clemens Fuest ed., 2021), https://www.cesifo.org/DocDL/cesifo1_wp9359.pdf [<https://perma.cc/4DZW-DZWX>] (finding that the readability scores of privacy policies have decreased since the passage of the GDPR).

220. *See also* Richards & Hartzog, *Pathologies*, *supra* note 22, at 1473 (“[H]ard-coding consent through legal or technical code is fraught at best. It also probably makes things worse because it offers an illusion of control that dulls impetus for meaningful change while entrenching the pathologies of the concept into the very design of information technologies.”).

221. Jones & Kaminski, *supra* note 50, at 109. *But see* COHEN, *supra* note 28, at 262.

saying that among the legal bases under which firms may process data, consent is just one (and not the most common one). Second, it can be understood as saying that the role of consent is limited to providing a legal basis, but the GDPR includes much more than requiring firms to have a legal basis for data processing.

As for the first point, while rigorous empirical examination is still wanting in this space, it is fair to assume that consent remains the leading legal basis for processing, together with but likely more so than the legitimate interest alternative in Article 6(f) of the GDPR.²²² Notably, the legitimate interest legal basis is not “consent-free,” as it includes a right to object that is akin to an opt-out consent mechanism.²²³ But the number of consent pop-ups,²²⁴ the fact that legitimate interest is legally complicated and involves a three-part balancing test,²²⁵ and the partial application of the EU ePrivacy Directive²²⁶ make it reasonable to as-

222. *Id.* (“Most businesses subject to the GDPR process personal data either under the individual consent ground or the legitimate interest ground.”).

223. See GDPR, *supra* note 17, art. 21; EUR. DATA PROT. BD., GUIDELINES 8/2020 ON THE TARGETING OF SOCIAL MEDIA USERS 18 (2021), https://edpb.europa.eu/system/files/2021-04/edpb_guidelines_082020_on_the_targeting_of_social_media_users_en.pdf [<https://perma.cc/GJA2-Q9MN>] [hereinafter EDPB GUIDELINES 8/2020] (“The EDPB recalls that in cases where a controller envisages to rely on legitimate interest, the duties of transparency and the right to object require careful consideration. Data subjects should be given the opportunity to object to the processing of their data for targeted purposes before the processing is initiated.”).

224. See *supra* note 214 and accompanying text.

225. See, e.g., Case C-40/17, *Fashion ID GmbH & Co. KG v. Verbraucherzentrale NRW eV*, ECLI:EU:C:2019:629, ¶ 95 (July 29, 2019); see also EDPB GUIDELINES 8/2020, *supra* note 223, at 17 (“[I]n *Fashion ID*, the [Court of Justice of the European Union] reiterated that in order for a processing to rely on the legitimate interest, three cumulative conditions should be met, namely (i) the pursuit of a legitimate interest by the data controller or by the third party or parties to whom the data are disclosed, (ii) the need to process personal data for the purposes of the legitimate interests pursued, and (iii) the condition that the fundamental rights and freedoms of the data subject whose data require protection do not take precedence Even if the targeter [sic] and the social media provider consider their economic interests to be legitimate, it does not necessarily mean that they will be able to actually rely on Article 6(1)(f) GDPR.”); Article 29 Data Prot. Working Party, *Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller Under Article 7 of Directive 95/46/EC*, 844/14/EN, at 3 (Apr. 9, 2014) https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf [<https://perma.cc/AW6H-5SLB>] (emphasizing that “[legitimate interest] should not be treated as ‘a last resort’ for rare or unexpected situations,” nor should it be “automatically chosen” or “unduly extended” due to a perception that it is less constraining than other grounds).

226. See, e.g., Konrad Kollnig et al., *Before and After GDPR: Tracking in Mobile Apps*, 10 INTERNET POL’Y REV. 1, 4 (2021) (“[T]he 2009 ePrivacy Directive . . . covers the privacy of electronic communications and includes rules on the use of cookies and related tracking technologies. Under Article 5(3) of the ePrivacy Directive, third-party tracking typically requires consent as it involves accessing or storing data that is not strictly necessary for delivering the app or service’s functionality on a user’s device [E]ven if it might otherwise be lawful to process data in third-party tracking under the GDPR without consent (e.g. using an alternative lawful basis like legitimate interests), the ePrivacy Directive would still require consent.”).

sume that consent is the main legitimation vehicle for firms' data practices (to the extent firms are not non-compliant²²⁷). GDPR enforcement actions by national EU Data Protection Authorities ("DPAs")²²⁸ also suggest that consent as a legal basis is heavily relied on by firms (and specifically industry leaders like Facebook, Google, and Amazon) and that problems with consent result in the highest of fines.²²⁹

227. See, e.g., Konrad Kollnig et al., *A Fait Accompli? An Empirical Study into the Absence of Consent to Third-Party Tracking in Android Apps*, 2021 PROC. SEVENTEENTH SYMPO. ON USABLE PRIV. & §. 181, 181–82; Rosa Barcelo & Matúš Huba, *EU Supervisory Authorities Led by the Belgian DPA Find IAB Europe's TCF Infringes EU Data Protection Rules*, 12 NAT'L L. REV. (Feb. 10, 2022), <https://www.natlawreview.com/article/eu-supervisory-authorities-led-belgian-dpa-find-iab-europe-s-tcf-infringes-eu-data> [<https://perma.cc/DD8X-7HTU>].

228. The EU has not yet established a database for GDPR enforcement decisions made by national DPAs. The following analysis is based on the online dataset maintained by CMA, an international law firm that collects and archives public GDPR enforcement cases from across the EU. *GDPR Enforcement Tracker*, CMS, <https://enforcementtracker.com> [<https://perma.cc/78X5-DU72>] [hereinafter CMS Database].

229. As of March 25, 2022, the CMS Database included a total of 1,105 entries of enforcement decisions from across the EU. *Id.* Based on a textual search in the CMS Database, 394 decisions found insufficient legal basis for data processing, 163 decisions discussed "consent," and only 19 decisions discussed "legitimate interest." *Id.* In addition, the CMS GDPR Enforcement Tracker Report, which analyzed enforcement trends up to early 2021, shows that the top ten fines are mostly attributed to insufficient legal basis for processing and lack of consent. CMS, *GDPR ENFORCEMENT TRACKER REPORT* (2d ed. 2021), <https://web.archive.org/web/20230121103430/https://cms.law/en/deu/publication/gdpr-enforcement-tracker-report/numbers-and-figures>. Seven out of the top ten fines are attributed to insufficient legal basis for processing, with five decisions directly finding lack of valid consent and the other two decisions discussing surveillance of employees in the workplace. *Id.*

