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Contracting as a Class

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Contract law is stuck in a loop of path dependency and stale precedent. Its metaphors, like "the meeting of the minds," are today laughably implausible. Its values, like "consent," have been stripped of any real meaning. No one reads or understands the overwhelming majority of contracts to which they agree. And no one should. Reading them is meaningless, because it simply does not matter what they say. Individuals must agree to them—indeed, are effectively forced to agree to them—if they wish to participate in the modern world.

Modern digital contracting is not a collaborative process. Today, most "contracting" involves merely browsing a website or clicking "yes" to agree to endless streams of unread boilerplate. Contracting now largely consists of a party in a superior bargaining position dictating terms to a weaker party.

To the extent the law has evolved to deal with the scale and complexity of the digital era, its focus has been on putting parties on notice of contract terms. However, we already know, at least in a vague sense, the terms of our "bargain." The real issue is power—we knowingly accept onerous terms because we lack the power to do anything else.

This Article seeks to revitalize the digital contracting process. It outlines the infrastructure necessary to facilitate class contracting between corporate entities, particularly Big Tech companies, and their users. Granting individuals the ability to engage in class contracting will improve the wellbeing of billions of individuals. It will facilitate meaningful communication, enable the collaborative development of shared priorities, and restore a vital balance to the modern contracting process.

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INTRODUCTION

Perhaps the most fundamental innovation of the modern era is scaling—that is, adapting singular processes, actions, or products so that they can be efficiently repeated, potentially billions of times. Scaling is the central insight behind today's most profitable companies and the goal of every startup.[1] Just as scaling has revolutionized the economy, it has also transformed contracts. As modern businesses have scaled, the costs of creating bespoke contracts for each interaction have eclipsed the benefits of doing so. Operating on a global scale dramatically increases the costs of heterogeneity. Boilerplate and standard form contracts can thus be understood as a response to the scaling problem.[2] Although not without their costs, standardized contracts are necessary predicates for scaled operations.

While scaling is highly profitable, it also has a key casualty: scaling heightens inequalities in bargaining power. As entities scale to global proportions, the power differential between entities and individuals necessarily increases. A company with twenty customers may bargain with each of them to meet their unique needs; a company with three billion will not.[3] Relatedly, as entities

1. *See* PETER THIEL & BLAKE MASTERS, ZERO TO ONE: NOTES ON STARTUPS, OR HOW TO BUILD THE FUTURE 67 (2014) ("[E]very single company in a good venture portfolio must have the potential to succeed at vast scale." (emphasis omitted)).

2. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (AM. L. INST. 1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution.").

3. *See* Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Market as Negotiation*, 96 NOTRE DAME L. REV. 1257, 1292 (2021) ("Commentators have noted that the sometimes-implicit idea behind contracts—that the parties will bargain with each other to reach their exchange—is becoming more of a myth than reality.").

scale, they often outcompete or absorb their competitors.[4] This means that the businesses that have scaled the most will often have significant market power, which further augments the power differential between individuals and scaled entities.[5]

The scaling movement has only accelerated in recent years. Yesterday's brick-and-mortar multinational companies have given way to today's tech giants.[6] Due to exceedingly low marginal costs, these leviathans have taken scaling to exponential levels.[7] The world's largest technology companies often have billions of users,[8] and each user has functionally no bargaining power. They must accept the terms of engagement or resign from the internet. However, if you cannot receive a message on your phone, apply for a job online, or send an email, it is almost as though you do not exist.

To a large extent, courts have idly accepted the modern "revolution" in contracting.[9] The primary legal "remedy" to inequitable contracting practices has emphasized notice of contract terms, as if users did not know that the contracts were highly problematic.[10] The truth is that users are well aware of the

4. *See* Chris Alcantara, Kevin Schaul, Gerrit De Vynck & Reed Albergotti, *How Big Tech Got So Big: Hundreds of Acquisitions*, WASH. POST (Apr. 21, 2021), https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/ (describing how the largest Big Tech companies acquired dozens of competitors).

5. *Id*. (discussing how Big Tech companies' acquisitions allowed these entities to amass significant market power).

6. Compare *The 100 Largest Companies in the World by Market Capitalization in 2022*, STATISTA (Aug. 5, 2022), https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/ (indicating that Apple, Microsoft, Amazon, Alphabet, and Meta are currently five of the six largest companies in the world), with *Fortune 500*, CNN MONEY, https://money.cnn.com/magazines/fortune/fortune500_archive/full/1990/ (last visited Mar. 7, 2023) (listing multinationals such as General Motors, Ford Motor Company, and Exxon Mobil as the largest companies in the United States in 1990).

7. Wil van der Aalst, Oliver Hinz & Christof Weinhardt, *Big Digital Platforms: Growth, Impact, and Challenges*, 61 BUS. & INFO. SYS. ENG'G 645, 646 (2019) (discussing how low marginal costs at technology companies facilitate scaling).

8. For example, Facebook had 3.3 billion monthly active users as of 2021. Mike Isaac, *Facebook Posts a 33 Percent Increase in Revenue and a 53 Percent Jump in Profit*, N.Y. TIMES (Jan. 27, 2021), https://www.nytimes.com/2021/01/27/business/facebook-earnings.html; *see also Most Popular Social Networks Worldwide as of January 2023, Ranked by Number of Monthly Active Users*, STATISTA (Jan. 2023), https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/ (indicating that Facebook, YouTube, WhatsApp, Instagram, WeChat, and TikTok all have at least 1 billion active users).

9. For a discussion of how contract law has dealt with modern contracts, see *infra* Part II.

10. *Id*.

ugly side of Big Tech.[11] Users accept their raw deal only because they lack the bargaining power to do otherwise.[12] Friedrich Kessler's 1943 prediction that standard form contracts could enable "commercial overlords . . . to impose a new feudal order of their own making upon a vast host of vassals" has come to pass.[13]

Modern contracts empower businesses to efficiently and effectively scale. However, there has been no comparable contract innovation that helps consumers adapt to scale. This Article proposes such an innovation: "class contracts," or contracts between a platform and a class of users, which will allow users to engage in true contractual bargaining at scale.[14] While class contracts draw conceptually from class action litigation, the analogy should not be stretched too far. Where class actions are a post hoc remedy, class contracts are intended to be a proactive tool to facilitate ex ante bargaining.

Part I of this Article examines the status quo, and it argues that users have become captive to inequitable and undesirable relationships with digital platforms. Part II explores the very limited ways that contract law has responded to the development of one-sided contracts and argues that existing contract law remedies are insufficient to restore balance. Part III sketches the contours of class contracts and provides hypothetical examples of what class contracts could achieve.

11. *See, e.g.*, Danielle Abril, *Americans to Companies: We Don't Trust You with Our Personal Data*, FORTUNE (Nov. 15, 2019, 10:00 AM), https://fortune.com/2019/11/15/pew-survey-state-of-data-privacy/ ("Nearly 80% of U.S. adults are 'somewhat' or 'very' concerned about how companies use their personal digital data. . . .").

12. *See, e.g.*, John Herrman, *We're Stuck with the Tech Giants. But They're Stuck with Each Other*, N.Y. TIMES MAG. (Nov. 13, 2019), https://www.nytimes.com/interactive/2019/11/13/magazine/internet-platform.html ("To use the internet, in 2019, is to engage to some degree with the handful of private entities that control it. . . . We, and the rest of the internet between us and them, are but subjects on the surface of a planet they've fully colonized and terraformed. Unfortunately for us, theirs are empires we're stuck with for the foreseeable future."). *But see* Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929, 933 (2020) (arguing that a small subset of vocal consumers can help to solve collective action problems).

13. Friedrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943).

14. For a thorough discussion of class contracts, see *infra* Part III.

I. THE MODERN CONTRACT

One morning, a billion people wake up to a notification on their phone: "Apple has updated its privacy policy. Click 'yes' to agree."[15] Users who do not agree with Apple's privacy practices are faced with a choice: (a) click "yes" anyway, or (b) immediately stop using their phones. Perhaps they consider the sole meaningful alternative, Google's Android operating system, and realize that its terms and conditions are as bad or worse.[16] After contemplating a life relying solely on landlines, a billion people sigh and click "yes."

This is what "contracting" has come to mean in the modern era. There is no longer an active, collaborative exchange between parties to a contract. Users do not bargain; they receive terms, which they know are drafted to their detriment. Users do not negotiate; they accept what they are given, because there is no alternative. The imbalance of power is total and complete: digital platforms control all the terms of engagement while their users have no ability whatsoever to participate in the contracting process.

This Part explores the modern contract in greater detail. Section I.A examines how contracts have evolved in response to the growth of businesses. Section I.B defines "captive contracts," or those agreements between digital platforms and their users that are characterized by their one-sidedness. Section I.C highlights common user concerns with captive contracts, and section I.D demonstrates that users require increased bargaining power in order to have their concerns addressed by management.

A. The Evolution of Contracts

When we envision a stereotypical contract, we are tempted towards oversimplification. We picture two parties, of relatively equal bargaining power, who negotiate about buying and selling a

15. *See* Zak Doffman, *New Report Warns Apple Users About iMessage Privacy Risks*, FORBES (Dec. 4, 2021, 6:30 AM), https://www.forbes.com/sites/zakdoffman/2021/12/04/apple-iphone-ipad-mac-icloud-warning-as-dangerous-settings-exposed/?sh=1411b1f17e72 (noting that there are over one billion iPhone users as of late 2021).

16. *See* Konrad Kollnig, Anastasia Shuba, Reuben Binns, Max Van Kleek & Nigel Shadbolt, *Are iPhones Really Better for Privacy? A Comparative Study of iOS and Android Apps*, 2 PROC. ON PRIV. ENHANCING TECHS., 6, 6 (2022), (finding "widespread potential violations of US, EU and UK privacy law" by applications in both the Android and Apple ecosystems).

physical good or providing a service at a certain price.[17] We might envision a couple agreeing to sell a plot of land to a neighbor over dinner.[18] We might imagine representatives of a business contracting to import food products for resale.[19] We might contemplate an agreement between a shipping company and a business owner regarding the transport of goods.[20] In short, we often think of "contracts" as the types of arrangements that contract law originally evolved to address.

In these now largely antiquated contracts, the principles and terminology of traditional contract law could be applied readily and easily. We could pinpoint the moment that a party "manifested assent"[21] to the contract, because she or he typically shook a hand or signed a paper—actions that directly communicate an intent to be bound. It made sense to speak of these contracts as a "bargained for" exchange[22] because both parties typically had a meaningful understanding of what they were sacrificing and receiving as a result of the exchange. It was reasonable to expect that both parties read the written contract in full,[23] since these agreements were often

17. Ethan J. Leib & Zev J. Eigen, *Consumer Form Contracting in the Age of Mechanical Reproduction: The Unread and the Undead*, 2017 U. ILL. L. REV. 65, 72–73 (2017) ("The image commonly invoked is of two businessmen haggling over the terms of sale of some commodity like wheat, real estate, or widgets, and then memorializing the terms in a jointly crafted document, or by exchanging drafts and dickering over terms until each freely assents.").

18. Lucy v. Zehmer, 84 S.E.2d 516, 517 (1954).

19. Frigaliment Imp. Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960).

20. Hadley v. Baxendale, 156 Eng. Rep. 145 (1854).

21. RESTATEMENT (SECOND) OF CONTRACTS § 18 (AM. L. INST. 1981).

22. RESTATEMENT (SECOND) OF CONTRACTS § 71(b) (AM. L. INST. 1981).

23. *See* Upton v. Tribilcock, 91 U.S. 45, 50 (1875) ("It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission."); Merit Music Serv., Inc. v. Sonneborn, 225 A.2d 470, 474 (Md. 1967) ("[T]he law presumes that a person knows the contents of a document that he executes and understands at least the literal meaning of its terms."); Patterson v. Nine Energy Serv., LLC, 330 F. Supp. 3d 1280, 1296 (D.N.M. 2018), *adhered to on denial of reconsideration*, 355 F. Supp. 3d 1065 (D.N.M. 2018) (citing Ballard v. Chavez, 868 P.2d 646, 648 (N.M. 1994)) ("It is a fundamental tenet of contract law 'that each party to a contract has a duty to read and familiarize himself with the contents of the contract, each party generally is presumed to know the terms of the agreement, and each is ordinarily bound thereby.'").

brief documents given the high costs of printing in earlier eras.[24] The metaphor of a "meeting of the minds"[25] had salience because there was mutuality and shared understanding involved.

However, the vast majority of modern contractual arrangements look nothing like these now *proto*-prototypical contracts.[26] Potentially dozens of times each day, people form "contracts" (which some call pseudo-contracts)[27] with digital supergiants like Amazon, Walmart, Facebook, and Instagram, wherein they "click to agree" with a voluminous set of terms that they do not, in fact, read or even fully understand.[28] Although courts often use the traditional terms and principles of contract law to analyze and adjudicate these agreements, their application is strained. We speak of the "manifestation of assent" to be bound when we really mean that a person merely used a particular platform or perfunctorily checked a box.[29] We refer to contracts as a "bargained for" exchange when we know that one party unilaterally set all the terms while the other party was only vaguely aware of what the terms might contain.[30] We refer to the "duty

24. *See* Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1180 (2019) (indicating that the duty to read was more reasonable for "many written contracts in the late nineteenth century, when mass printing of preformatted text was so costly that writings were typically much shorter."); Robert M. Lloyd, *The "Circle of Assent" Doctrine: An Important Innovation in Contract Law*, 7 TRANSACTIONS: TENN. J. BUS. L. 237, 237–38 (2006) ("The traditional rule was that a person was bound by what he or she signed, regardless of whether he or she read it or understood it. This rule made sense in the days when signing a standard-form contract was an unusual occurrence.") (footnote omitted).

25. *See* Balt. & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923) ("[A]n agreement . . . founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.").

26. *See* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) (Slawson, an early critic of standard form or adhesion contracts, noted in 1971 that "[s]tandard form contracts probably account for more than ninety-nine percent of all the contracts now made." Such contracts have only grown more dominant in the past half-century.).

27. Kar & Radin, *supra* note 24, at 1140.

28. *See infra* Fig. 1.

29. *See, e.g.*, Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 460 (2006) ("An 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.").

