Confronting Biomedical Progress Beyond Patents

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Public investment, notably by the National Institutes of Health (NIH), is a key driver of biomedical innovation in the United States, yet access to advancements remains uneven. While the NIH provides $48 billion annually, commercial interests that benefit from these funds often dictate the direction of innovation, leading to access concerns, such as rising drug prices and neglected research areas. This Article examines whether NIH's financial leadership truly promotes biomedical progress aligned with constitutional values, questioning if progress solely equates to more innovation.

Current scholarship often focuses on patent law to respond to accessibility challenges. Proponents argue that patents create own-and-control incentives that optimize innovation, assuming commercially minded public funding recipients will be responsive to market demand and serve people's needs. From their view, 'progress' is more intellectual property. Critics, however, point out that this model favors commercially successful technologies only. To them, more intellectual property does not mean progress for all. In its focus on patenting, however, this entrenched debate discounts alternate ways to evaluate progress and the industrial policy role that NIH plays in advancing biomedical innovation.

This Article shifts the focus to contract law, proposing that NIH grants function as relational contracts. With the vast majority of NIH funds primarily for fundamental research and allocated in extramural grants, these funding agreements are positioned to catalyze the private use of public funds more responsive to the public health interest while holding both the state and grant recipients accountable to health law standards. The use of grants is far more prevalent in the early stages of R&D, in sharp contrast to the later stages in which innovation is more reliant on private investment. This sequence positions grants to strategically direct medical innovation before patenting activity. As such, their spillover effects down the pharmaceutical value chain can indirectly reform patenting, bind funders and grant beneficiaries to access pledges and commitments to reinvestment in the economy, bolster the public credibility of funders and developers, and re-evaluate the adequacy of complementary industrial policies affecting access to biomedical innovation.