Analyzing the updated CMS Database as of March 25, 2022, the top ten fines include eight decisions that find lacking consent and transparency, six of them new compared to the 2021 report. *Id.*; CMS Database, *supra* note 228. These decisions are the following: (1) The Luxembourg National Commission for Data Protection ("CNPD") fined Amazon Europe Core S.à.r.l. €746,000,000 on July 16, 2021, *see* CMS Database, *supra* note 228, <https://etid.link/ETid-778> [<https://perma.cc/W4UC-RTMX>]; *see also* Alice O'Donovan, *CNPD vs. Amazon, the Largest GDPR Fine on Record – What Do We Know so Far?*, JD SUPRA (Aug. 16, 2021), <https://www.jdsupra.com/legalnews/cnpd-vs-amazon-the-largest-gdpr-fine-on-7214477/> [<https://perma.cc/YPE2-UED8>] (explaining that lack of valid consent is likely the reason for the fine, the details of which are currently mostly nonpublic); (2) The Data Protection Commission of Ireland fined WhatsApp Ireland Ltd. €225,000,000 following the conclusion of a multi-DPA dispute resolution process under Article 65 GDPR on September 2, 2021, *see Data Protection Commission Announces Decision in WhatsApp Inquiry*, DATA PROT. COMM'N (Sept. 2, 2021), <https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-announces-decision-whatsapp-inquiry> [<https://perma.cc/Y879-PVZN>]; (3) The French Data Protection Authority ("CNIL") fined Google LLC €90,000,000 on December 31, 2021, *see* CMS Database, *supra* note 228, <https://etid.link/ETid-978> [<https://perma.cc/9AYC-84DY>]; (4) The CNIL fined Facebook Ireland Ltd. €60,000,000 on December 31, 2021, *see* CMS Database, *supra* note 228, <https://etid.link/ETid-980> [<https://perma.cc/STSQ-MA3X>]; (5) The CNIL fined Google Ireland Ltd. €60,000,000 on December 31, 2021, *see* CMS Database, *supra* note 228, <https://etid.link/ETid-979> [<https://perma.cc/XMM6-DKKE>]; (6) The CNIL fined Google LLC €50,000,000 on January 21, 2019, *see* CMS Database, *supra* note 228, <https://etid.link/ETid-23> [<https://perma.cc/S7CZ-T9X9>]; (7) The Italian Data Protection Authority ("Garante") fined TIM (a telecommunications operator) €27,800,000 on January 15, 2020, *see* CMS Database, *supra* note 228, <https://etid.link/ETid-1891> [<https://perma.cc/Y27L-Q6FS>]; (8) Garante fined Enel Energia S.p.A €26,500,000 on December 16, 2021, *see* CMS Database, *supra* note 228,

To the second point (that the GDPR does more than require firms to have a legal basis for data processing), there are indeed additional mechanisms that the GDPR employs. For our purposes, I suggest roughly dividing these mechanisms into two categories: individual control rights²³⁰ and other compliance mechanisms. Regarding individual control rights, which are central to the GDPR,²³¹ I suggest understanding them as being part of a broader consent regime — not in the strict sense of how the GDPR defines “consent,” but in the more general sense of how consent operates as a control mechanism in markets.²³² For example, the right to access information about oneself supports the basic consent underlying the entire transaction; more information about the firm’s conduct is meant to support continued informed consent or to inform consent withdrawal.²³³ Other examples are the rights to ask to erase or rectify information about oneself which, when used, are equivalent to saying, “I do not consent to what is being done with my information.”²³⁴ Hence, these control rights, potentially and effectively (to the extent they are used) facilitate the “consent” of the individual to the firm’s offering and conduct. Beyond that, the burdens involved in the fairly passive act of consenting are no less if not *more* challenging in the relatively active acts of exercising such control rights.²³⁵ Ultimately, for these reasons, we should examine individual control rights

<https://etid.link/ETid-1005> [<https://perma.cc/JJ83-QCMB>]; see also Jukka Ruohonen & Kalle Hjerpe, *The GDPR Enforcement Fines at Glance*, 106 INFO. SYS., May 2022, at 6 (finding for the period until September 24, 2020 that “Articles [5 and 6] of the GDPR] have been the most frequently referenced ones in the enforcement decisions This observation is not surprising; these two articles are perhaps the most fundamental ones among the ninety-nine articles laid down in the GDPR. Article [5] specif[ies] the accountability criterion and the mandate to be able to demonstrate compliance Article [6] . . . specifies the six conditions under which the lawfulness of processing personal data can be established Thus, it is no real wonder that as many as 67% of the enforcement decisions have referenced either [5, 6, or both of these.]”).

230. See GDPR, *supra* note 17, ch. III.

231. See, e.g., *id.* recital 7 (declaring that one of the GDPR’s key purposes is to ensure that “[n]atural persons should have control of their own personal data”); Woodrow Hartzog, *The Case Against Idealising Control*, 4 EUR. DATA PROT. L. REV. 423, 424–25 (2018) (finding privacy-as-control rights to be a dominant common thread among the tech industry, scholars, professional organizations, privacy advocates, lawmakers, regulators, and judges, with the GDPR, the ePrivacy Directive, and the CCPA being prime examples).

232. See *supra* Part II.

233. See GDPR, *supra* note 17, art. 15.

234. See *id.* arts. 16–17.

235. See Daniel J. Solove, *The Limitations of Privacy Rights*, 8 NOTRE DAME L. REV. (forthcoming 2023) (manuscript at 5, 10–17) (on file with author) [hereinafter Solove, *Limitations of Privacy Rights*] (explaining why personal rights provided in privacy regulations systematically fail); Ari Ezra Waldman, *Privacy’s Rights Trap*, 117 NW. U. L. REV. ONLINE 88, 93–105 (2022) [hereinafter Waldman, *Privacy’s Rights Trap*] (criticizing the argument that privacy rights are an effective means of regulating the data-extractive economy). For similar though not identical individual control rights, see California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 1798.105, 1798.106, 1798.110, 1798.115, 1798.120, 1798.121, 1798.130, 1798.135 (a right to request information about what is being collected about consumers and whether any such information is being sold or disclosed to third parties; a right to

under the consent burden framework. As with consent regimes, individual control rights shift most burdens to consumers, thus contributing to the high consent burden in digital markets, and they are likely to fail for the same reasons explicit consent fails.

Regarding the category of other compliance mechanisms (not explicit consent or individual control rights), the GDPR does impose certain extra-consensual obligations on firms,²³⁶ like security, data protection by design and by default, and impact assessment requirements,²³⁷ which have the potential to reduce the consent burden by substantively limiting firm conduct without resorting to consent or control mechanisms. However, thus far it seems that these parts of the GDPR have not substantially altered market dynamics or reduced the consent burden,²³⁸ and not everyone is optimistic that they can.²³⁹ Since 2018, when the GDPR came into effect, firms, consumers, and DPAs have been adjusting and reacting to each other's moves in a process that is still ongoing. As market dynamics under the GDPR are still evolving, as is enforcement policy by DPAs, it remains to be seen whether the market can be shifted to a point where the consent burden is ultimately reduced, with more substantive privacy provided for individuals. It also remains to be seen what impact the new EU regulatory approach will

opt out of the sale or sharing of consumers' personal information; a right, subject to limitations, for consumers to request deletion of personal information collected; a right to correct inaccurate personal information; and a right to limit use and disclosure of "sensitive personal information").