30. *See, e.g.*, John Gramlich, *10 Facts About Americans and Facebook*, PEW RSCH. CTR. (June 1, 2021), https://www.pewresearch.org/fact-tank/2021/06/01/facts-about-americans-and-

to read" when we know that the terms and conditions of these agreements are very rarely read or fully understood.[31] In this context, language and meaning become contorted:

> "[C]ontract"—which now allows businesses to create legal obligations unilaterally without obtaining any actual agreement over many boilerplate "terms"—is no longer contract. "Agreement" is no longer agreement. "Consent" is no longer consent; "assent" is no longer assent; and "terms"—which now include enormous streams of boilerplate text that are delivered but never read by anyone—are no longer terms with shared meaning.[32]

When individuals conduct a Google search or purchase something on Amazon, the law says they are entering into "contracts" with these digital giants. But these digitized agreements differ in several important ways from the historical notion of a contract.

B. Defining Captive Contracts

Modern digitized contracts feature four separate but overlapping attributes that, when combined, test traditional understandings of contract law. First, these modern contracts are formed digitally, often within a particular ecosystem such as Facebook or Google. Second, most modern, digitized contracts contain ample boilerplate, or "preformatted text that is provided during contract formation to multiple parties, on multiple occasions, or both."[33] Third, such contracts constitute some flavor of a wrap agreement, meaning that users must click "yes" to acknowledge their consent to the boilerplate terms (clickwrap);[34] actively open or scroll through terms and conditions before clicking

facebook/ ("As of late 2018, around three-quarters of Facebook users were not aware that the site lists their traits and interests for advertisers.").

31. *See* Davis v. M.L.G. Corp., 712 P.2d 985, 992 (Colo. 1986) ("It is common knowledge that the detailed provisions of standardized contracts are seldom read by consumers."); Lloyd, *supra* note 24, at 238 ("Today, however, the old rule [of the duty to read] needs to be tempered with a realistic understanding that people who sign form contracts do not take the time to read them carefully, and that those who present them with the contracts do not expect them to."); Kar & Radin, *supra* note 24, at 1180–81 ("[I]n the information age, we now know that a great amount of boilerplate text is neither read nor understood by anyone.").

32. Kar & Radin, *supra* note 24, at 1140.

33. *Id.* at 1139 n.8.

34. *See* Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577, 598 (2007).

"yes" to assent to such terms (scrollwrap);[35] click a button such as "continue" or "sign-in" alongside a notice that doing so indicates consent to the boilerplate terms (hybridwrap);[36] or be presumed to consent to such terms by virtue of their use of the particular platform (browsewrap).[37] Finally, most digital contracts constitute contracts of adhesion, a take-it-or-leave-it arrangement "under which the only alternative to complete adherence is outright rejection."[38]

In this Article, I will refer to contracts possessing each of these four attributes as "captive contracts." This phrase encapsulates the experience of modern digital contracting on multiple levels. First, digital ecosystems, such as Google and Facebook, typically have only a few true competitors and, to the extent that alternatives exist, such competitors likely employ captive contracts of their own.[39] In this way, captive contracts go beyond traditional contracts of adhesion: digital users are faced not with a singular "take-it-or-leave-it" deal but with the prospect of taking or leaving the digital experience in its entirety.[40]

Second, most users have already made a substantial commitment of time and energy to a given platform before they manifest their assent to new and updated terms.[41] For instance,

35. Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 398 (E.D.N.Y. 2015).

36. Nicosia v. Amazon.com, Inc., 384 F. Supp. 3d 254, 266 (E.D.N.Y. 2019), *aff'd*, 815 F. App'x 612 (2d Cir. 2020), *and motion for relief from judgment denied*, No. 14-CV-4513, 2021 WL 4480487 (E.D.N.Y. Sept. 30, 2021) (defining hybridwrap by stating that "[s]ome websites—such as Amazon—prompt the user to manifest their assent to particular terms by engaging in some dual-purpose action, such as creating an account").

37. Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter & Jennifer C. Debrow, *Browse-wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 279–80 (2003).

38. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.26 (2d ed. 2001).

39. *See* Kashmir Hill, *I Tried to Live Without the Tech Giants. It Was Impossible.* N.Y. TIMES (July 31, 2020), https://www.nytimes.com/2020/07/31/technology/blocking-the-tech-giants.html ("Critics of the big tech companies are often told, 'If you don't like the company, don't use its products.' My takeaway from the experiment was that it's not possible to do that.") *See also, infra*, *Figure 1* which identifies the most popular digital platforms as uniformly featuring captive contracts.

40. Professor Nancy Kim refers to this phenomenon with the terminology of coercion. NANCY S. KIM, WRAP CONTRACTS 4 (2013) ("[B]usinesses, courts and technology create a coercive contracting environment where one-sided legal terms are imposed upon non-drafting parties who literally have no choice but to accept them if they wish to participate in modern society.").

41. *See* David Ronayne, Daniel Sgroi & Anthony Tuckwell, *How Susceptible Are You to the Sunk Cost Fallacy?*, HARV. BUS. REV. (July 15, 2021), https://hbr.org/2021/07/how-

users have often expended significant resources to identify and connect with "friends," obtain followers, establish a history of posts and interactions with other users, and/or purchase a particular device and a related constellation of apps. Users are thus "captive" to the prior investment that they have made in the platform.[42]

Third, digital ecosystems have become an integral part of many communities, educational institutions, professions, and interpersonal relationships, to the point that non-users experience a considerable degree of social and professional ostracism.[43] For many, this makes rejection of a platform's terms functionally impossible, and they are thus "captive" to the degree to which technology platforms have become embedded in modern life.

Fourth, many digital platforms deliberately employ manipulative tactics that habituate or even addict users to the dopamine surge provided by the platform.[44] Such addicted or habituated users are held "captive" by these platforms and the manipulative tactics that they employ.

Fifth, many digital platforms utilize tracking software that continues to accumulate and store data about users long after they have "left" the platform.[45] In this way, users are held "captive" to past agreements. This effectively nullifies the ability of users to truly escape problematic contractual agreements.

Sixth, nonusers are still vulnerable to many digital platforms by virtue of photos and other personal data that are shared by their

susceptible-are-you-to-the-sunk-cost-fallacy (describing the sunk cost fallacy and the difficulty many people have in abandoning a given course of action when a prior investment has been made).

42. *Id*.

43. *See, e.g.*, Aja Romano, *How Facebook Made it Impossible to Delete Facebook*, VOX (Dec. 20, 2018), https://www.vox.com/culture/2018/3/22/17146776/delete-facebook-how-to-quit-difficult (describing how quitting Facebook is difficult because of its role in many professions, educational settings, communities, and interpersonal relationships).

44. Paul Lewis, *'Our Minds Can be Hijacked': The Tech Insiders Who Fear a Smartphone Dystopia*, THE GUARDIAN (Oct. 6, 2017, 1:00 PM), https://www.theguardian.com/technology/2017/oct/05/smartphone-addiction-siliconvalley-dystopia. (quoting Nir Eyal, a well known technology consultant that specializes in "hooking" users on digital platforms: "'The technologies we use have turned into compulsions, if not full-fledged addictions,' Eyal writes. 'It's the impulse to check a message notification. It's the pull to visit YouTube, Facebook, or Twitter for just a few minutes, only to find yourself still tapping and scrolling an hour later.' None of this is an accident, he writes. It is all 'just as their designers intended.'").

45. Geoffrey A. Fowler, *Facebook Will Now Show You Exactly How It Stalks You – Even When Your're Not Using Facebook*, WASH. POST (Jan. 28, 2020, 8:35 PM), https://www.washingtonpost.com/technology/2020/01/28/off-facebook-activity-page/.

friends and relatives, often without their consent.[46] This is particularly true for minors, whose parents may share information about them from birth. It is thus very difficult for individuals to protect themselves from digital platforms because of the behaviors of third parties.

Seventh, users are captive to the high-speed nature of the digital economy and the increasing pressures on their time.[47] Given the length of most online terms and conditions, and the velocity with which most people click between various platforms, it is simply impractical to think that a user can or should take the time to read lengthy sets of terms and conditions, which often do not have easily intelligible meanings for the average consumer and are routinely updated.[48] As *Figure 1* below demonstrates, users are engaging with digital platforms that employ captive contracts hundreds of billions of times each month, even considering just a handful of digital platforms.

46. Emily Dreyfuss, *Teens Don't Use Facebook, But They Can't Escape It, Either*, WIRED (Feb. 5, 2019, 2:17 PM), https://www.wired.com/story/teens-cant-escape-facebook/.

47. *See* Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J. OF L. & POL'Y FOR THE INFO. SOC'Y 543, 563 (2009) (estimating in 2009 that it would take 40 minutes per day to read the privacy policies of websites users visited that year. This figure has likely only increased as people spend more time online).

48. Kar & Radin, *supra* note 24, at 1155 (stating that modern contracts feature language that is so long and difficult to understand that it does not result in "shared meaning" between consumers and providers).

Figure 1: Examples of Captive Contracts

Platform	Monthly Visits[49]	Digital	Boilerplate	Wrap Format	Adhesion
Google[50]	86.9 Billion	X	X	X (Clickwrap & Browsewrap[51])	X
YouTube[52]	22.8 Billion	X	X	X (Clickwrap & Browsewrap[53])	X
Facebook[54]	20 Billion	X	X	X (Hybridwrap & Browsewrap[55])	X
Wikipedia	13.6 Billion	X	X	X (Browsewrap[57])	X

49. Data on the volume of monthly visits was gathered from Statista. Tiago Bianchi, *Most Popular Websites Worldwide as of November 2022, By Total Visit*s, STATISTA (Feb. 1, 2023), https://www.statista.com/statistics/1201880/most-visited-websites-worldwide/ (listing the volume of monthly visitors for the most frequently visited websites in the world which includes Google, YouTube, Facebook, Wikipedia, Yahoo, Instagram, Amazon, and Twitter); Stephanie Chevalier, *Leading E-commerce Websites in the United States as of June 2021, Based on Number of Monthly Visits*, STATISTA (July 26, 2022), https://www.statista.com/statistics/271450/monthly-unique-visitors-to-us-retail-websites/ (listing the volume of monthly visitors for the most frequently visited e-commerce websites in the United States).

50. *Google Terms of Service for Your Personal Use*, GOOGLE, https://www.google.com/intl/en/mobile/xhtml/terms_of_service.html (last visited Mar. 6, 2023).

51. Google employs Browsewrap when users perform a Google search and Clickwrap when users form an account. *See Privacy and Terms*, GOOGLE, https://accounts.google.com/signup/v2/webtermsofservice?continue=https%3A%2F%2Fwww.google.com%2F&hl=en&dsh=S1778758336%3A1639961040651382&biz=false&flowName=GlifWebSignIn&flowEntry=SignUp&TL=AM3QAYbzAn1xnLym7bMCoc9ogE1tqb9po6xY5XDD-hdOFuTWxInKi97O5aDzwr0L (last visited Mar. 6, 2023) ("To create a Google Account, you'll need to agree to the Terms of Service below.").

52. *Terms of Service*, YOUTUBE (Jan. 5, 2022), https://www.youtube.com/t/terms?preview=20220105.

53. YouTube employs Browsewrap when users browse YouTube and Clickwrap when users form a Google account which can be later used to establish a YouTube account. *See Terms of Service*, YOUTUBE (FEB. 5, 2022), https://www.youtube.com/static?template=terms.

54. *Terms of Service*, FACEBOOK (July 26, 2022), https://www.facebook.com/terms.php.

55. Facebook employs Browsewrap when users view content and Hybridwrap when users form a new account. *See Sign Up*, opened upon clicking "Create new account[,]" FACEBOOK, https://www.facebook.com/ (last visited Mar. 6, 2023) ("By clicking Sign Up, you agree to our Terms, Privacy Policy and Cookies Policy.").

56. *Terms of Use*, WIKIMEDIA FOUND. (Oct. 5, 2021), https://foundation.wikimedia.org/wiki/Terms_of_Use/en.

57. Wikipedia employs only Browsewrap. *See Terms of Use*, WIKIPEDIA, https://meta.wikimedia.org/wiki/Terms_of_use (effective as of June 16, 2014).

Yahoo[58]	5.2 Billion	X	X	X (Hybridwrap & Browsewrap[59])	X
Instagram[60]	4.4 Billion	X	X	X (Hybridwrap & Browsewrap[61])	X
Amazon[62]	4.4 Billion	X	X	X (Hybridwrap & Browsewrap[63])	X
Twitter[64]	3.6 Billion	X	X	X (Hybridwrap & Browsewrap[65])	X
WhatsApp	1.7 Billion	X	X	X (Hybridwrap[67])	X
eBay[68]	885 Million	X	X	X (Hybridwrap & Browsewrap[69])	X

58. *Yahoo Terms of Service*, YAHOO! (Feb. 1, 2023), https://legal.yahoo.com/us/en/yahoo/terms/otos/index.html.

59. Yahoo employs Browsewrap when users view content without an account and Hybridwrap when users form a new account. *See Create an Account*, YAHOO, https://login.yahoo.com/ (last visited Mar. 6, 2023) ("By clicking 'Continue', you agree to the Terms and acknowledge the Privacy Policy.").

60. *Terms of Use*, INSTAGRAM HELP CTR. (July 26, 2022), https://help.instagram.com/581066165581870.

61. Facebook, which owns Instagram, employs Browsewrap when users view content and Hybridwrap when users form a new account. *See Sign Up*, INSTAGRAM, https://www.instagram.com/accounts/emailsignup/ (last visited Mar. 6, 2023) ("By signing up, you agree to our Terms, Privacy Policy and Cookies Policy.").

62. *Conditions of Use*, AMAZON (Sept. 14, 2022), https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM.

63. Amazon employs Browsewrap when users view content and Hybridwrap when users make an account or complete a purchase. *See Create Account*, AMAZON, https://www.amazon.com/ (last visited Mar. 6, 2023) ("By creating an account, you agree to Amazon's Conditions of Use and Privacy Notice.").

64. *Terms of Service*, TWITTER (June 10, 2022), https://twitter.com/en/tos.

65. Twitter employs Browsewrap when users view content and Hybridwrap when users form a new account. *See New to Twitter?*, TWITTER, https://twitter.com/ (last visited Mar. 4, 2023) ("By signing up, you agree to the Terms of Service and Privacy Policy, including Cookie Use.").

66. *WhatsApp Terms of Service*, WHATSAPP (Jan. 4, 2021), https://www.whatsapp.com/legal/updates/terms-of-service/?lang=en.

67. WhatsApp employs Browsewrap when users download the platform. *See Download WhatsApp*, WHATSAPP, https://www.whatsapp.com/download (last visited Mar. 4, 2023) ("By installing WhatsApp, you agree to our Terms & Privacy Policy.").

68. *User Agreement*, EBAY CUSTOMER SERV. (Oct. 28, 2022), https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259.

69. eBay employs Browsewrap when users view content and Hybridwrap when users form a new account and when they make a purchase. *See Create an Account*, opened upon clicking "register[,]" EBAY, www.ebay.com (last visited Mar. 4, 2023) ("By Creating an account, you agree to our User Agreement and acknowledge reading our User Privacy Notice.").

Walmart[70]	410 Million	X	X	X (Hybridwrap & Browsewrap[71])	X

The framework of captivity is a useful tool for understanding the behavior of most digital users. For example, most digital users do not read captive contracts[72]—why should users read the terms of something they cannot change and for which there is no meaningful alternative? Moreover, despite having "consented" to captive contracts, many users remain highly dissatisfied with how digital platforms operate[73]—how meaningful is consent in the context of coercion?[74] Digital users also struggle to disengage from problematic platforms even when they desire to do so[75]—despite their desire to leave, they remain captive in the walled gardens of infinite scroll. Finally, in spite of high rates of use, public sentiment

70. *Walmart.com Terms of Use*, WALMART (Jan. 6, 2023), https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af40340d6bbd596f116fae5a0.

71. Walmart employs Browsewrap when users view content and Hybridwrap when users form a new account and when they make a purchase. *See Create Your Walmart Account*, opened upon clicking "Sign In Account" and entering an email, WALMART, https://walmart.com (last visited Feb. 5, 2023) ("By clicking Create Account, you acknowledge you have read and agreed to our Terms of Use and Privacy Policy.").

72. Woodrow Hartzog, *Website Design As Contract*, 60 AM. U. L. REV. 1635, 1651–52 (2011) ("Most individuals simply do not read the terms, and even if they did, most individuals have difficulty fully comprehending what they actually agreed to and the risk they inherited by that consent." (citations omitted)).

73. *See, e.g.*, Brooke Auxier, *64% of Americans Say Social Media Have a Mostly Negative Effect on the Way Things Are Going in the U.S. Today*, PEW RSCH. CTR. (Oct. 15, 2020), https://www.pewresearch.org/fact-tank/2020/10/15/64-of-americans-say-social-media-have-a-mostly-negative-effect-on-the-way-things-are-going-in-the-u-s-today/ (finding that "about two-thirds of Americans (64%) say social media have a mostly negative effect on the way things are going in the country today" and that sixty-three percent of users (compared to sixty-nine percent of non-users) believe that social media has a mostly negative effect).

74. KIM, *supra* note 40 at 4 ("[B]usinesses, courts and technology create a coercive contracting environment where one-sided legal terms are imposed upon non-drafting parties who literally have no choice but to accept them if they wish to participate in modern society.").

75. *See, e.g.*, Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/ ("Despite a string of controversies and the public's relatively negative sentiments about aspects of social media, roughly seven-in-ten Americans say they ever use any kind of social media site – a share that has remained relatively stable over the past five years, according to a new Pew Research Center survey of U.S. adults."); Eric P.S. Baumer, Shion Guha, Emily Quan, David Mimno & Geri K. Gay, *Missing Photos, Suffering Withdrawal, or Finding Freedom? How Experiences of Social Media Non-Use Influence the Likelihood of Reversion*, SOC. MEDIA + SOC'Y, July 2015-Dec. 2015: 1–14 (describing users' difficulty exiting social media platforms).

about some of the largest digital platforms is extremely negative,[76] yet users lack the bargaining power to effectuate a better arrangement.

C. Proliferation of User Complaints

Although we speak of the arrangements between users and Big Tech platforms using the language of contract law, including terms such as "assent" and "agreement," it is readily apparent that the terms of engagement are set unilaterally by digital providers. There is virtually no opportunity for users to negotiate with digital platforms in order to seek a better or more personalized user experience. Given the one-sidedness of these "bargains,"[77] it is unsurprising that user dissatisfaction abounds.[78] This section catalogs some of the most common complaints with digital platforms, which range from concerns about mental health to data privacy to environmental impacts.

1. Mental Health

One common concern is the impact that some digital platforms have on users' mental health. One-in-three American adults believes social media is harmful to mental health, and sixty-seven percent believe that social media usage is related to loneliness and social isolation.[79] In particular, the vast majority (eighty-eight percent) of American adults express concern over young people's

76. *See, e.g.*, Mark Murray, *Poll: Americans Give Social Media a Clear Thumbs-Down*, NBC NEWS, (Apr. 5, 2019, 3:30 AM) https://www.nbcnews.com/politics/meet-the-press/poll-americans-give-social-media-clear-thumbs-down-n991086 ("Big majorities say social media divides us, wastes time, spreads falsehoods and unfair attacks.").

77. For a theoretical examination of why sellers have an economic incentive to make contract terms favorable to themselves, see Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003) ("While sellers have an economic incentive to provide the efficient level of quality for the attributes buyers consider ('salient' attributes), they have an incentive to make attributes buyers do not consider ('non-salient' attributes) favorable to themselves, as doing so will not affect buyers' purchasing decisions.").

78. *See, e.g.*, Kari Paul, *A Brutal Year: How the 'Techlash' Caught up with Facebook, Google and Amazon*, THE GUARDIAN (Dec. 28, 2019, 6:00 AM), https://www.theguardian.com/technology/2019/dec/28/tech-industry-year-in-review-facebook-google-amazon (cataloging numerous complaints with digital platforms).

79. *Americans are Concerned About Potential Negative Impacts of Social Media on Mental Health and Well-being*, AM. PSYCHIATRIC ASS'N (May 20, 2019), https://www.psychiatry.org/newsroom/news-releases/americans-are-concerned-about-potential-negative-impacts-of-social-media-on-mental-health-and-well-being.

use of social media.[80] This concern is well founded, as research suggests that social media may contribute to depression,[81] anxiety,[82] suicidality,[83] eating disorders,[84] and other mental health issues,[85] particularly for younger users. In fact, Facebook was recently embroiled in a scandal when evidence emerged that it knew of but did not act on evidence that Instagram harmed teenage girls' mental health.[86] Given that the vast majority of teenagers[87] and young adults[88] use social media regularly, there is significant public concern over whether and to what extent social media companies are aware of their contribution to mental health issues as well as what steps such companies will take to mitigate mental health harms.[89]

80. *Id*.

81. Yvonne Kelly, Afshin Zilanawala, Cara Booker & Amanda Sacker, *Social Media Use and Adolescent Mental Health: Findings from the UK Millennium Cohort Study*, 6 ECLINICALMEDICINE 59, 67 (2019) (finding that social media use was correlated with increased rates of depression).

82. Heather Cleland Woods & Holly Scott, #*Sleepyteens: Social Media Use in Adolescence Is Associated with Poor Sleep Quality, Anxiety, Depression and Low Self-Esteem*, 51 J. ADOLESCENCE 41, 48 (2016) (finding that social media use is associated with anxiety among adolescents).

83. David D. Luxton, Jennifer D. June & Jonathan M. Fairall, *Social Media and Suicide: A Public Health Perspective*, 102 AM. J. PUB. HEALTH S195, S197 (2012) (citing studies that indicated an association between social media use and suicide).

84. Simon M. Wilksch, Anne O'Shea, Pheobe Ho, Sue Byrne & Tracey D. Wade, *The Relationship Between Social Media Use and Disordered Eating in Young Adolescents*, 53 INT'L J. EATING DISORDERS 96, 105 (2020) (finding an association between social media use and disordered eating conditions).

85. *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 (Dec. 2018) (finding that limiting use of social media decreased several mental health issues, including loneliness, fear of missing out, anxiety, and depression).

86. Georgia Wells, Jeff Horwiz & Deepa Seetharaman, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021, 7:59 AM), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739.

87. Monica Anderson & Jingjing Jiang, *Teens, Social Media and Technology* 2018, PEW RSCH. CTR. (May 31, 2018), https://www.pewresearch.org/internet/2018/05/31/teens-social-media-technology-2018/ (finding that the majority of teens use Instagram, Facebook, Snapchat and YouTube).

88. Auxier & Anderson, *supra* note 75 (finding that roughly eighty-four percent of adults ages eighteen to twenty-nine use social media sites).

89. *See*, *e.g.*, Cristina Criddle, *Facebook Grilled over Mental-Health Impact on Kids*, BBC NEWS (Sept. 30, 2021), https://www.bbc.com/news/technology-58753525 (describing controversy surrounding Instagram's impact on teenagers' mental health).

2. Speech

A second group of concerns relate to speech on digital platforms. First, users have expressed concern over hate speech, or "offensive discourse targeting a group or an individual based on inherent characteristics (such as race, religion or gender) and that may threaten social peace."[90] Hate speech is associated with increased rates of hate crimes and other acts of violence,[91] and research suggests that online hate speech has increased in recent years.[92] Several features of the Internet, and social media in particular—including the ability to post anonymously, to post for free, and to rapidly share communications—are thought to aid in the dissemination of hateful and divisive speech, and many are dissatisfied with the way Big Tech companies have addressed hateful speech on their platforms.[93] Additionally, users express concern over the dissemination of false and misleading information online. The majority (fifty-nine percent) of American adults believe that "technology companies should take steps to restrict misinformation online."[94] Finally, users also express concern over cyberbullying and its impact on minors using digital platforms. Nearly six-in-ten American teenagers have been bullied or harassed online, and two-thirds of teenagers have unfavorable views of how social media companies address online harassment.[95]

90. *What is Hate Speech?*, UNITED NATIONS, https://www.un.org/en/hate-speech/understanding-hate-speech/what-is-hate-speech (last visited Mar. 4, 2023) [hereinafter *Hate Speech*].

91. Zachary Laub, *Hate Speech on Social Media: Global Comparisons*, COUNCIL ON FOREIGN RELS. (June 7, 2019), https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons.

92. Michael Baggs, *Online Hate Speech Rose 20% During Pandemic: 'We've Normalised It'*, BBC NEWS (Nov. 15, 2021), https://www.bbc.com/news/newsbeat-59292509 (reporting an increase in hate speech online).

93. *Hate Speech*, *supra* note 90.

94. Amy Mitchell & Mason Walker, *More Americans Now Say Government Should Take Steps to Restrict False Information Online than in 2018*, PEW RSCH. CTR. (Aug. 18, 2021), https://www.pewresearch.org/fact-tank/2021/08/18/more-americans-now-say-government-should-take-steps-to-restrict-false-information-online-than-in-2018/.

95. Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, PEW RSCH. CTR. (Sept. 27, 2018), https://www.pewresearch.org/internet/2018/09/27/a-majority-of-teens-have-experienced-some-form-of-cyberbullying/.

3. Privacy

A third concern with digital platforms involves privacy.[96] By design, most platforms collect users' personal and/or browsing information, either to resell or to facilitate personalized advertising campaigns.[97] The vast majority of Americans (eighty-one percent) believe that they lack control over how companies use their personal information, and they also believe the risks of this type of data collection outweigh the benefits.[98] Specifically, users express concerns about how their personal data is stored, collected, and used and whether their personal data is vulnerable to hackers.[99] Despite their significant concerns, most Americans are resigned to the fact that their data will be collected by digital platforms: nearly two-thirds (sixty-two percent) believe that it is "not possible to go through daily life without companies collecting data about them."[100]

Relatedly, many digital users express concerns about digital collection and storage of biometric identifiers. Biometric identifiers are distinctive physical characteristics that can identify and distinguish individuals, such as facial scans, voiceprints, fingerprints, or retinal scans.[101] Unlike passwords or pin numbers, biometric data cannot be changed if it becomes compromised, meaning that users are highly vulnerable to data leaks or misuse of their biometric information.[102] Users have expressed concerns about how digital media companies will use the biometric data they have collected, including whether such information will be

96. *See, e.g.*, Rudgayzer v. Google, Inc., 986 F. Supp. 2d 151, 153 (E.D.N.Y. 2013), *order withdrawn*, No. 13-cv-120, 2014 WL 12676233 (E.D.N.Y. Feb. 10, 2014) (noting a group of plaintiffs alleged that Google violated federal and state privacy laws by making Gmail users' contact information public without consent).

97. Liz Mineo, *On Internet Privacy, Be Very Afraid*, HARV. GAZETTE (Aug. 24, 2017), https://news.harvard.edu/gazette/story/2017/08/when-it-comes-to-internet-privacy-be-very-afraid-analyst-suggests/.

98. Brooke Auxier, Lee Rainie, Monica Anderson, Andrew Perrin, Madhu Kumar & Erica Turner, *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, PEW RSCH. CTR. (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/.

99. *Id.*

100. *Id.*

101. Claire Gartland, *Biometrics Are a Grave Threat to Privacy*, N.Y. TIMES (July 15, 2016), https://www.nytimes.com/roomfordebate/2016/07/05/biometrics-and-banking/biometrics-are-a-grave-threat-to-privacy.

102. *Id.*

used by police[103] and whether such information is collected without users' consent.[104]

4. Digital Dependency, Overuse, & Addiction

Users also express concern over the degree to which digital platforms contribute to digital dependency, overuse, and addiction.[105] Social media platforms generate revenue based upon the amount of time users spend on their sites.[106] To capitalize on this profit model, most digital platforms have intentionally employed addictive practices that exploit users' psychological vulnerabilities to encourage compulsive use.[107] These tactics have been highly effective, and they help explain why Americans check their phones an average of 262 times per day[108] and why people worldwide spend an average of six hours and fifty-nine minutes online daily.[109] From "like" buttons to infinite scroll to intrusive notifications, most digital platforms are designed to encourage frequent and prolonged use.[110] A number of former Big Tech employees have publicly denounced social media platforms for their use of these manipulative and addictive practices,[111] and users are increasingly concerned with digital dependence, overuse,

103. *See, e.g.*, Jay Greene, *Amazon Bans Police Use of Its Facial-Recognition Technology for a Year*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/technology/2020/06/10/amazon-rekognition-police/ (describing the controversy surrounding Rekognition, Amazon's facial recognition technology that has been used by the police).