236. Specifically, on consent, Article 9(2)(a) of the GDPR states that Union law or Member State law may provide that even explicit consent shall not be a satisfying legal basis for the processing of certain sensitive personal data. GDPR, *supra* note 17, art. 9(2)(a).

237. *See id.* arts. 25, 32, 35 (discussing data protection by design and by default, security of processing, and data protection impact assessment, respectively); *see also* Margot E. Kaminski & Gianclaudio Malgieri, *Algorithmic Impact Assessments Under the GDPR: Producing Multi-Layered Explanations*, 11 INT'L DATA PRIV. L. 125, 127–129 (2021) (arguing in favor of data protection impact assessments, explaining that they advance algorithmic accountability on two fronts, individual rights and systemic governance). *But see* Waldman, *New Privacy Law*, *supra* note 28, at 33 (criticizing compliance requirements like impact assessments); Ari Ezra Waldman, *Data Protection by Design? A Critique of Article 25 of the GDPR*, 53 CORNELL INT'L L.J. 147, 149 (2020) (criticizing another of these mechanisms, i.e., arguing that the GDPR's approach to privacy by design is lacking); Ari Ezra Waldman, *Privacy's Law of Design*, 9 U.C. IRVINE L. REV. 1239, 1240–45 (2019) (arguing that it is unclear what "privacy by design" really means and proposing a model for what it should mean based on products liability for design defects).

238. *See, e.g.*, Kollnig et al., *supra* note 226, at 2–3 (finding, based on a study of third-party tracking in nearly two million Android apps from before and after the GDPR's passage, that there was only limited change and that the concentration of tracking capabilities among a few large companies persists); Midas Nouwens, Ilaria Liccardi, Michael Veale, David Karger & Lalana Kagal, *Dark Patterns After the GDPR: Scraping Consent Pop-Ups and Demonstrating their Influence*, 2020 CHI CONF. ON HUM. FACTORS COMPUTING SYS. 1 (finding that new consent management platforms ("CMPs") have been introduced to conform with GDPR's requirements but also that the designs of the most popular CMPs are embroiled with dark patterns and implied consent and only 11.8% meet the minimal legal requirements).

239. *See, e.g.*, Waldman, *New Privacy Law*, *supra* note 28, at 22–23, 30–35.

have on the information economy²⁴⁰ and on the level of the consent burden and privacy in digital markets.

* * * * *

The starting point of Part III's analysis was that of an inverse relationship between the level of regulation and the consent burden in a market. However, we now see that command-and-consent regulation requires a refinement of that rule: the consent burden is inversely related to the level of meaningful, extra-consensual, regulatory oversight in a market, i.e., the extent of hard proscriptions and prohibitions or effective incentives that take some firm behaviors out of the question and which firms cannot bypass by resorting to consent mechanisms. The result of this analysis is that consent-based regulatory schemes may not produce meaningful regulatory oversight and may be burdensome for individuals no less than they are for firms. This is because first, consent-based regulatory schemes often enable too much and require too little of firms, which may lead to consumer exploitation. And in the case that there are some rules that attempt to direct the behavior of firms to protect consumers, the coexistence of consent mechanisms may allow firms to bypass or override those consumer protections by the mere attainment of empty (and easy-to-obtain) consumer consent. Second, consent mechanisms shift many of the transactional burdens to consumers, thus subjecting consumers to additional costs — both *ex ante* and *ex post* — to no end. This is true even if these consent mechanisms also create some burdens for firms (such as the requirement to provide lengthy and complex disclosures). Command-and-consent regulation can thus be burdensome to *both* firms and consumers at the same time; while command-and-consent may appear to benefit consumers — e.g., the GDPR — it may fall into the pattern of using consent as a control mechanism in the market, where it is prone to fail.

As the analysis shows, the GDPR includes both command-and-consent and potentially more robust oversight mechanisms. Thus far it seems that the command-and-consent part of the GDPR has been more dominant. To achieve substantive privacy and control over firms and the harms they produce, I posit that the consent burden must be reduced

240. See, e.g., *EU Digital Markets Act and Digital Services Act Explained*, EUR. PARLIAMENT NEWS (July 5, 2022, 1:53 PM), <https://www.europarl.europa.eu/news/en/headlines/society/20211209STO19124/eu-digital-markets-act-and-digital-services-act-explained> [<https://perma.cc/6G64-CTNR>] (describing the recent enactment of the Digital Markets Act and the Digital Services Act); Mitzi László, Gregory Narr, Velislava Hillman, Nick Couldry & Russell Newman, *4 Ways the New EU Digital Acts Fall Short and How to Remedy It*, MEDIUM (July 5, 2022), <https://medium.com/@gregerwinnarr/4-ways-the-new-eu-digital-acts-fall-short-and-how-to-remedy-it-d16b681a88bc> [<https://perma.cc/ZP5A-ELTQ>] (arguing that deficiencies in EU Digital Acts will hamper their effectiveness).

by strengthening extra-consensual “hard” obligations on firms and decreasing the reliance on consent/control mechanisms. This applies to both the European and the American markets.

Thus far, the Article has discussed a new framework that fleshes out the burdens (both *ex ante* and *ex post*) for consumers that result from consent-based regimes. It has then analyzed the type of regulation that can lower those burdens and the type of regulation that may seem to work to the benefit of consumers but actually does not, for the same reasons that consent fails. Part III has demonstrated the usefulness of the consent burden framework for analyzing different regulatory approaches and evaluated different approaches that hold more and less promise in dealing with the consent burden. Ultimately, the weight of the consent burden is on a spectrum; it can be lower or higher, depending not only on informational and decisional circumstances but also on the regulatory setup. While some regulations appear pro-consumer, they may not actually benefit consumers because they perpetuate the consent burden and even engrave it in regulation.

IV. ACCOUNTING FOR THE CONSENT BURDEN WILL CHANGE REGULATORY LOGIC

In previous Parts, this Article explored the prevalence of consent mechanisms in consumer and digital markets, developed an analytic framework for uncovering and comprehending the burden that consent imposes on individuals, and consequently showed the likelihood of failure to regulate some markets via consent. It then analyzed the possibility of remedying this failure with regulation, which turns on the type of regulation, *i.e.*, whether it is command-and-consent (likely failure) or substantive regulation (likely success). Based on the consent burden framework, this Part proposes a novel way forward: that regulators, legislators, and policymakers account for the consent burden when designing regulation — the same way they routinely account for the regulatory burden on firms. I first develop an analogy between the consent burden and the regulatory burden and then provide one way of conducting a consent burden review: through a diagnostic process that includes a set of questions for evaluating the consent burden likely to be created by a proposed regulatory regime.