104. *See, e.g.*, *Judge Approves $650m Settlement of Privacy Lawsuit Against Facebook*, THE GUARDIAN (Feb. 27, 2021), https://www.theguardian.com/technology/2021/feb/27/facebook-illinois-privacy-lawsuit-settlement (describing a class action settlement related to Facebook's use of facial recognition technology).

105. *See, e.g.*, Jamie Waters, *Constant Craving: How Digital Media Turned Us All into Dopamine Addicts*, THE GUARDIAN (Aug. 22, 2021), https://www.theguardian.com/global/2021/aug/22/how-digital-media-turned-us-all-into-dopamine-addicts-and-what-we-can-do-to-break-the-cycle.

106. *Id.*

107. *See, e.g.*, *id.*

108. Trevor Wheelwright, *Cell Phone Behavior in 2021: How Obsessed Are We?*, REVIEWS.ORG (Apr. 21, 2021), https://www.reviews.org/mobile/cell-phone-addiction/.

109. John Koetsier, *Global Online Content Consumption Doubled in 2020*, FORBES (Sept. 26, 2020, 5:16 PM), https://www.forbes.com/sites/johnkoetsier/2020/09/26/global-online-content-consumption-doubled-in-2020/?sh=5e51f97b2fde.

110. *Id.*

111. *Id.*

and addiction.[112] In particular, there is concern about children and young adults and their overuse of digital devices: forty-five percent of teens report that they are online "almost constantly,"[113] and roughly ninety percent of teens believe overuse of digital technology is a problem for their age group.[114]

5. Platform Features

Users also express frustration with their inability to control the features of various digital platforms. In many cases, users desire greater control over the content to which they are exposed while using a digital platform. For example, some users of social media sites prefer images while others prefer text while still others prefer videos.[115] Relatedly, as platforms alter their features and layouts over time, some users would rather switch back to the prior incarnation of the platform, if only that were an option.[116] Likewise, some users dislike the volume of advertisements on a platform and would even be willing to pay for an ad-free option if that were possible.[117] In addition, users often have suggestions for new or altered features, but they are often unable to bring those suggestions to the attention of platform management. For example, some users might desire "bedtime" controls that would block access to a given platform during certain nighttime hours.[118] Further, many digital platforms and other websites have issues

112. *See, e.g.*, Hilarie Cash, Cosette D. Rae, Ann H. Steel & Alexander Winkler, *Internet Addiction: A Brief Summary of Research and Practice*, 8 CURRENT PSYCHIATRY REV. 292, 295–98 (2012) (discussing problems associated with internet addiction).

113. Anderson & Jiang, *supra* note 87.

114. *See, e.g.*, *id.* (finding that ninety percent of teens believe spending too much time online is a problem for their age group).

115. *See, e.g.*, Taylor Lorenz, *Instagram Knows You Don't Like Its Changes. It Doesn't Care.*, WASH. POST (July 27, 2022), https://www.washingtonpost.com/technology/2022/07/27/instagram-video-shift-kardashian/ (discussing a petition to have Instagram prioritize photo posts).

116. *Id.* (discussing user dissatisfaction with recent changes made to Instagram).

117. *See, e.g.*, Tracey Lien & David Pierson, *Would You Pay for an Ad-Free Facebook?*, CHI. TRIB. (Apr. 16, 2018), https://www.chicagotribune.com/business/blue-sky/ct-biz-ad-free-facebook-20180416-story.html (reporting survey data showing that twenty-three percent of respondents would be willing to pay for an ad-free Facebook).

118. *See* Melissa Hogenboom, *The Vital Time You Shouldn't Be on Social Media*, BBC NEWS (Jan. 11, 2018), https://www.bbc.com/future/article/20180110-the-vital-time-you-really-shouldnt-be-on-social-media (discussing problems associated with using social media during bedtime hours).

with their display or layout that prevent or limit participation by those with disabilities.[119] Indeed, one study found that 97.4% of websites failed to comply with standards for digital accessibility.[120] Changes to digital platforms, or new features to facilitate access, could increase navigability of these sites for users with disabilities. The key thread uniting users' concerns over features—whether they desire to reinstate older features, to change how features are displayed, or to prompt the creation of new features—is that they currently lack any meaningful influence over their user experience.

6. Fairness of Payment Structures

A sixth concern involves the payment structures at the many digital platforms through which users are able to earn income. On many sites, such as eBay and Etsy, users can sell their own items directly to consumers.[121] On other platforms, including Amazon and Walmart, users can take advantage of the sites' established digital marketplace as marketplace sellers.[122] Other users earn a portion of ad revenue when their content is viewed, an approach taken by content creators on platforms such as YouTube.[123] Although the models differ in their particulars, the principal controversy in each involves a tech giant potentially exploiting the largely powerless parties with whom it contracts. In particular, many users argue that payment rates are too low,[124] fees are too

119. *Why Americans with Disabilities Use the Internet Less Frequently*, BUREAU OF INTERNET ACCESSIBILITY (Feb. 17, 2022), https://www.boia.org/blog/why-americans-with-disabilities-use-the-internet-less-frequently.

120. *Id.*

121. *See* Maryalene LaPonsie, *How to Make Money on Etsy*, U.S. NEWS (Sept. 13, 2021), https://money.usnews.com/money/personal-finance/articles/how-to-make-money-on-etsy.

122. *See Getting Started as a Seller*, AMAZON, https://docs.aws.amazon.com/marketplace/latest/userguide/user-guide-for-sellers.html.

123. *See How to Make Money on YouTube*, YOUTUBE, https://www.youtube.com/creators/how-things-work/video-monetization/.

124. *Why 'Success' on YouTube Still Means a Life of Poverty*, FORTUNE (Feb. 27, 2018), https://fortune.com/2018/02/27/youtube-success-poverty-wages/ (discussing how even successful Youtubers may not earn a significant income from the site).

high,[125] or there are other barriers to earning revenue.[126] For example, Amazon has been criticized for the high fees it imposes on marketplace sellers, which have become its most profitable business segment and its fastest-growing revenue stream, on the grounds that Amazon is "exploiting its monopoly power over these small businesses to pocket a huge and growing cut of their revenue."[127] Given the imbalance of power between users and platforms, users are at a significant disadvantage when trying to negotiate for a superior arrangement, even when their concerns are widely shared.

7. Mistreatment of Workers

A number of large tech companies have come under scrutiny in recent years for their mistreatment of workers. For example, evidence has emerged that Amazon employees work under punishing timelines, which have led to, among other issues, employees urinating in bottles.[128] In addition, Amazon has been identified as one of the most dangerous employers in the United States due to high rates of worker injuries on the job.[129] Similarly, drivers for Uber and Lyft have been critical of these platforms and their low wages and poor working conditions.[130] While workers themselves have protested their poor working conditions,[131] users

125. *See, e.g.*, Sara Morrison, *Amazon's Strategy to Squeeze Marketplace Sellers and Maximize Its Own Profits Is Evolving*, (Dec. 1, 2021, 8:00 AM) VOX, https://www.vox.com/recode/22810795/amazon-marketplace-prime-report (indicating that Amazon's high fees are heavily lopsided and "squeeze" marketplace sellers).

126. *See, e.g.*, John Koestier, *YouTube Bug Cutting Creator Pay 50% Or More; YouTubers Becoming Desperate*, FORBES (Nov. 6, 2020, 10:38 AM) https://www.forbes.com/sites/johnkoetsier/2020/11/06/youtube-bug-cutting-creator-pay-50-or-more-youtubers-becoming-desperate/?sh=4f123787753e (describing a controversy over an alleged "bug" that reduced YouTube creator's revenue significantly).

127. *See, e.g.*, Morrison, *supra* note 125 (indicating that Amazon's high fees are heavily lopsided and "squeeze" marketplace sellers).

128. *Amazon Apologises for Wrongly Denying Drivers Need To Urinate in Bottles*, BBC NEWS (Apr. 4, 2021), https://www.bbc.com/news/world-us-canada-56628745.

129. Todd Wasserman, *Amazon's Biggest, Hardest-to-Solve ESG Issue May Be Its Own Workers*, CNBC NEWS (Aug. 29, 2021), https://www.cnbc.com/2021/08/29/amazons-biggest-hardest-to-solve-esg-issue-may-be-its-own-workers.html.

130. Kari Paul, *Uber and Lyft Drivers Join Day-Long Strike Over Working Conditions*, THE GUARDIAN (July 21, 2021, 7:34 PM), https://www.theguardian.com/technology/2021/jul/21/uber-lyft-drivers-strike-app-based-work-gig-economy.

131. *See, e.g.*, *id.* (describing a strike of Uber and Lyft drivers over wages and working conditions).

are also concerned that many of the most powerful tech companies routinely fail to protect and properly compensate their workers. Some users have even boycotted certain platforms due to their mistreatment of workers.[132]

8. Environmental Impacts

An eighth concern centers on how digital platforms and online shopping contribute to environmental degradation and climate change. Digital activities account for about 3.7% of global greenhouse gas emissions, a comparable figure to global airline traffic.[133] In particular, the data centers and servers that are needed to facilitate internet usage consume sizable amounts of energy, with data centers alone constituting two percent of the energy consumption in the United States.[134] In addition, the proliferation of online shopping has led to considerable inefficiencies in the transport of goods[135] as well as the increased use of shipping boxes and other forms of packaging.[136] Many consumers express concern regarding the overall impact of digital platforms on the environment,[137] and there is a growing movement in favor of sustainable, eco-friendly business practices.[138]

132. *See, e.g.*, Alana Semuels, *Why #DeleteUber and Other Boycotts Matter*, THE ATLANTIC (Feb. 22, 2017), https://www.theatlantic.com/business/archive/2017/02/why-deleteuber-and-other-boycotts-matter/517416/.

133. Sarah Griffiths, *Why Your Internet Habits Are Not As Clean As You Think*, BBC NEWS (Mar. 5, 2020), https://www.bbc.com/future/article/20200305-why-your-internet-habits-are-not-as-clean-as-you-think.

134. *Id.*

135. AJ Dellinger, *Just How Big Is Amazon's Carbon Footprint?*, MIC (Sept. 13, 2019), https://www.mic.com/impact/amazons-carbon-footprint-goes-beyond-shipping-millions-of-prime-packages-18739965 (describing how short delivery windows and reliance on diesel shipping trucks means that Amazon deliveries likely contribute more to greenhouse gas emissions than consumer transport).

136. *See, e.g.*, Steven Mufson, *Amazon Plastic Use Soared in 2020, Environmental Group Says*, WASH. POST (Dec. 15, 2021), https://www.washingtonpost.com/climate-environment/2021/12/15/amazon-plastic-waterways/ (reporting that in 2020 Amazon alone produced 599 million pounds of plastic packaging waste).

137. Madhumitha Jaganmohan, *Customer Opinion on the Environmental Impact of Amazon in the United States as of February 2020, by Age Group*, STATISTA (Jan. 29, 2021), https://www.statista.com/statistics/1124516/environmental-impact-amazon-customer-perception-us/.

138. *See, e.g.*, *Empowered Consumers Call for Sustainability Transformation*, FORBES (Jan. 21, 2021), https://www.forbes.com/sites/forrester/2021/01/21/empowered-consumers-call-for-sustainability-transformation/?sh=25dab39f2042 (describing consumer interest for eco-friendly brands and products).

D. The Need for Increased User Negotiating Power

In the modern world, "contract" is no longer a verb but only a noun. Most modern contracts consist of a party in a superior bargaining position unilaterally imposing terms on a passive, weaker party. In such contracts, the human beings involved have no ability to either participate in the contracting process or to seek out a meaningfully different contracting partner. This Article has thus termed such contracts "captive contracts." Billions of people have resigned themselves to unthinkingly accepting onerous and inequitable terms because they know it is the only way to participate in modern social and economic life.

The problem of lopsided contracting Is particularly acute in the case of Big Tech companies, which subject billions of users to undesirable terms on a daily basis. These enormous digital platforms have brandished their incredible scale as a weapon: users must accept the terms of engagement or surrender essential tools for modern life. It is unsurprising that scandals and controversies plague Big Tech. With no real counterweight to their power, the tech titans have been largely free to do as they wish.

II. JUDICIAL RESPONSES TO CAPTIVE CONTRACTS

The law has slowly begun to adapt to technological changes and to address some specific harms associated with captive contracts.[139] One court has described this process as "the struggle to make the common law of contracts applicable when people interacted with people in the commercial world, fit comfortably in a time when people interact with machines in that world."[140] This Part examines these unfolding solutions, with a focus on judicial approaches that have already been attempted as well as proposals to extend or improve legal protections for internet users. Overall, it identifies the inherent limitation in relying on *post hoc* judicial remedies to increase user satisfaction with captive contracts: such remedies cannot give users the opportunity to meaningfully participate in the contracting process—i.e., to negotiate the terms of their digital agreements. As a result, users remain "captive" to terms and conditions set unilaterally by digital platforms, even if such terms

139. Kar & Radin, *supra* note 24, at 1215.

140. Nicosia v. Amazon.com, Inc., 384 F. Supp. 3d 254, 277–78 (E.D.N.Y. 2019).

are made somewhat less egregious or more conspicuous due to pressure from the courts. Section II.A comments on judicial solutions generally. Section II.B considers how the law addresses contract formation. Section II.C explores alternate approaches courts have taken to regulating problematic digital contracts. Section II.D examines proposals that seek to expand legal protections for users of digital platforms.

A. Judicial Solutions Generally

By their nature, judicial solutions can provide only a very limited response to the problems inherent in captive contracts. As an initial matter, judicial remedies are highly constrained by process.[141] Specifically, captive contracts commonly contain provisions known as arbitration clauses, in which users purportedly consent to have disagreements adjudicated by arbitrators rather than courts.[142] Alternatively, such contracts may employ forum selection clauses, under which users "agree" that only a court located in a specific location will have the power to resolve any disputes that may arise.[143] Separately or in conjunction with arbitration and forum selection clauses, captive contracts also frequently contain "class action waivers," provisions that attempt to limit users' rights to file a class action lawsuit or a class-wide arbitration.[144] Finally, many captive contracts also include limitations on liability, which typically provide that the digital platform will "in no event . . . be liable for any damages" stemming

141. *See* Juliet M. Moringiello, *Notice, Assent, and Form in a 140 Character World*, 44 SW. L. REV. 275, 277 (2014) ("[I]t is probably safe to say that most challenges to online terms of use are challenges to choice of forum and arbitration clauses.").