Before setting out this Article’s proposed solution, it is worth considering previous proposals to resolve problems with consent. The failure of consent has long been a concern due to the prevalence of one-sided terms that favor firms and the lack of consumer negotiation

power, most evident in take-it-or-leave-it contracts.²⁴¹ In response, scholars and regulators have argued for more or improved disclosures and better drafting of terms (in purpose of recovering informed consent),²⁴² defining default rules,²⁴³ and further developing judicial doctrines such as unconscionability.²⁴⁴ However, more, simpler, or “better” disclosures often do not help because of a high ex ante consent burden.²⁴⁵ Default rules sometimes work,²⁴⁶ but they also may turn out too slippery (too easy to opt out) or too sticky (too difficult to opt out), to the detriment of consumers, again due to a high ex ante consent burden.²⁴⁷ And judicial doctrines such as unconscionability develop slowly and variedly, and the general direction courts have taken is to legitimize

241. See, e.g., Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1174–76 (1983) (suggesting that contracts of adhesion be held presumptively unenforceable due to power asymmetries between firms and individuals).

242. See, e.g., NANCY KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 176 (2013) (proposing “a duty to draft reasonably; replacing blanket assent with specific assent; considering contract function when applying existing doctrinal rules, and reinvigorating unconscionability”); BAR-GILL, *supra* note 106, at 37–41 (discussing various types of disclosures as solutions); Sunstein, *Empirically Informed Regulation*, *supra* note 15, at 1411 (advocating for the use of disclosure regimes); CASS R. SUNSTEIN, OFF. OF INFO. & REGUL. AFFS., MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, DISCLOSURE AND SIMPLIFICATION AS REGULATORY TOOLS 3 (2010), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/info/reg/disclosure_principles.pdf [<https://perma.cc/7A22-2MS7>] (same) [hereinafter OIRA Memo 2010].

243. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (providing “a theory of how courts and legislatures should set default rules”); THALER & SUNSTEIN, *supra* note 6, at 158, 188–89 (introducing and advocating for “nudges” as an application of the default-rules approach); Sunstein, *Empirically Informed Regulation*, *supra* note 15, at 1411 (advocating for the use of defaults); OIRA Memo 2010, *supra* note 242, at 9–12 (same); Badawi, *supra* note 87, at 995, 1006–07 (suggesting making default rules more seller friendly in order to improve outcomes for consumers).

244. See, e.g., KIM, *supra* note 242, at 176; Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 285 (1995) (“reject[ing] the view that all voluntary contracts should be enforced”); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003) (advocating for “greater use of mandatory contract terms and judicial modification of the unconscionability doctrine” in response to the one-sidedness of consumer contracts).

245. See *supra* Section II.C; see also BEN-SHAHAR & SCHNEIDER, *supra* note 72, at 123 (describing the failure of simplification), 138–50 (arguing that even if simplification were helpful, it would likely be defeated by the growing expansion of disclosures across markets).

246. See, e.g., Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 SCIENCE 1338 (2003) (investigating the effect of defaults on organ donation agreement rates and finding a strong effect of the default, i.e., that having donation as the default increased donation agreement rates).

247. See Willis, *supra* note 49, at 1174–1210 (describing the conditions that make defaults slippery); James J. Choi, David Laibson, Brigitte C. Madrian & Andrew Metrick, *Defined Contribution Pensions: Plan Rules, Participant Choices, and the Path of Least Resistance*, 16 TAX POL’Y AND ECON. 67, 81 (2002) (describing evidence of sticky defaults); see also Ben-Shahar & Strahilevitz, *supra* note 146, at S3–S4, S7–S9; Bar-Gill & Ben-Shahar, *supra* note 25, at 580–84; Willis, *Privacy*, *supra* note 49; Oren Bar-Gill & Omri Ben-Shahar, *Optimal Defaults in Consumer Markets*, 45 J. LEGAL STUD. S137, S139–41 (2016).

rather than denounce empty consent,²⁴⁸ essentially imposing a high ex post consent burden. In sum, previously proposed solutions to part of the problem — boilerplate contracts — have not resolved it or ameliorated the consent burden.²⁴⁹

But contracts are not the whole story. As we have explored, consent is an important element in tort law and it has become central to regulatory regimes in consumer markets. The regulatory tool of mandated disclosure — which as we explored is a command-and-consent mechanism — is heavily used by regulators and has also (unproductively) surfaced many times in response to the problem of depriving boilerplate contracts. The consent burden framework elucidates why mandated disclosure is often a poor solution, specifically for the problem of depriving boilerplate contracts: by enhancing the ideal of consent, mandated disclosure perpetuates the same power and information imbalances that cause the consent burden to begin with, without solving them. It is like trying to reduce sodium levels in food by using finer rather than coarser grains of salt, instead of decreasing the amount of salt used. To level the playing field, we need to replace “consent” with more robust rules.

A. Analogizing the Consent Burden to the Regulatory Burden

This Article proposes thinking about the consent burden imposed on individuals the same way we think about the regulatory burden imposed on firms: individuals participate in the market subject to their consent burden just as firms participate in the market subject to their regulatory burden. Thus, this Section first compares the consent burden to the regulatory burden, revealing that they have some commonalities but also some opposite effects. It then looks at how regulators have routinely considered the effects of proposed regulation on the regulatory burden and argues that they should similarly consider the effects

248. See Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 824, 827 (2020) (discussing empirical findings pointing to low success rate of unconscionability claims and canvassing unconscionability’s philosophical and legal roots, finding that much of the modern doctrine is about “consent” and autonomy in contract formation); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–51 (7th Cir. 1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996); see also Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 460 (2006) (“[A]n increasing number of courts have enforced ‘browsewrap’ licenses, in which the user does not see the contract at all but in which the license terms provide that using a Web site constitutes agreement to a contract whether the user knows it or not.”).

249. Additionally, Radin suggested a novel tort treatment. See RADIN, *supra* note 15, at 197–216 (proposing that abusive boilerplate could either be treated as a defective product or regulated under a new tort of intentional deprivation of legal rights). Simkovic and Furth-Matzkin suggested a Pigouvian tax to make firms internalize the attention costs they impose on consumers. See Simkovic & Furth-Matzkin, *supra* note 84, at 234–35. While these solutions have the potential to reduce the consent burden in boilerplate contracts, they have not been tested thus far.

of proposed regulation on the consent burden. Additionally, this Section will show that the consent burden was *increased* over time due to regulators' wishes to *reduce* the regulatory burden.

The regulatory burden is comprised of the costs firms incur by complying with regulation.²⁵⁰ These costs result from regulatory requirements including environmental and labor law, safety and quality standards, price and entry controls (such as import restrictions), licensing needs, disclosure law, reporting obligations, and acquiring legal and accounting services to comply with regulation.²⁵¹ That is not to say that there are no other costs for firms in the market. But these costs originate from a regulatory intervention, and they may impact firms' entry into markets, lead to reduction of output, or induce firms to exit the market, thereby potentially affecting market-wide prices, productivity, innovation, investment, employment, and growth.²⁵²

The two burdens have some commonalities. The consent burden may, like the regulatory burden, impact entry of individuals into the market: consent is supposed to be the entry gate. Additionally, the consent burden can affect individuals' decisions to exit (withdraw consent) in response to changes, such as firms' unilateral changes to the terms and conditions of an ongoing transaction or consumer relationship (a common practice among websites and online services).²⁵³ Both burdens represent the unique rules of the game for the two sides of a market transaction: firms participate subject to the regulatory burden, and individuals participate subject to the consent burden. There is one main difference, however. While the risk from an excessive regulatory burden is leaving some firms out of the market to the detriment of overall welfare, the main risk from an excessive consent burden is the opposite: potentially dragging and locking in individuals against their best interests and overall welfare. Neither result is good.

Thus far, despite mounting evidence, it seems that the consent burden has largely been ignored by regulators. But regulators have long

250. This definition focuses on the regulatory burden for a single firm and does not include what can be called "budgeted costs" of a country's regulatory efforts, which entail spending taxpayer funds on carrying out regulatory programs. See Thomas D. Hopkins, *Regulatory Costs in Profile*, 31 POL'Y SCIS. 301, 303 (1998); Dieter Helm, *Regulatory Reform, Capture, and the Regulatory Burden*, 22 OXFORD REV. ECON. POL'Y 169, 169 (2006).

251. See, e.g., Hopkins, *supra* note 250, at 301.

252. See, e.g., Dinissa Duvanova, *Bureaucratic Discretion and the Regulatory Burden: Business Environments Under Alternative Regulatory Regimes*, 42 BRITISH J. POL. SCI. 573, 573–74 (2012); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

253. See, e.g., Kate O'Flaherty, *Facebook's New Privacy Policy — What You Need To Know*, FORBES (May 27, 2022, 10:14 AM), <https://www.forbes.com/sites/kateoflahertyyuk/2022/05/27/facebook-new-privacy-policy-what-you-need-to-know/?sh=3f1c2457f84c> [https://perma.cc/9MEZ-TVBP].

evaluated the regulatory burden: it is routinely considered in governmental regulatory review and cost-benefit analysis of regulation,²⁵⁴ in what “has arguably become the most important institutional feature of the regulatory state.”²⁵⁵ Regulatory review is a tool to evaluate the likely consequences of proposed regulation by estimating both its costs and benefits and its alternatives, with regulation being supported only when the benefits “justify” the costs.²⁵⁶ While some attribute the origin of regulatory review to President Ronald Reagan in the early 1980s, its roots can be traced to the late 1960s.²⁵⁷ Through the years and presidential terms, regulatory review developed an anti-regulatory bent with a built-in assumption that agency regulations often represent costly overregulation.²⁵⁸ The fear of excessive regulation has been historically focused on the regulatory burden experienced by firms and was influenced by industry advocacy.²⁵⁹ Over time, the goal of lowering the regulatory burden has been implemented in Presidential Executive Orders,²⁶⁰ acts of Congress,²⁶¹ and the establishment of the Office of

254. See, e.g., James C. Miller III, *The Early Days of Reagan Regulatory Relief and Suggestions for OIRA's Future*, 63 ADMIN. L. REV. 93, 97–98 (2011).

255. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1260 (2006); see also Cass R. Sunstein, *The Cost-Benefit State I* (Coase-Sandor Inst. for L. & Econ., Working Paper No. 39, 1996) (“Gradually and in fits and starts, the American regulatory state is becoming a cost-benefit state. By this I mean that government regulation is increasingly assessed by asking whether the benefits of regulation justify the costs of regulation.”).

256. Exec. Order No. 12,866 § 1(b)(6), 3 C.F.R. 638, 639 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 102 (2018).

257. Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 39 (2011).

258. Bagley & Revesz, *supra* note 255, at 1260; see Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RES. L. 1, 5 (1984); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (1995). See generally Tozzi, *supra* note 257 (covering the history and development of regulatory review during the presidential terms of Presidents Johnson, Nixon, Ford, Carter, and Reagan).

259. See, e.g., Bagley & Revesz, *supra* note 255, at 1265; Olson, *supra* note 258, at 60–62; Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way To Write a Regulation*, 99 HARV. L. REV. 1059, 1065 (1986).

260. See, e.g., Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (revoked 1993); Exec. Order No. 12,866, *supra* note 256; Exec. Order No. 13,132, 3 C.F.R. §§ 206, 208 (2000), *reprinted in* 5 U.S.C. § 601 at 93–95 (2012); Exec. Order No. 13,258, 3 C.F.R. 204 (2003) (revoked 2009); Exec. Order No. 13,422, 3 C.F.R. 191 (2008), *revoked by* Exec. Order No. 13,497, 3 C.F.R. 218 (2010), *reprinted in* 5 U.S.C. § 601 app. at 115 (2012); Exec. Order No. 13,563, 3 C.F.R. §§ 215, 216 (2012), *reprinted in* 5 U.S.C. § 601 app. at 115–16 (2018); Exec. Order No. 13,609, 3 C.F.R. § 255 (2012), *reprinted in* 5 U.S.C. § 601 app. at 118–20 (2018); Exec. Order No. 13,610, 77 Fed. Reg. 28,496 (May 10, 2012), *reprinted in* 5 U.S.C. § 601 app. at 120 (2018); Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

261. See, e.g., Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501–3520; Congressional Review Act, 5 U.S.C. §§ 801–808; Regulatory Flexibility Act, 5 U.S.C. §§ 601–612; Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501–1571.

Information and Regulatory Affairs (“OIRA”) as a meta-regulator conducting centralized regulatory review.²⁶²

Moreover, the consent burden has increased over time due to regulators’ efforts to reduce the regulatory burden. Executive Order 12,866 — issued by President Bill Clinton in 1993 and one of the foundational sources governing regulatory review — directs agencies “to foster the development of effective, innovative, and least burdensome regulations”²⁶³ and to “identify and assess available alternatives to direct regulation, including . . . providing information upon which choices can be made by the public.”²⁶⁴ In 2011, President Barack Obama issued Executive Order 13,563, establishing five new principles to guide regulatory decision-making. One among them was that agencies should identify and consider “flexible approaches” to problems, including warnings and disclosure requirements.²⁶⁵ The Order endorses such approaches, explaining that they “reduce burdens and maintain flexibility and freedom of choice for the public.”²⁶⁶

Relatedly, in 2010, then-OIRA Administrator Cass Sunstein issued a memorandum titled “Disclosure and Simplification as Regulatory Tools,” encouraging and guiding agencies to use disclosure(-and-consent) as a preferred regulatory tool.²⁶⁷ Addressing the cost-benefit analysis of disclosure-and-consent regimes, the memorandum notes that a quantitative analysis may be hard to conduct and “involve a high degree of speculation.”²⁶⁸ Thus, the memorandum suggests a “qualitative discussion,” and it notes that “[i]n assessing benefits, agencies should consider the fact that improvements in welfare are a central goal of disclosure requirements, but should also note that informed choice is a value in itself (even if it is difficult to quantify that value).”²⁶⁹ Under this approach, informed choice is assumed to be a *realized* benefit, and

262. See, e.g., Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1839, 1841 (2013); Susan E. Dudley, *The Office of Information and Regulatory Affairs and the Durability of Regulatory Oversight in the United States*, 16 REGUL. & GOVERNANCE 243, 253 (2022).