142. *See, e.g.*, *Terms of Use*, INSTAGRAM (July 26, 2022), https://help.instagram.com/581066165581870 ("YOU AGREE THAT DISPUTES BETWEEN YOU AND US WILL BE RESOLVED BY BINDING, INDIVIDUAL ARBITRATION AND YOU WAIVE YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION LAWSUIT OR CLASS-WIDE ARBITRATION.") (emphasis in original).

143. *See, e.g.*, *Terms of Service*, GOOGLE, https://policies.google.com/terms?hl=en&fg=1 (last visited Feb. 15, 2023) ("These disputes will be resolved exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts.").

144. *See, e.g.*, *Terms of Use*, INSTAGRAM, (July 26, 2022) https://help.instagram.com/581066165581870 ("YOU AGREE THAT DISPUTES BETWEEN YOU AND US WILL BE RESOLVED BY BINDING, INDIVIDUAL ARBITRATION AND YOU WAIVE YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION LAWSUIT OR CLASS-WIDE ARBITRATION.") (emphasis in original).

from the platform's use.[145] As *Figure 2* below highlights, such provisions are commonplace, and one or more of them appear in the vast majority of captive contracts.

Figure 2: Process-Focused Clauses in Captive Contracts

Platform	Arbitration Clauses	Forum Selection Clause	Class Action Waiver	Limitation on Liability
Google Store[146]	X	X	X	X
Google Search[147]		X		X
YouTube[148]		X		X
Facebook[149]		X		X
Wikipedia[150]		X		X
Yahoo[151]	X	X	X	X
Instagram[152]	X	X	X	X
Amazon[153]		X		X

145. *See, e.g.*, Kraft Real Est. Invs., LLC v. HomeAway.com, Inc., No. 4:08-CV-3788, 2012 WL 220271, at *2 (D.S.C. Jan. 24, 2012) (considering whether two provisions purporting to limit liability in a wrap agreement were unconscionable).

146. *Google Store Sales Terms*, GOOGLE STORE (Aug. 3, 2020), https://store.google.com/intl/en_us/about/device-terms/.

147. *Terms of Service*, GOOGLE (Jan. 5, 2022), https://policies.google.com/terms?hl=en&fg=1.

148. *Terms of Service*, YOUTUBE (Jan. 5, 2022), https://www.youtube.com/t/terms?preview=20220105.

149. *Terms of Service*, FACEBOOK (July 26, 2022), https://www.facebook.com/terms.php.

150. *Terms of Use*, WIKIPEDIA (June 16, 2014), https://foundation.wikimedia.org/wiki/Terms_of_Use/en.

151. *Yahoo Terms of Service*, YAHOO! (Feb. 1, 2023), https://legal.yahoo.com/us/en/yahoo/terms/otos/index.html.

152. *Terms of Use*, INSTAGRAM (July 26, 2022), https://help.instagram.com/581066165581870.

153. *Conditions of Use*, AMAZON (Sept. 14, 2022), https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM.

Twitter[154]		X		X
WhatsApp[155]	X	X	X	X
eBay[156]	X	X	X	X
Walmart[157]	X	X	X	X
Target[158]	X	X	X	X
Etsy[159]	X	X	X	X

Due to the widespread use of arbitration clauses, forum selection clauses, and class action waivers, courts that adjudicate disputes related to captive contracts frequently must restrict their analysis to the applicability and/or enforceability of these specific waivers and clauses.[160] Where arbitration or forum selection clauses are found to be applicable and enforceable, courts will, respectively, "compel arbitration"[161] or "transfer venue"[162] to the appropriate court and thereby conclude their analysis. Likewise, where class action waivers are found to be applicable and

154. *Twitter Terms of Service*, TWITTER (June 10, 2022), https://twitter.com/en/tos (last visited Feb. 2, 2023).

155. *WhatsApp Terms of Service*, WHATSAPP (Jan. 4, 2021), https://www.whatsapp.com/legal/updates/terms-of-service/?lang=en.

156. *User Agreement*, EBAY (Oct. 28, 2022), https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259.

157. *Walmart.com Terms of Use*, WALMART (Jan. 6, 2023), https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af40340d6bbd596f116fae5a0.

158. *Terms & Conditions*, TARGET (Dec. 20, 2022), https://www.target.com/c/terms-conditions/-/N-4sr7l.

159. *Terms of Use*, ETSY (Mar. 16, 2022), https://www.etsy.com/legal/terms-of-use?ref=ftr5.

160. *See, e.g.*, Unite Here Loc. 217 v. Sage Hosp. Res., 642 F.3d 255, 259 (1st Cir. 2011) (describing how the court must focus "only on the threshold issue of arbitrability").

161. *Id.* (discussing the court's duty to compel arbitration should arbitrability be established).

162. *See* 28 U.S.C. § 1404(a) (2012) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.").

enforceable, users are precluded from bringing or participating in class action litigation, leading to the termination of such proceedings.[163]

Process-focused clauses such as these effectively restrict the court system's involvement in adjudicating digital conflicts. First, arbitration and forum selection clauses may make it too inconvenient, costly, or logistically difficult for users to pursue legal action in the first place.[164] Likewise, class action waivers, when enforced, reduce the likelihood that users will bother to dispute matters with little financial worth to begin with: as one court put it, "the *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[165]

Further, even when such claims are brought to the court system, process-focused clauses frequently prevent courts from ever addressing users' substantive complaints, meaning that much of the jurisprudence related to captive contracts focuses on procedural matters. Indeed, courts adjudicating disputes related to captive contracts frequently focus on two issues. First, many courts base their analysis of the validity of the contract on foundational contract law principles, primarily on whether a valid contract was formed. Cases of this type are discussed in section II.B below. Second, assuming a valid contract was formed, many courts analyze the enforceability of the disputed waivers or clauses. Section II.C below considers how recent courts have treated the enforceability of so-called forum grabbers and arbitration agreements.

As Parts B and C emphasize, the focus on contract formation and the propriety of arbitration and class action waivers means that court judgments often turn on matters of form. Specifically, courts frequently base their judgments on the conspicuousness of the text of the digital agreement[166] or on whether the language of the

163. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011).

164. *See, e.g.*, Scarcella v. AOL, 798 N.Y.S.2d 348 (Civ. Ct. 2004), aff'd sub nom. Scarcella v. Am. Online, Inc., 811 N.Y.S.2d 858 (App. Term 2005) (describing logistical difficulties related to a forum selection clause).

165. Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).

166. *See* Nicosia v. Amazon.com, Inc., 534 F.3d 220, 233 (2d. Cir. 2016) ("So long as a[n] [offeree] could have seen a reasonably conspicuous reference to the . . . Agreement . . . a jury could conclude that [she] manifested assent." (citing Spam Arrest v. Replacements, LTD., 2013 WL 4675919 *8 (W.D. Wash. 2013) (alterations in original)).

agreement to arbitrate was sufficiently explicit.[167] Such a formalistic analysis is frequently far removed from users' higher-order complaints and instead hinges on highly mundane—at times, trivial—issues such as font size, text color, the use of hyperlinks, and the explicitness of the language used. In many cases, then, the overall impact of the judicial process is merely to prompt digital platforms to superficially edit the text or appearance of captive contracts rather than to address any deeper, more substantive problems.

For most users, the font, color, and typeface of digital agreements are functionally irrelevant. It does not matter whether terms and conditions are displayed in enormous blue text or a tiny black font or flashing neon lights: the reality is that the terms and conditions will not be read or understood by the vast majority of users, no matter how such terms are presented.[168] In fact, one study found that just 0.03% of users viewed the terms and conditions and that the manner of display did not significantly alter the number of views or the time spent reviewing terms and conditions.[169] Further, even if users were to read the terms and conditions of modern websites, such terms are not written in a way that most users can understand.[170] Indeed, research suggests that most online contracts use overly complex language making them "generally unreadable."[171] Because most cases turn on matters of form unlikely to meaningfully impact the user experience, the current judicial treatment of captive contracts is of limited utility.

In addition, judicial responses are further limited by the fact that they are inherently retrospective and reactive in their nature. They do not aid users in negotiating for a preferable arrangement with digital providers at the time of contract formation but instead

167. *See, e.g.*, Atalese v. U.S. Legal Servs. Grp., L.P., 99 A.3d 306, 316 (N.J. 2014) ("[T]he wording of the service agreement did not clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court. That deficiency renders the arbitration agreement unenforceable.").

168. 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, 178 (2011). Further, experimental research suggests that some efforts to call attention to certain portions of text, such as through all-caps, may actually be harmful to some readers. *See* Yonathan A. Arbel & Andrew Toler, *All-Caps*, 17 J. EMPIR. LEG. STUD. 862, 866 (2020).

169. *Id.*

170. Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2277–78 (2019) (analyzing the readability of modern digital contracts and finding that "consumer sign-in-wrap contracts are generally unreadable").

171. *Id.*

function only to correct abuses that have already occurred. This means that the judicial process generally cannot address the fundamental imbalance between users and platforms in terms of their bargaining power, nor will the judicial approach provide users with an opportunity to proactively negotiate terms with digital providers. This foundational limitation underscores the need for a new approach that empowers users to negotiate directly with platforms. A proposal to facilitate class contracting between users and large digital platforms is discussed in detail in Part III below.

B. Contract Formation

Commonly, courts' analysis of modern digital agreements focuses on whether a valid contract has formed and/or whether a particular contract term has been adopted as part of the overall contract. Due to the procedural limitations outlined in section II.A above, such an analysis is commonly restricted to whether an arbitration provision or forum selection clause was adopted as part of the contract. In their assessment of contract formation, courts typically focus on the twin factors of notice and assent: "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility."[172] Reasonably conspicuous notice commonly turns on whether terms were "reasonably communicated" and assent depends on whether such terms were "accepted, and, if so, the manner of acceptance."[173] Courts focus on the notice element first on the grounds that, where notice is lacking, parties cannot be said to have made "unambiguous assent."[174]

172. Ajemian v. Yahoo!, Inc., 987 N.E.2d 604, 612 (Mass. App. Ct. 2013), *aff'd*, 84 N.E.3d 766 (Mass. 2017) (quoting Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 35 (2d Cir. 2002)); Nicosia v. Amazon.com, Inc., 815 F. App'x 612, 614 (2d Cir. 2020) (noting that even when an offeree lacks actual notice, "an offeree is still bound by the provision if he or she is on *inquiry* notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent.") (emphasis in original).

173. *Ajemian*, 987 N.E.2d at 613.

174. *See, e.g.*, Cullinane v. Uber Techs., Inc., 893 F.3d 53, 64 ("Because the Plaintiffs were not reasonably notified of the terms of the Agreement, they did not provide their unambiguous assent to those terms.").

1. Notice

Analyses of whether contracts satisfy the requirement of conspicuous notice prove to be highly fact-dependent, with courts engaging in painstaking examinations of the physical appearance of the digital agreement and the design of the interface and/or webpage(s) involved.[175] *Figure 3* below highlights factors that have been used to support or contradict a finding of conspicuous notice in recent cases.

Figure 3: Factors Considered in Contract Formation Cases

Positive Features	**Negative Features**
Capitalized Font[176]	Lowercase Font[177]
Large Font[178]	Smaller Font[179]
Contrasting Font[180]	Non-Contrasting Font[181]

175. RESTATEMENT OF CONSUMER CONTRACTS § 2 (AM. L. INST., Tentative Draft No. 2, 2022) ("[T]he reasonableness of any process of adoption of a standard term is based on the totality of the circumstances and requires a case-by-case, fact-intensive analysis in light of the ordinary behavior and perspective of consumers engaged in the type of transaction at issue and their interaction with the business. The analysis of whether the consumer, who manifested assent to the transaction, has adopted the standard contract terms includes a review of numerous factors, such as the form and nature of the transaction; the clarity, sequence, flow, and simplicity of the communication of the terms; the design, layout, and content of the interface; the nature of the transaction; the totality of the consumer 's interactions with the business; the difficulty of identifying the notices and finding the location of the terms; the prominence of notices regarding important terms and their nature; and the visibility and clarity of the language alerting consumers that specific steps will result in the adoption of the terms as part of the contract with the business, as well as the manner in which the consumer is asked to manifest assent to the transaction and acknowledge the adoption of the standard contract terms.").

176. Sarchi v. Uber Techs., Inc., 268 A.3d 258, 270–71 (Me. 2022).

177. *Id.*

178. *Cullinane*, 893 F.3d at 64.

179. *Id.*

180. *Id.*

181. *Id.*

Directly Visible[182]	Visible Only Via Hyperlink[183]
Hyperlink In Blue Text[184]	Hyperlink In Black Text[185]
Underlined Hyperlink[186]	Non-Underlined Hyperlink[187]
User Required to View Terms[188]	User Not Required to View Terms[189]
Headings[190]	Lack of Headings[191]
Email Notice of Terms & Conditions[192]	No Email Notice[193]
Focus on Terms & Conditions[194]	Focus on Entering Payment Information[195]

As this *Figure* reveals, courts have frequently based their judgments in such cases on surprisingly simplistic, formalist factors, such as the use of large typefaces, contrasting text colors, or capitalization. Such cases have the predictable effect of incentivizing digital platforms to adopt those features that have been viewed positively and eschewing those which have been treated negatively. Naturally, changes to the appearance of digital agreements do nothing to alter or improve their substance.

Will the user experience be meaningfully altered in the event that websites adopt all of the "positive features," such as blue hyperlinks and scrollwrap, and forgo all of the "negative features,"

182. Theodore v. Uber Techs., Inc., 442 F. Supp. 3d 433, 439 (D. Mass. 2020), appeal dismissed (Aug. 25, 2020).

183. *Id.*

184. Meyer v. Uber Techs., Inc., 868 F.3d 66, 78 (2d Cir. 2017).

185. *Id.*

186. *Id.*

187. *Id.*

188. Kauders v. Uber Techs., Inc., 159 N.E.3d 1033, 1052 (Mass. 2021).

189. *Id.*

190. *Id.*

191. Kemenosh v. Uber Techs., Inc., No. 181102703, 2020 WL 254634, at *6 (Pa. Com. Pl. Jan. 3, 2020).

192. *Id.* ("[I]f Uber had somewhere conveyed that Ms. Kemenosh should read the Terms of Service (as it did in its 2016 email), an offer to arbitrate may have been properly conveyed.").

193. *Id.*

194. Sarchi v. Uber Techs., Inc., 268 A.3d 258, 270 (Me. 2022).

195. *Id.*

such as small fonts and no headings? Almost certainly not. In the words of one court, "a legal rule which merely exalts the *form* and *visual* layout of the hybridwrap agreement, incentivizing merchants to adopt some judicially-favored website designs while foregoing others, is unlikely to have more than a negligible impact on the way buyers and sellers contract over the internet."[196] For all of the judicial anguish over notice, the truth is that internet users are well aware that there are often highly unfavorable terms and conditions attached to their digital activities. This awareness does not change their behavior, however, because digital platforms are so integral to modern life that users have resigned themselves to "consenting" to whatever terms are offered.

2. Assent

When and if the court finds that parties had "reasonably conspicuous notice of the existence of contract terms," courts then turn to the issue of assent.[197] In recent years,[198] assent to most captive contracts has occurred through wrap agreements, which typically take one of four forms: (1) *clickwrap*, where users actively click "yes" to agree to a set of terms and conditions; (2) *scrollwrap*, where code requires users to scroll through terms and conditions before clicking "yes" to agree; (3) *hybridwrap*, where users click a button (such as "continue" or "purchase") while receiving a notice that clicking constitutes acceptance of certain terms and conditions; and (4) *browsewrap*, where users are presumed to consent to a set of terms and conditions by virtue of using a specific platform.

Courts sometimes fail to distinguish between scrollwrap, in which web design requires users to view, open, or scroll through the full text of digital agreements before clicking "yes" to agree to be bound, and clickwrap, in which viewing the terms and conditions is not required.[199] Where the presence of scrollwrap is

196. Nicosia v. Amazon.com, Inc., 384 F. Supp. 3d 254, 279 (E.D.N.Y. 2019).

197. Specht v. Netscape Commc'n Corp., 306 F.3d 17, 35 (2d Cir. 2002).

198. The initial wrap agreement was a shrinkwrap agreement, wherein the terms and conditions were included inside a physical package of software that had to be purchased and opened before the terms and conditions could be accessed. However, today very few customers purchase software in a physical store, rendering shrinkwrap relatively obsolete. *See* Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1050 (2005).

199. *See, e.g.*, Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 398 (E.D.N.Y. 2015) ("Some court decisions that use the term 'clickwrap' are in fact dealing with 'scrollwrap' agreements.").

directly or indirectly identified, however, courts tend to hold that such agreements are enforceable.[200] Clickwrap also receives strong judicial protection, with most courts finding such contracts to be enforceable because "the requirements of an express contract for reasonable notice of terms and mutual assent are satisfied."[201] Hybridwrap is typically enforceable provided that users receive reasonably conspicuous[202] notice of the terms, which usually can be achieved by a clear and obvious statement near a digital icon that clicking the icon constitutes agreement to a set of terms.[203] Finally, browsewrap agreements are less frequently enforced, unless the plaintiff had actual or constructive knowledge of a site's terms and conditions prior to using the site.[204] One study found that, in 2020, clickwrap agreements were considered enforceable in seventy percent of cases, compared to sixty-four percent for hybridwrap, and fourteen percent for browsewrap agreements.[205] Thus, the

200. Kemenosh v. Uber Techs., Inc., No. 181102703, 2020 WL 254634, at *6 (Pa. Com. Pl. Jan. 3, 2020) ("Had Ms. Kemenosh been required to open the hyperlink and scroll through the Terms of Service and Privacy Policy, which contained the arbitration agreement, there may have been an effective offer to arbitrate.").

201. Feldman v. Google, Inc., 513 F. Supp. 2d 229, 238 (E.D. Pa. 2007). *See also* Swift v. Zynga Game Network, Inc., 805 F. Supp. 2d 904, 912 (N.D. Cal. 2011) ("[C]lickwrap presentations providing a user with access to the terms of service and requiring a user to affirmatively accept the terms, even if the terms are not presented on the same page as the acceptance button, are sufficient."); Burcham v. Expedia, Inc., No. 4:07-cv-1963, 2009 WL 586513, at *3 (E.D. Mo. 2009) (stating that clickwrap agreements "have been routinely upheld by circuit and district courts").

202. *Specht*, 306 F.3d at 35 ("Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.").

203. Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009), *aff'd*, 380 F. App'x 22 (2d Cir. 2010) ("Hines therefore lacked notice of the Terms and Conditions because the website did not prompt her to review the Terms and Conditions and because the link to the Terms and Conditions was not prominently displayed so as to provide reasonable notice of the Terms and Conditions. Very little is required to form a contract nowadays—but this alone does not suffice.").

204. *Id.*; *see also Specht*, 306 F.3d at 32 ("We conclude that in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms."); RESTATEMENT OF CONSUMER CONTRACTS § 2 (AM. L. INST., Tentative Draft No. 2, 2022) (noting that "It may, in some circumstances, be more difficult to demonstrate satisfaction of the requirements of adoption in a 'browsewrap' presentation, where the alerts provided to consumers about the proposed terms are often less visible, and where the connection between the action taken and the adoption of the terms is sometimes less clear.").

205. *What Is a Clickwrap Agreement?*, IRONCLAD, https://ironcladapp.com/journal/contract-management/what-is-a-clickwrap-agreement/ (last visited Mar. 2, 2023).

general hierarchy is that scrollwrap, clickwrap, and conspicuous hybridwrap are preferred over browsewrap.

In theory, differential treatment of various forms of wrap agreements protects users from forming legally binding agreements without receiving sufficient notice that they have done so. In practice, this differential treatment merely incentivizes digital platforms to adopt scrollwrap, clickwrap, or conspicuous hybridwrap in lieu of browsewrap.[206] Is this shift revolutionary, or even relevant, for most consumers? Likely not. In fact, one study found that a shift from browsewrap to clickwrap would increase consumer readership of terms and conditions by a mere 0.04%.[207] The vast majority of consumers (ninety-one percent overall and ninety-seven percent for those ages 18–34) will actively click "yes" to consent to legal terms and conditions without reading them, let alone altering their behavior because of them.[208] Even those that do "read" the terms and conditions spend only about four percent as long reading these documents as average reading speeds would suggest is necessary to fully review and consider the text.[209] Ultimately, a judicial preference for certain types of assent in digital agreements is far more about formalism than it is about achieving any genuine benefit to consumers.

Of course, the form of the agreement is not dispositive, and a user may still be found to assent to browsewrap.[210] Where a digital agreement does not actively require a user to click yes to agree, the validity of the agreement depends on whether a "reasonably

206. *See 2021 Report: Clickwrap Litigation Trends*, IRONCLAD, https://explore.ironcladhq.com/rs/528-QBH-821/images/Clickwrap%20Litigation%20Trends%20Report%202021.pdf ("Compared to 2019, clickwrap and sign-inwrap agreements increased in popularity while the use of browsewrap agreements decreased significantly.").

207. Marotta-Wurgler, *supra* note 168, at 183.

208. Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreements*, INSIDER (Nov. 15, 2017, 5:30 AM) https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11 (reporting the results of a Deloitte study).

209. Jonathan Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, INFO., COMMC'N & SOC'Y 1, 16 (2018).

210. RESTATEMENT OF CONSUMER CONTRACTS § 2 (AM. L. INST., Tentative Draft No. 2, 2022) ("[T]he form of the presentation of terms or of the invited manifestation of assent (sometimes referred to as 'clickwrap' or 'browsewrap,' online or in a brick-and-mortar setting) does not of itself determine whether the standard terms have become part of the contract.").

prudent user" is put "on inquiry notice of the terms of the contract."[211] In particular, courts may require "a textual notice" that "advise(s) consumers that continued use of a Web site will constitute the consumer's agreement to be bound by the Web site's terms of use."[212] Again, the court's analysis often focuses on the appearance and visual layout of the website at issue, with courts considering factors such as the conspicuousness of hyperlinks to terms and conditions, the proximity of the hyperlink to other content, the layout of the webpage, and the font and coloring of the webpage.[213] This emphasis on the appearance and design of a digital interface does not relate to the substance of the underlying agreement, and it likely incentivizes digital platforms to alter their website design rather than the substance of their agreements.

C. Contract Enforceability

Some courts, rather than framing the issue in terms of contract formation, have analyzed the provisions of digital contracts in terms of enforceability. This section explores the case law in this area. Section II.C.1 focuses on the doctrine of unconscionability. Section II.C.2 identifies alternative approaches to invalidating problematic captive contracts. Overall, this section finds that these types of judicial remedies offer consumers, at best, limited protection from captive contracts.

1. Unconscionability

Some courts have considered whether digital contracts, or some provisions contained therein, are unconscionable. Under the unconscionability doctrine, courts refuse to enforce a contract or contractual provision involving "extreme unfairness,"[214] including an unfair bargaining process (procedural unconscionability) and unfair terms (substantive unconscionability).[215] Procedural unconscionability

211. Long v. Provide Com., Inc., 245 Cal. App. 4th 855, 867 (2016).

212. *Id.*

213. *Id.*

214. Blue Bird, LLC v. Nolan, No. 302920-V, 2009 WL 1498704, at *4 (Md. Cir. Ct. Apr. 28, 2009).

215. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340 (2011) ("Under California law, courts may refuse to enforce any contract found 'to have been unconscionable at the time it was made' or may 'limit the application of any unconscionable clause.' . . . A finding

is generally held to involve oppression and unfair surprise,[216] while substantive unconscionability is commonly found where the terms of the agreement are overly harsh or one-sided.[217]

In the early aughts, courts occasionally found that arbitration clauses in captive contracts were unconscionable, rendering them unenforceable. For example, in *Comb v. PayPal, Inc.*, the court held that a clickwrap agreement to arbitrate that precluded class action proceedings was unconscionable.[218] In particular, the court took issue with the fact that the class action waiver would functionally preclude adjudication of the disputes at issue, which generally involved very modest sums.[219] Because of this, the court found that the arbitration clause functioned to shield PayPal "from liability instead of providing a neutral forum in which to arbitrate disputes."[220] Initially, cases such as these suggested that the unconscionability defense might be a useful tool to curtail egregious abuses in captive contracts.

However, in *AT&T Mobility LLC v. Concepcion,* the Supreme Court held that the Federal Arbitration Act (FAA) preempts state rules regarding the unconscionability of class action waivers in consumer contracts.[221] Although heavily criticized,[222] this decision

of unconscionability requires 'a 'procedural' and a 'substantive' element . . . ." (citation omitted)); Strand v. U.S. Bank Nat'l Ass'n ND, 693 N.W.2d 918, 924 (N.D. 2005) ("[A] party alleging unconscionability must demonstrate some quantum of both procedural and substantive unconscionability.").

216. U.C.C. § 2-302 (AM. L. INST. & UNIF. L. COMM'N 1952) ("The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.") (citation omitted); A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 486 (1982) ("The procedural element focuses on two factors: 'oppression' and 'surprise.'").

217. Wayne v. Staples, Inc., 135 Cal. App. 4th 466, 480 (2006).

218. Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002) (finding a digital agreement involving an arbitration clause unconscionable under California law).

219. *Id.*

220. *Id.*

221. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

222. *See, e.g.*, Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 266 (2015) ("The Second Circuit erred when it claimed difficulty in overstating the federal policy favoring arbitration. Courts overstate this policy regularly, often with disastrous consequences for consumers, workers, and the bodies of law designed to protect their interests."); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 80 (2011) (stating that cases including *AT&T v. Concepcion* "make plain that the constitutional concept of courts as a basic public service provided by government is under siege."); James Dawson, *Contract After*

was later affirmed in *American Express Co. v. Italian Colors Restaurant*, where the Supreme Court again enforced a class action waiver in an arbitration agreement despite a lower court determination that such a waiver was unconscionable.[223]

Commentators have disputed the degree to which *Concepcion* limits the applicability of the unconscionability doctrine in digital agreements. Some have argued that *Concepcion* only applies to the specific context of class action waivers,[224] while others contend that "*Concepcion* is broadly written."[225] On the whole, given the strong and unspecific language of the opinion, *Concepcion* likely implies that a "generally applicable state contract defense such as unconscionability is preempted by the FAA if it targets arbitration for disfavored treatment,"[226] severely restricting if not outright precluding this doctrine as it applies to arbitration agreements in captive contracts. Even the few courts that have attempted to continue to apply the unconscionability doctrine to arbitrations post-*Concepcion* have recognized that they must do so only on a "case-by-case basis."[227] This doctrine, however, may retain some vitality when considering the unconscionability of forum selection clauses,[228] such as those employed by Google[229] and Meta.[230]

Concepcion*: Some Lessons from the State Courts*, 124 YALE L.J. 233, 247 (2014) ("Many have argued that the proliferation of forced-arbitration clauses has stripped lay claimants of basic procedural protections and given big business the ability to abuse consumers without fear of class-action liability.").

223. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 228 (2013).

224. *See, e.g.*, Saleemi v. Doctor's Assocs., Inc., 292 P.3d 108, 113 (2013) ("Whether *Concepcion* reaches beyond class arbitration procedures is subject to debate.").

225. Coneff v. AT&T Corp., 673 F.3d 1155, 1158 (9th Cir. 2012).

226. Arpan A. Sura & Robert A. DeRise, *Conceptualizing* Concepcion*: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 451 (2013).

227. Brewer v. Mo. Title Loans, 364 S.W.3d 486, 492 (Mo. 2012).

228. *See, e.g.*, Witt v. Nation-Wide Horse Transp., Inc., 197 F. Supp. 3d 1146, 1152 (S.D. Iowa 2016) (considering whether a wrap agreement containing a forum selection clause was unconscionable but finding it did not rise to the level of unconscionability); *see also* Somerset Fine Home Bldg., Inc. v. Simplex Indus., Inc., 185 A.D.3d 752, 753–54 (2020) (considering the unconscionability of a forum selection clause but ultimately finding that the clause did not rise to the level of unconscionability).

229. *Terms of Service*, GOOGLE (Jan. 5, 2022), https://policies.google.com/terms?hl=en&fg=1 ("These disputes will be resolved exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts.").