263. Exec. Order No. 12,866 § 6(a)(2), 3 C.F.R. 638, 639 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 104 (2018).

264. *Id.* § 1(b)(3); see also *id.* § 6(a)(3)(C)(iii) (directing agencies to analyze “potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions”).

265. Exec. Order No. 13,563, *supra* note 260, § 1.

266. *Id.* § 4.

267. See OIRA Memo 2010, *supra* note 242, at 3 (“The goal of disclosing such information is to provide members of the public with relevant information at the right moment in time, usually when a decision is made. Often that decision is whether to purchase a particular product.”).

268. *Id.* at 6.

269. *Id.*

the costs to consumers from disclosure-and-consent regimes are ignored.²⁷⁰ These costs are precisely those that the consent burden framework analyzes and exposes, alongside opportunity costs from not having alternative rights-enhancing regulation.

In 2011, another memorandum called for the adoption of “smart disclosure[s],”²⁷¹ setting out guidance for agencies to further facilitate the use of disclosure as regulatory means. The memorandum noted that “[u]nder relevant statutes, disclosure is one of the chief tools that agencies can use to improve the operation of consumer markets,” elaborating the benefits of smart disclosure and highlighting that “[c]onsumers will frequently be able to make better choices when they have accurate information about the economic consequences of those choices.”²⁷²

Evidently, thus far, the consent burden has largely been invisible to regulators, while the regulatory burden has long been considered by them. This one-sidedness has skewed regulation in markets, leaving too much power in the hands of firms under the guise of empowering and promoting consumer choice. Bringing the consent burden into the equation reveals this fallacy. I argue that if regulators consider both the regulatory burden and the consent burden, they will adopt better regulation that will effectively advance the values that current consent-based regulation only purports to advance. The following Section proposes a way for regulators to consider the consent burden.

B. Consent Burden Review: Fundamental Questions for Regulators

How does one assess the consent burden? In this Section, I propose a consent burden review: a set of diagnostic questions that regulators should address before choosing a consent-based regime as the main control mechanism in a market. These questions should be applied to a specific proposed regulatory regime; I use the case of privacy and pri-

270. See also CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* 124–26 (2018) (discussing cost-benefit analysis of mandatory disclosure on the consumer side and noting “a quite low” “[s]mall [c]ognitive [t]ax” on the part of reading and processing information but highlighting a few forms of “hedonic” taxes and losses from learning that some preferred choices are less healthy than others).

271. CASS R. SUNSTEIN, OFF. OF INFO. AND REGUL. AFFS., *MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, INFORMING CONSUMERS THROUGH SMART DISCLOSURE* 1–2 (2011), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/inforeg/inforeg/for-agencies/informing-consumers-through-smart-disclosure.pdf [<https://perma.cc/W5YC-WNZD>] (“[T]he term ‘smart disclosure’ refers to the timely release of complex information and data in standardized, machine readable formats in ways that enable consumers to make informed decisions.”).

272. *Id.* at 2; see also THE EXEC. OFF. OF THE PRESIDENT, NAT’L SCI. & TECH. COUNCIL, *SMART DISCLOSURE AND CONSUMER DECISION MAKING: REPORT OF THE TASK FORCE ON SMART DISCLOSURE* (May 2013) (summarizing the federal government’s efforts in the smart disclosure domain and providing recommendations for expanding the use of smart disclosure across the federal government and in consumer markets).

vacy harms to illustrate the function of the questions. To be clear, consent is not always self-defeating or inappropriate, but it needs to be directed and applied to the sort of interactions in which it can open possibilities to consumers rather than close them. Indeed, crafting beneficial regulation is no doubt a big challenge. Not every set of rules that reduces the consent burden will necessarily be beneficial and increase consumer welfare, but the analysis in this Article suggests that the consent burden is a major problem that should not be overlooked when choosing among market control strategies. While the consent burden is not the whole story (or the only potential negative outcome), the consent burden framework fleshes out why it is a crucial part. With that in mind, I suggest that this set of questions should begin the investigation into the ramifications created by consent regimes in markets.²⁷³ The following diagnostic process does not aim to suggest a set of prescriptive rules but rather an analytic means to help the regulator assess consent regimes and alternatives. It aims to provide a set of questions so that those evaluating a regulation can see more clearly what role consent will play in regulating the market, how consumers are likely to consent, and whether that expectation matches the harms the regulation originally sought to prevent.

1. What are the potential or actual exploitative, damaging, or otherwise harmful behaviors of firms in the market?

The purpose of this question is to identify and delineate the harmful conduct that a proposed regulation is trying to prevent. Essentially, this question is about the values behind the regulatory effort and the pro-consumer goals that regulators are trying to achieve through market intervention. For example, in the regulation of the information economy, regulators can set a goal of preventing privacy harms. This question aims to help regulators define what precisely those “privacy harms” are.²⁷⁴ A privacy harm may be the mere existence of corporate surveillance (what has been called “surveillance capitalism”²⁷⁵) or certain harmful corollaries of corporate surveillance such as discrimination,²⁷⁶

273. This set of initial questions can be developed into a more elaborate formal review process, but that is beyond the scope of this paper.

274. Many scholars and thinkers have tried to define the right to privacy and privacy harms, and the debate has yet to subside. See, e.g., Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 477–78 (2006).

275. SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 8–9 (2019); Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, 30 J. INFO. TECH. 75, 75–76 (2015).

276. See, e.g., SURVEILLANCE AS SOCIAL SORTING: PRIVACY, RISK AND AUTOMATED DISCRIMINATION 1 (David Lyon ed., 2002); Muhammad Ali, Piotr Sapiezynski, Miranda Bogen, Aleksandra Korolova, Alan Mislove & Aaron Rieke, *Discrimination Through Optimization: How Facebook’s Ad Delivery Can Lead to Biased Outcomes*, 3 PROC. ACM ON HUMAN-

manipulation and dark patterns,²⁷⁷ targeted ads,²⁷⁸ disinformation/misinformation,²⁷⁹ political and social polarization,²⁸⁰ or data breaches.²⁸¹ Whatever it may be, regulators should first identify the harmful behaviors they wish to prevent.