230. *Terms of Service*, FACEBOOK (July 26, 2022), https://www.facebook.com/terms.php ("You and Meta each agree that any claim, cause of action, or dispute between us that arises

However, the Supreme Court has previously held that forum selection clauses should be upheld unless "extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer," which presents a rather high bar.[231]

Even to the extent that the unconscionability doctrine applies, however, it provides, at best, a very limited tool to curtail captive contracts and their creators. As the language of the unconscionability doctrine suggests, courts typically apply this doctrine only in extreme and atypical circumstances—violations so egregious as to "shock the conscience."[232] Thus, by its nature, the unconscionability doctrine cannot serve as a panacea for captive contracting.

In addition, courts often look to industry standards to determine whether a given contract is unconscionable.[233] Problematically, however, this emphasis on industry standards offers consumers little protection when it is common practice in a given industry to employ unfair contracting practices, and it may even incentivize the widespread adoption of harsh and restrictive agreements across an entire industry.[234] As Professor Nancy S. Kim describes, "using industry standards as a guideline where contracts of adhesion are involved merely reinforces overreaching by the party with greater market power."[235]

Notice alone has also frequently been used to negate the unconscionability defense. Theoretically, many courts consider unconscionability on a "sliding scale" where a strong showing of one type of unconscionability can compensate for a weaker showing of the other.[236] In the context of digital agreements, however, courts

out of or relates to these Terms or your access or use of the Meta Products shall be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County.").

231. Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49, 50–51 (2013).

232. Wayne v. Staples, Inc., 135 Cal. App. 4th 466, 480 (2006).

233. Dov Waisman, *Preserving Substantive Unconscionability*, 44 SW. L. REV. 297, 299 (2014).

234. KIM, *supra* note 40, at 88.

235. *Id*.

236. Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—the Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 6 (2012) (indicating that from 2000–2012 "twelve state supreme courts have either adopted or reaffirmed the sliding scale approach"); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 472–73 (1995) ("Some courts have also indicated that a sliding scale applies: for example, a contract with extraordinarily oppressive substantive terms will require less in the way of procedural unconscionability.").

have frequently dismissed claims before even reaching the substantive inquiry, meaning that a strong showing of both types of unconscionability is functionally required.[237] In particular, courts often dismiss unconscionability claims merely on the basis that "there was notice and an opportunity to read the contract terms," something routinely found in wrap agreements.[238] For example, in *PDC Laboratories, Inc. v. Hach Co.*, a case addressing the enforceability of a digital agreement involving hyperlinked terms, the court found that the mere presence of the hyperlink in blue contrasting text (a common practice in digital agreements) meant that the contract "cannot be considered procedurally unconscionable."[239] In such cases, the mere presence of hyperlinked terms and conditions has had the effect of insulating digital platforms from findings of unconscionability. Overall, the judicial focus on "notice" means little in the face of the reality that few consumers will take the time to read the terms and conditions of digital agreements since they have no ability to negotiate for a superior arrangement.

Furthermore, because unconscionability "must be determined on a case-by-case basis in light of a variety of factors,"[240] courts often apply the doctrine in an *ad hoc* and inconsistent manner, leaving consumers and providers uncertain about whether a specific agreement will be enforced.[241] Even where unconscionability has been found in digital agreements,[242] the findings are usually narrow and predicated on specific facts, meaning that courts frequently decline to extend one precedent to cases which invariably involve

237. KIM, *supra* note 40, at 88.

238. *Id*.

239. PDC Laboratories, Inc. v. Hach Co., No. 09-1110, 2009 WL 2605270, at *3 (C.D. Ill. Aug. 25, 2009); *see also* Hubbert v. Dell Corp., 835 N.E.2d 113, 124 (2005) (finding that the presence of contrasting blue hyperlinks in a digital agreement meant that a contract was not procedurally unconscionable).

240. *See* Besteman v. Pitcock, 272 S.W.3d 777, 787–88 (Tex. App. 2008). *See also* Comb v. Paypal, Inc., 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002) ("A claim of unconscionability cannot be determined merely by examining the face of the contract; there must be an inquiry into the circumstances under which the contract was executed, its purpose, and effect."); Strand v. U.S. Bank Nat. Ass'n ND, 693 N.W.2d 918, 921 ("Because the determination of unconscionability is fact specific, courts must consider such claims on a case-by-case basis.").

241. Oakley, *supra* note 198, at 1061–62.

242. *See, e.g.*, Comb, 218 F. Supp. 2d at 1172 ("A claim of unconscionability cannot be determined merely by examining the face of the contract; there must be an inquiry into the circumstances under which the contract was executed, its purpose, and effect.").

different factual circumstances.[243] Users, then, cannot rely upon the unconscionability doctrine as a dependable source of legal protection. Given the sophistication of most digital platforms, judicial findings of unconscionability merely serve as a rudder guiding these platforms towards minor formalistic modifications that reduce the risk of a finding of unconscionability without significantly changing the user experience.[244]

On balance, the unconscionability doctrine will have, at best, limited utility in providing users with relief from abusive, unjust, or otherwise undesirable captive contracts. The ubiquity of arbitration clauses means that courts are generally limited to analyzing the unconscionability of only the arbitration provisions, rather than the contract's substantive terms. Moreover, the Supreme Court has essentially erased the traditional state law contract defenses through its holdings on FAA preemption. What legal analysis does occur is almost comically superficial. The legal system's path dependency has forced courts into the land of "kindergarten contracts," where judges focus on things like the color of words, whether the words are big or small, and whether they are capitalized or lowercase. Well-resourced tech giants are generally quite capable of capitalizing words and implementing other superficial tweaks to their agreements, thus essentially compelling courts to find that users had constructive notice of the relevant terms. Despite this notice being effectively useless, courts have held that it largely precludes a finding of unconscionability. Ultimately, consumers will have to look elsewhere for protection.

2. Additional Approaches

Some courts have applied (or, as some might argue, stretched) other doctrines, such as public policy exceptions or state laws governing misrepresentations, to avoid undesirable outcomes in

243. *See, e.g.*, Witt v. Nation-Wide Horse Transp., Inc., 197 F. Supp. 3d 1146, 1153 (S.D. Iowa 2016) (distinguishing a digital agreement from that addressed in *Comb*, where unconscionability was found, due to the greater financial value of the matter at hand).

244. *See, e.g.*, Burke v. E-bay, Inc., No. 06-6078, 2007 WL 1219697, at *1 (W.D. Ark. Apr. 24, 2007) (distinguishing the 2002 PayPal agreement at issue in *Comb* from the 2004 PayPal agreement, which PayPal presumably modified following the 2002 decision in *Comb*). *See also* Kraft Real Est. Invs., No. 4:08-cv-3788, 2012 WL 220271, at *8 (D.S.C Jan. 24, 2012) (finding that users can be held to have agreed to terms that have been updated without clear notice of the change so long as the user clicked yes to agree to the terms after they had been updated).

certain factual situations.[245] Additionally, some plaintiffs and their lawyers have attempted to take creative approaches to invalidating problematic contracts, including by raising contract law defenses like infancy and duress.[246] Such alternative approaches may be useful in providing legal relief for a small number of plaintiffs in a relatively narrow set of circumstances; however, these narrow doctrines cannot be relied upon to address the large-scale problems inherent in modern digital contracting. In particular, these solutions will not empower individual users to increase their bargaining power or enable such users to enter into proactive and meaningful negotiations with digital platforms.

D. Proposals for Change

Given the deficiencies in the aforementioned judicial responses to captive contracts, legal scholars, commentators, and politicians have proposed alternative approaches to the problems inherent in captive contracts. This section examines some of those proposals. It finds that, while many are laudable and would protect users from certain abuses and unfair practices, they either fail to address the ultimate source of these issues—users' fundamental lack of bargaining power—or do so only in a very narrow set of circumstances. As a result, this section argues that, in addition to the solutions laid out in these proposals, there is a need for a new approach that empowers digital consumers.

1. Best Practices for Digital Contacts

Interest groups and some scholars have pushed for the adoption of best practices for wrap contracts.[247] Although proposals vary, in general, best practices focus on protecting the basic rights of consumers, such as the right to have disputes settled in a convenient venue[248] or the requirement that consumers affirmatively accept terms.[249]

245. *See, e.g.*, Nguyen v. Barnes & Noble Inc., 763 F.3d 1171 (9th Cir. 2014) (involving a "putative class action in state court against retailer, alleging deceptive practices and false advertising"); *see also* Kar & Radin, *supra* note 24, at 1169.

246. *See, e.g.*, A.V. v. iParadigms LLC, 544 F. Supp. 2d 473, 481–82 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom.* A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009) (wherein plaintiffs put forth duress and infancy defenses).

247. *See, e.g.*, Oakley, *supra* note 198 (discussing best practices for digital agreements).

248. *Id.* at 1085.

249. *Id.* at 1078–79.

The widespread adoption of best practices would be a meaningful step towards reforming captive contracts and reducing their worst abuses. Legislation that mandates some or all of these best practices may be a more direct way to protect consumers from certain egregious violations.[250] Either through public pressure or legislation, best practices could reform captive contracts and eliminate certain features deemed most problematic.

2. Objective Unreasonableness

An additional approach to reforming legal treatment of captive contracts builds off of the proposals of noted legal scholar Karl Llewellyn. Llewellyn, a legal realist, argued that customers do not truly consent to all terms in adhesive contracts but instead give a "blanket assent" to any terms that are not "objectively unreasonable."[251] A common law doctrine based upon Llewellyn's theories would enable courts to invalidate contract terms that are substantively unreasonable.[252] Although the judicial determination of which precise terms should be considered "unreasonable" in the context of a particular bargain may be a somewhat more difficult and subjective exercise than it first appears, a standard of this nature would give courts greater freedom to protect consumer welfare and to invalidate provisions that no rational person would have willingly accepted.

3. The Conscionability Approach

Professor Nancy S. Kim proposes an additional judicial protection for consumers. Specifically, Professor Kim proposes that the party wishing to enforce a wrap contract would be required to affirmatively demonstrate that the contract was "conscionable," unless the term was affirmatively permitted by legislation or unless

250. *Id.* at 1101 (discussing the E.U. approach which involves a set of consumer-focused protections).

251. KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1961).

252. Nicosia v. Amazon.com, Inc., 384 F. Supp. 3d 254, 279 (E.D.N.Y. 2019). *See also* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 429 (2002) ("The authors conclude that Professor Karl Llewellyn's theory of blanket assent . . . should apply equally to the Internet world."); Korobkin, *supra* note 77, at 1206 (suggesting a similar approach but focused on efficiency as opposed to reasonability, wherein courts "increase utility for buyers and sellers, as well as promote social efficiency, by enforcing efficient terms in form contracts and refusing to enforce inefficient terms.").

there was an alternative term expressly available.[253] This approach would greatly reinvigorate the unconscionability doctrine and would place the burden of proving fairness on the party with far greater power and resources. It would likely encourage digital platforms to take a more thoughtful and consumer-focused approach to contract drafting, given their eventual burden to affirmatively prove conscionability. In addition, it would provide courts with significantly more leeway in their analysis of wrap contracts, likely leading to greater legal protections for individual users.

4. Tort Liability

Another proposal calls for the establishment of a new tort for the "intentional deprivation of basic legal rights."[254] This proposal would go beyond merely disallowing certain activities and would provide a sizable financial penalty for violators.[255] The addition of financial liability would incentivize superior contracting practices and would give users greater incentives to pursue litigation than mere non-enforcement of a contract. In these ways, the establishment of such a tort could provide much needed protections for users of digital platforms.

5. Grassroots Efforts

In addition, a number of grassroots efforts have emerged to address the imbalance of power between platforms and users. For example, Facebook users have formed the "Facebook Users Union" which seeks to "build[] user power to hold Facebook accountable" on issues of concern, including misinformation and hate speech.[256] Likewise, YouTube content creators and users have formed their own grassroots group, termed the YouTubers Union, which advocates for various changes to the platform's terms and conditions, such as those related to monetization and demonetization, as well as greater

253. KIM, *supra* note 40, at 203–10.

254. MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 215 (2013).

255. *Id.* at 154–242.

256. *About*, FACEBOOK USERS UNION, https://facebookusers.org/about/ (last visited Mar. 2, 2023).

transparency on the platform.[257] Although these groups often adopt the union label, they do not qualify as unions under existing labor laws.[258] Some, however, have argued that the scope of labor laws should be broadened in order to include nontraditional employees, such as content creators and those who provide data to digital platforms.[259] Additionally, others have argued that the labor union model could be a starting point for efforts to democratize digital platforms' approach to privacy.[260] At present, however, users lack sufficient bargaining power to translate their shared concerns into real-world change.

6. Overall

Although the foregoing are useful tools to address some of the most egregious abuses involved in captive contracting, these proposed reforms predominantly focus on preventing, deterring, or penalizing platforms that engage in the most significant abuses of the contracting process. They largely fail to address what is perhaps the most foundational problem: users' near total lack of bargaining power. While mitigating certain abuses, each of the foregoing proposals still relegates consumers to a reactive role where they remain captive to the terms drafted by digital platforms. The emphasis on protection rather than empowerment means that most of these proposals fail to address users' most fundamental, higher-order concerns.[261] Part III, which follows, thus explores how users could be empowered not only to accept or reject a given set of terms, but to proactively negotiate with digital platforms on a wide array of issues.

257. *Home*, YOUTUBERS UNION, https://youtubersunion.org/ (last visited Mar. 1, 2023); *see also* Samson Amore, *TikTok Creators Are Angling for a Union. Labor Experts Predict an Uphill Battle*, DOT.LA (OCT. 3, 2022), (discussing initial efforts of TikTok content creators to form a union).

258. Eugene K. Kim, *Data As Labor: Retrofitting Labor Law for the Platform Economy*, 23 MINN. J.L. SCI. & TECH. 131, 132–33 (2022); *see also* Stephanie Gorin, *Collective Bargaining in Rent Stabilized Buildings: How New York City's Rent Regulated Market Can Benefit from the Fundamentals of Labor Law*, 17 CARDOZO J. CONFLICT RESOL. 1045, 1062–63 (2016) (arguing that the labor union model could be extended to the rental market).

259. Eugene K. Kim, *Data As Labor: Retrofitting Labor Law for the Platform Economy*, 23 MINN. J.L. SCI. & TECH. 131, 142 (2022).

260. Sari Mazzurco, *Democratizing Platform Privacy*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 792, 862–63 (2021).

261. *See supra* Section I.C (discussing common user concerns with digital platforms).