2. Does the proposed regime directly prohibit or materially limit these harmful behaviors?

The purpose of this question is to verify whether and to what extent the regulation is actually achieving what it was set to achieve (on the books). If regulators intend to prevent certain harmful firm behavior, we would expect the regulation to include a prohibition or material limitation on such behavior (or otherwise a strong economic incentive discouraging it). Following our example, if “privacy harms” equals corporate surveillance, then this question asks whether the proposed regime is prohibiting corporate surveillance in totality or includes some material limitations on it, such as materially limiting possible purposes of such surveillance (e.g., only for the purpose of anonymized health-related big-data research); the amount or type of information firms can surveil (e.g., only specific predefined parameters like age and gender); or the period of time such information can be held by firms (e.g., historical data would be limited to a period of one month). It further asks whether the proposed regime provides effective enforcement mechanisms to make sure firms follow the rules (e.g., by establishing a private right of action, by imposing severe penalties for noncompliance, or by requiring firms to provide the regulator with access to inspect their systems, data, and insights).

COMPUTER INTERACTION 199:1, 199:1 (2019); Basileal Imana, Aleksandra Korolova & John Heidemann, *Auditing for Discrimination in Algorithms Delivering Job Ads*, 2021 PROC. WEB CONF. 3767, 3767.

277. See *supra* note 122 and accompanying text.

278. See, e.g., Muhammad Ali, *Measuring and Mitigating Bias and Harm in Personalized Advertising*, 2021 FIFTEENTH ACM CONF. RECOMMENDER SYS. 869, 870; see also Alisa Frik, Amelia M. Haviland & Alessandro Acquisti, *The Impact of Ad-Blockers on Product Search and Purchase Behavior: A Lab Experiment*, 2020 PROC. 29TH USENIX SEC. SYMP. 163, 163 (finding in an experiment that blocking targeted ads did not have a significant effect on the “prices of products participants chose to purchase, the time they spent searching for them, or how satisfied they were with the chosen products, prices, and perceived quality”).

279. See, e.g., Ashley Smith-Roberts, *Facebook, Fake News, and the First Amendment*, 95 DENV. L.R.F. 118, 119–20 (2018).

280. See, e.g., Christopher A. Bail et al., *Exposure to Opposing Views on Social Media Can Increase Political Polarization*, 37 PROC. NAT’L ACAD. SCI. U.S. 9216, 9216 (2018).

281. See, e.g., DANIEL J. SOLOVE & WOODROW HARTZOG, *BREACHED! WHY DATA SECURITY LAW FAILS AND HOW TO IMPROVE IT* 5–7 (2022).

3. Does the proposed regime allow these harmful behaviors if consumers consent to them? If so, what are the potential ramifications, and what is the justification for having a consent override?

This question begins to uncover the role consent plays in the market under the proposed regime as a legitimation vehicle and an allocator of burdens among parties. Under the proposed regime, can consent legitimize otherwise illegitimate and harmful behavior — i.e., is there a consent override? Specifically, can consumers consent to anything, or does the proposed regulation identify certain firm behavior to which consent is not allowed? If so, is this limitation on consent material or immaterial in its impact on consumer welfare?

More specifically, if consent is given this role of a legitimation vehicle, what are the ramifications of that? Might consent legitimize firm conduct that contravenes consumer rights and welfare, including undermining public goods or harming competition? Who bears the burden of risks assessment:²⁸² Does the firm have an obligation to prevent harm, or does the consumer bear the consent burden? This question also brings in ex post ramifications: How will a consent regime affect consumers' ability to assert their rights in court? Will it make it more difficult and costly to do so?²⁸³

Finally, what are the justifications for having a consent override? One justification could be maintaining consumer autonomy. Another could be that consent ameliorates the identified harm, but in many consumer markets that would not be the case.²⁸⁴ Going back to our example, if corporate surveillance is defined as a privacy harm, why should it be allowed if firms obtain consumer consent? Does consent really ameliorate the harm? In the case of "privacy harms," an argument could be made that consent indeed ameliorates some of the harm: if we (charitably) define privacy as control over information flows and consider the act of consent to a new information flow as representing such control,²⁸⁵ then it makes sense that consent is potent enough to ameliorate some of the significant harms caused by corporate surveillance. Under these assumptions, consent could solve the autonomy harm in corporate

282. There could be a mix of short-term and long-term effects for which risks should be assessed. Additionally, the more dimensions to asked-for consent, the greater the potential for a consent regime to have deleterious effects on consumers.

283. If so, then one must investigate whether this result is desirable on moral, rule-of-law, welfare, or distributive grounds.

284. That would be the case for certain physical harms, e.g., those that are caused by smoking cigarettes (the fact that one smokes consensually while knowing the harms of smoking does not ameliorate such harms); legal harms, e.g., those that are caused by depriving arbitration clauses or warranty disclaimers, *see, e.g.*, RADIN, *supra* note 15, at 8; or economic harms, e.g., those that are caused by exploitative financial services, *see, e.g.*, BEN-SHAHAR & SCHNEIDER, *supra* note 72, at 68.

285. *See supra* notes 35–37 and accompanying text. *But see, e.g.*, RICHARDS, *supra* note 37, at 90–100 (arguing that privacy is not primarily about control).

surveillance, although it could not solve the corollary harms mentioned above. But it is doubtful that consent actually provides autonomy in digital markets.²⁸⁶

4. Why do we expect people would consent to these otherwise harmful behaviors?

This question calls to clarify our expectations for why certain people would consent to harmful behaviors and how many of them would. Going back to the first question, do we think it would be rational for certain people, in certain circumstances, to consent to the identified harmful behavior because they think there is an overall beneficial tradeoff between expected losses and expected benefits (in our example, some amount of harmful corporate surveillance in exchange for some services)? Alternatively, is it the case that we actually expect all or most people to consent to harmful behavior because a high consent burden would make consenting inescapable? Indeed, consenting may become inescapable because of either significant informational burdens, significant decisional burdens, or a combination of both (consequences of the *ex ante* consent burden).

Put another way, do we expect to see a real divergence of preferences among consumers, or do we expect that mostly everyone will end up “consenting” to the terms provided by firms?²⁸⁷ What do we expect most people would choose if they had adequate information and decisional capacities, and a choice among various options: would they consent?²⁸⁸ These questions can be put to an empirical test using, for example, consumer surveys. To clarify, the question here is not what people are *currently* doing; we know from Part II that people do not read privacy policies and other disclosures and that their decision-mak-

286. As the analysis in this Article shows, consent-based regimes may lead to systemic burden-shifting from firms to consumers, undermining consumer rights, powers, and welfare. Why? Because firms may draw excessive power from consent-based regimes, essentially becoming the ones who call the shots in the market. A common argument for consent is that the government should avoid paternalism. But if firms are calling the shots, it is unclear what amount of individual autonomy remains. Is it better to be controlled by firms than by the government? There are good reasons to expect a democratic government to govern in line with consumers’ interests and the public good, albeit imperfectly but at least not less than firms will.

287. See Cohen, *Privacy Law*, *supra* note 5, at 5 (“Individual users asserting preferences over predefined options on modular dashboards have neither the authority nor the ability to alter the invisible, pre-designed webs of technical and economic arrangements under which their data travels among multiple parties. Nor can they prevent participants in those webs from drawing inferences about them—even when the inferences substitute for the very same data that they have opted out of having collected.”).

288. See, e.g., DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION 106–16 (2008) (discussing the importance of alternatives for decision-making).

ing processes are often significantly lacking. The question is what people *would have* chosen to do if they had adequate information, decisional capacities, and a choice among various options — all resources they do not currently have.

There are essentially three entangled questions here. The first directly assesses the *ex ante* consent burden, i.e., the informational and decisional burdens, and their combined effect on consent behavior and decision-making. The second assesses the heterogeneity of consumers, i.e., their diversity of preferences in a setting where they are better situated to make meaningful decisions.²⁸⁹ The third assesses the heterogeneity of firms, i.e., the level of market competition, and thereby how much consumer consent is constrained by a lack of options.²⁹⁰ If firms are not competing over deal terms or business models, then consumer choice may be significantly reduced to a point where we cannot glean preferences from consumer behavior. In such market circumstances, consumers may be locked into exploitative practices without alternatives.

5. If consent legitimizes otherwise illegitimate and harmful behavior, what intervention is still provided by the proposed regime?

This question is about what is left of the proposed intervention after deducting protections from harmful behavior that could be circumvented by “consent.” There could still be benefits, modest or significant, in the proposed regime, but it would seem the regulation is not

289. However, privacy preferences are a complicated and contested issue. *See, e.g.*, Alessandro Acquisti, Laura Brandimarte & George Loewenstein, *Privacy and Human Behavior in the Age of Information*, 347 *SCIENCE* 509, 510 (2015) (citation omitted) (“Even when aware of the consequences of privacy decisions, people are still likely to be uncertain about their own privacy preferences. Research on preference uncertainty shows that individuals often have little sense of how much they like goods, services, or other people. Privacy does not seem to be an exception.”); Daniel J. Solove, *The Myth of the Privacy Paradox*, 89 *GEO. WASH. L. REV.* 1, 22–23 (2021) (“[T]he very notion that people may have *actual* or *true* preferences must be qualified. Whether measured via stated attitudes or behavior, preferences themselves are not static; they are highly contextual, subject to distortion, and malleable [I]ndividual preferences should not be the focus for establishing the value of privacy or for determining whether regulation is justified.”).

290. *See, e.g.*, Lancieri & Sakowski, *supra* note 21, at 74–75 (reviewing competition expert reports from around the world and showing that there is a wide consensus that digital markets are prone to concentration). There could be synergy between the level of competition in a market and how preferences are shaped. In concentrated markets, consumers may not be able to choose the privacy options that align with their preferences as they can only choose in line with what a few uncompetitive firms are offering, thus preferences may be shaped by firms instead of by consumers. *See* Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 *BERKELEY TECH. L.J.* 1051, 1089–91 (2017). Additionally, in technology spaces, design plays a big role in creating and directing preferences. *See* WOODROW HARTZOG, *PRIVACY’S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES* 5–7, 12 (2018). *See generally* Deirdre K. Mulligan & Kenneth A. Bamberger, *Saving Governance-By-Design*, 106 *CALIF. L. REV.* 697 (2018) (discussing how technological design has become central to policymaking).

fully or materially achieving what it was set to achieve (see the first question). These benefits would include any extra-consensual mandatory mechanisms that leave consumers better off.²⁹¹ The focus here is on mechanisms that cannot be circumvented by firms — i.e., places where the regulator imposes the burden strictly on firms — and that provide, directly and indirectly, benefits to consumers. These mechanisms might include, for example, completely prohibiting certain data collection and uses, like behavioral targeting and location tracking.²⁹² Another example is found in the Genetic Information Nondiscrimination Act,²⁹³ which directly “prohibits employers from obtaining employee or applicant genetic information except under limited circumstances,” thereby limiting collection, dissemination, and use of highly sensitive data without relying on individual action.²⁹⁴

* * * * *

What comes out of this analysis is not that consent and regulation are mutually exclusive. Quite the contrary, they can, and often should, coexist. Consent should be reserved for the issues that most implicate autonomy and agency, and regulation should be used to eliminate harmful behavior in circumstances where consent fails to do so on a large or collective scale. The balance between consent and regulation is crucial for achieving individual and social welfare and avoiding harms, with substantive regulatory oversight being the main vehicle for lowering an excessive consent burden and reigning in firms.

V. CONCLUSION

Consent as control over markets is important, and it is everywhere. But excessive consent burden is a major problem, and it is not an uncommon one. For these reasons, consent should not have an outsized role in our economy, and we should try to avoid its pitfalls whenever

291. For example, requirements that firms meet clear standards to improve their products or services; requirements that they undergo audits by the regulator to make sure they meet those standards; laws to imbue the regulator with effective investigatory, enforcement, and penalizing powers; and laws to provide a private right of action, and possibly statutory damages.

292. Waldman, *Privacy's Rights Trap*, *supra* note 235, at 105 (“A radical response to the harms of informational capitalism might prohibit companies from using data for behavioral targeting and ban location tracking. It would subsidize open-access, not-for-profit Internet intermediaries that would become a counterweight to the extractive information industry. It could ensure transparency and public interrogation of algorithmic decision-making processes by removing corporate trade secrecy protections for automated systems they sell to the state.”)

293. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110–233, 122 Stat. 881.

294. Solove, *Limitations of Privacy Rights*, *supra* note 235, at *41; *see* Genetic Information Nondiscrimination Act of 2008 § 202.

they are significant. In some markets — and digital markets are a timely and considerable example — substantive regulation should overthrow Queen consent from its long reign as the only check on firms. Otherwise, the insurmountable consent burden defeats consumer rights, powers, and welfare.

The new framework developed in this Article brings the consent burden to light and shows that while generally regulation reduces the consent burden, a certain type of regulation, command-and-consent, typically perpetuates the problem and sometimes makes the consent burden even more severe. But there is hope: By drawing an analogy between the consent burden and the regulatory burden, we see both the one-sidedness of the current regulatory logic (considering only the regulatory burden) and an opportunity to correct it. Implementing a consent burden review as part of regulatory and lawmaking processes will lead to effective and evenhanded regulation and a more balanced power structure in markets.

Organized society presents many struggles, perhaps the main one being the unwavering tension between the wants of the individual and the collective. The consent burden encapsulates at least two forms of this tension: consent represents the autonomy of the individual against coercion, but sometimes it also represents the neglect of the individual by society, leaving them prey to larger forces. We should recognize these tensions and work to alleviate them.