III. TOWARDS CLASS CONTRACTS

Under the status quo, consumers lack even the barest opportunity to negotiate with digital platforms. There is virtually no way for users to communicate with digital giants regarding their higher-order concerns, let alone to pursue a more bespoke arrangement with such platforms with respect to particular issues or features that matter to them. The captive contracts that dominate the digital arena are inherently one-sided arrangements, with the terms set by the platforms themselves. This Part provides a rough framework for class contracts, an innovation that would harness the efficiencies of the digital age to empower consumers to harness and act on shared concerns. Section III.A describes in broad strokes how class contracting might work in practice. Section III.B provides hypothetical examples of what users could achieve through class contracting. Section III.C explores the costs and benefits of class contracts in comparison to the status quo, and it concludes that class contracting would generate significant benefits that would, overall, outweigh the costs.

A. The Class Contracting Process

Captive contracts have become a collective problem. Much of the world is beholden to Big Tech companies, and billions of users have resigned themselves to accepting whatever terms these entities deign to dole out. The result is supremely unoptimized "agreements" and abounding user dissatisfaction along many dimensions. Class contracts, however, have the potential to empower users to communicate their grievances to Big Tech and to achieve profound and positive change.

A key first step in facilitating class contracts would be to establish or identify a neutral third party that could assist users in identifying shared concerns and then communicating those concerns to digital platforms. This Article thus proposes the establishment of a regulatory body charged with facilitating the class contracting process. In this Article, I will refer to the agency as the Class Contracts Bureau (CCB). The CCB would be charged with overseeing class contracts between users and digital platforms. In order to focus the CCB's efforts, I propose that legislators empower the CCB to establish a size threshold for platforms that fall under the agency's purview, such as platforms with more than one

million U.S. users.[262] This limitation would focus the agency's efforts on larger platforms, and it may even increase competition in the marketplace by providing lighter regulatory burdens for less dominant firms.

Once the CCB is established, individual users and groups of users would be able to submit a petition to the CCB identifying a specific issue or concern common to all or a significant subgroup of users of a digital platform and requesting CCB support in facilitating class contracting with the platform.[263] Perhaps users might express dissatisfaction with Instagram's effects on teen mental health and seek changes in its algorithm, or perhaps they might seek more equitable revenue sharing on YouTube, Amazon, or another digital marketplace. The petition should contain a good faith estimate of the number of users with the shared concern as well as evidence to support such an estimate, in order to demonstrate that the number of users impacted by this issue is sufficient to merit the CCB's intervention.[264] The evidence in support of the size might include an online poll or petition supported by a significant number of digital users, but it could also

262. Elsewhere, I have proposed that certain large digital platforms be designated as "systemically important platforms" ("SIPs"), a designation analogous to the systemically important financial institution ("SIFI") designation in the financial sector. Caleb N. Griffin, *Systemically Important Platforms*, 107 CORNELL L. REV. 445, 509–10 (2022). Platforms designated as SIPs would be ideal candidates for class contracting, given their significant scale and dominance in the digital sphere.

263. This requirement could be analogized to the commonality requirement in class action proceedings. FED. R. CIV. P. 23(a)(2) (requiring that "there are questions of law or fact common to the class."). Class contracting would only be appropriate where at least a meaningful subgroup of users shared a common concern, as class contracting tools and procedures are not designed to pursue individual grievances or to negotiate for outcomes specific to individual users.

264. This requirement would be similar to the requirement of numerosity requirement in class action proceedings, which allows for class actions only where "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). In the class action context, "no specific number alone is determinative of whether numerosity is present, but joinder is generally deemed practicable in classes with fewer than 20 members and impracticable in classes with more 40 members." *in* 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 3:11 (6th ed., Dec. 2022 update). Given the enormous scale of digital platforms, the shared concerns of 40 users would likely be insufficient to merit CCB intervention. A potential threshold of five percent of the U.S. user base could be a more workable threshold in this context, although a threshold measured off of only a particular subgroup of users (e.g., users who are minors) may be appropriate in certain circumstances.

take various other forms appropriate to the particular context.[265] In addition, the petition would identify a person or group seeking to represent impacted users in negotiations, as well as evidence that the proposed representative is capable of representing users' concerns in an appropriate manner.[266]

Once the CCB had received a petition, the CCB might solicit applications from alternate representatives willing and able to negotiate on the same topic of concern, perhaps giving interested parties a number of months to submit relevant materials. In addition, the CCB might consolidate several similar positions, if they seem overly duplicative. The CCB would then be in a position to select the best representative after thoroughly considering all applicants.

If a petition is deemed meritorious, the CCB would then reach out to the digital platform in order to initiate an "opt-in" period, during which users could agree to be represented by the proposed representative.[267] Given the online nature of digital platforms, users would be able to opt in digitally, in an opt-in portal supported and monitored by the CCB. Ideally, the CCB would notify users of the opportunity to opt in and provide a link to the opt-in portal, perhaps through a prominently displayed link on its website, an email to users, a message or alert on the platform itself, or some other notification when users first log in. The opt-in portal would contain some brief information about the representative's

265. Analogous evidence of numerosity is also required in class action proceedings. In the class action context, very general evidence, such as data on the number of individuals who use a certain product, has been deemed sufficient. 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 3:13 (6th ed., Dec. 2022 update). A similar approach may be beneficial in the context of class contracts.

266. This requirement would be similar to the adequacy prerequisite in class action proceedings, which requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4); 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 3:54 (6th ed., Dec. 2022 update). A similar analysis for proposed representatives of digital users would serve to protect users' interests and avoid frivolous use of the class contracting process.

267. This approach would stand in contrast to the class action context, where potential class members must affirmatively opt out. *See* 3 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 9:38 (6th ed., Dec. 2022 update) ("If a class member affirmatively opts out, she can litigate herself another time—or choose to not litigate at all—but if she does not affirmatively opt out, she will be bound by the class judgment."). An opt-in approach is preferable in the context of class contracts, both because the existing infrastructure of the digital platform facilitates direct communications with impacted parties and because there is less need for a one-size-fits-all solution that address an issue once and for all.

proposals for change as well as further information about the representative's experience, goals, and priorities. Given the nature of the internet, it might make sense to have an ongoing opt-in period of between several weeks to a few months in length, with users able to opt in to representation at any point during this period.

A representative that achieves sufficient support, as demonstrated by having a specified number or percentage[268] of users opt in to representation during the opt in period, would be certified as the "lead user." Importantly, lead users would represent only those users who opted in to such representation. This would ensure that users affirmatively consented to be represented and actively supported the proposals laid out by the lead user. Given the diversity and heterogeneity of users' concerns with digital platforms, it would be reasonable—and for larger platforms, expected—to have multiple certified representatives simultaneously representing user concerns to the same digital platform, with each advocating for a different issue and/or a different group of users. In addition, given that users might share a broad concern that is relevant for many different platforms, a single representative should be permitted to represent users on multiple platforms at the same time. For example, a lead user might negotiate for improved environmental practices related to the shipping of consumer goods at Amazon, Walmart, Target, and eBay simultaneously.

Once a representative has been certified, the lead user and the digital platform would be subject to a number of regulations designed to encourage fair and productive negotiations. First, the digital platform would be required to meet with the lead user regularly to negotiate on their specific area of concern. Regular negotiations might occur monthly or biweekly until an agreement has been reached. These negotiations could be conducted in person, but, to minimize unnecessary costs, negotiations via video conferencing would be preferable in most circumstances.

268. The CCB might set a general numerical threshold such as one percent of the U.S. base or 100,000 users, whichever is lower. Alternatively, the CCB might set a numerical threshold specific to the context, perhaps where impacted users are only a subset of the overall user population such as users with disabilities or users that serve as digital marketplace sellers. The precise threshold value should serve the goal of concentrating the CCB's efforts on issues of significant concern.

Second, the digital platform and the lead user would be subject to a duty to negotiate in good faith.[269] The goal of this duty would be to establish "community standards of decency, fairness or reasonableness" and thereby encourage fruitful and productive negotiations.[270] Although amorphous by nature, such a duty would be designed to exclude bad faith conduct in negotiations, such as dishonesty, deception, refusal to cooperate, or abuse of bargaining power.[271]

Third, digital platforms and lead users would be obliged to engage in fair negotiation practices. In particular, platforms would be banned from retaliating against users for engaging in class contracting.[272] This ban on retaliation might bar activities such as censoring posts on social media, imposing less favorable terms on users, removing their right to sell products, or closing the accounts of users supportive of class contracting efforts.

Fourth, once the parties reach an agreement, the digital platform would be required to post a notice about the outcome of the negotiation in a prominent place on its website. The benefits of the negotiation would generally apply only to those who opted in

269. The duty to bargain in good faith has been established in a number of other contexts, including the National Labor Relations Act § 8(d) and the Federal Truth in Lending Act. Browning Jeffries, *Preliminary Negotiations or Binding Obligations? A Framework for Determining the Intent of the Parties*, 48 GONZAGA L. REV. 1, 14 n.71 (2013). In addition, parties to preliminary agreements have been held to have a duty "to bargain in good faith over open terms." Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 664 (2007).

270. The contract law doctrine of good faith has been characterized in this manner. RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. a (AM. L. INST. 1981).

271. Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 201–203 (1968) (discussing how good faith is an "excluder" that "serves to exclude a wide range of heterogeneous forms of bad faith" and providing some examples of conduct held to constitute bad faith under contract law).

272. Digital platforms have allegedly engaged in retaliation in other contexts. *See, e.g.*, *Meta Disables Facebook Users Union Instagram Account*, GLOB. EXCH. (Mar. 23, 2022), https://globalexchange.org/2022/03/23/meta-disables-facebook-users-union-instagram-account/ ("Facebook disabled FUU's account and then labeled it as 'a mistake' and on March 22nd, Facebook fully deleted FUU's account"); Michael Sainato, *US Judge Orders Amazon to 'Cease and Desist' Anti-Union Retaliation*, THE GUARDIAN (Nov. 28, 2022 13:10 PM), https://www.theguardian.com/technology/2022/nov/28/amazon-staten-island-new-york-retaliation (discussing Amazon's retaliation against workers seeking unionization). Thus, provisions designed to protect users involved in class contracting from retaliation would be desirable and important safeguards.

to representation during the opt-in period,[273] although there may be cases where the benefits would be extended more broadly to all users or certain subsets of users, such as minors. In some circumstances, it might be appropriate to give users a second opportunity to opt in at this point, after the outcome is clearly established and when they can make a more informed choice.[274]

The CCB would be charged with oversight of the negotiation process. In the event that the lead user or platform violated the aforementioned restrictions, the CCB would be empowered to impose various penalties on the violator, such as monetary fines. In addition, participants and third parties would be able to flag alleged violations to the CCB for further investigation.

Lead users would have a number of tools available to empower their negotiations. Supportive users might pledge to boycott the platform for a period of time or until a successful agreement is reached.[275] Some users might even commit to close their accounts if a successful bargain is not achieved. In addition, users could share posts on the platform itself or unrelated social media sites to raise awareness of the issues at play in the negotiations. As users are the primary income source for platforms, the threat of exit or negative

273. For example, a representative focused on data privacy might reach an agreement that bars Facebook from selling only supportive users' personal data, just as California citizens currently have the right to opt out of the sale of their personal information while non-Californians do not. CAL. CIV. CODE tit. 1.81.5 § 1798.120(a) (2020) (giving California residents the legal right to opt out of the sale of their personal information).

274. A somewhat analogous second opportunity to opt out is sometimes available to members of a class after a class action settlement has been reached. The benefit of this second opt-out is that members have more information about the terms of the settlement when they make their decision to opt out. *See* Nicholas Barnhorst, *How Many Kicks at the Cat?: Multiple Settlement Protests by Class Members Who Have Refused to Opt Out*, 38 TEX. TECH L. REV. 107, 112 (2005) (discussing how the second settlement opt-out, "where the terms of the settlement, and by extension the outcome of the class litigation, is known" help ensure that "the decision to opt out is made with full information"). A similar, but opposite, approach might be beneficial in case of class contracts, where users would have a second opportunity to opt in to the benefits secured by class contracting.

275. For a discussion of various ways users might use collective action to pressure digital platforms to reach a negotiated solution, see Nicholas Vincent, Brent Hecht & Shilad Sen, *"Data Strikes": Evaluating the Effectiveness of a New Form of Collective Action Against Technology Companies*, PROCEEDINGS OF THE 28TH WORLD WIDE WEB CONFERENCE (2019), https://brenthecht.com/publications/thewebconference2019_datastrikes.pdf.

publicity would provide a powerful source of leverage for class contracting efforts.[276]

Additionally, lead users could incentivize change at digital platforms with positive enforcement mechanisms, or "carrots." For instance, lead users might agree to pay for a subscription service that provided or eliminated specific features. Perhaps eco-conscious consumers would pay a premium for a hypothetical, more environmentally friendly version of Amazon ("Amazon Green") that had certain additional benefits, such as the use of biodegradable packing materials or automatic carbon offsets for deliveries. Lead users might also negotiate for the right to pay a premium in exchange for increased privacy protections, such as limitations on the collection of personal data by social media platforms, or, alternatively, for an enhanced suite of parental control features that allow parents to more closely monitor and tailor their children's use of other platforms, such as YouTube. Digital platforms may accede to such demands for purely economic reasons. Alternatively, digital platforms might be encouraged to come to an agreement with lead users in order to improve their public image. Being seen as cooperative and even innovative in the face of challenges would likely have positive repercussions for platforms, especially those that have had a history of scandals and negative press.[277]

B. Imagining the Impact of Class Contracts

What could class contracts achieve for users? The potential positive outcomes from class contracts are as varied as the problems plaguing digital platforms. When users and platforms work together to identify innovative solutions to new and existing problems, there are almost limitless possibilities for positive change. Still, it is illustrative to imagine what class contracts could

276. For instance, Meta netted $84.4 billion in the first three quarters of 2022, and $82.4 billion (97.6% of its total revenue) was generated from ads. Given that ad revenue is a reflection of usership, Meta has a significant financial incentive to preserve its user base and deter users from exiting the platform. *Meta Reports Third Quarter 2022 Results*, META (Oct. 26, 2022), https://s21.q4cdn.com/399680738/files/doc_news/Meta-Reports-Third-Quarter-2022-Results-2022.pdf.

277. *See, e.g.*, Kari Paul, *Facebook's Very Bad Year. No, Really, it Might be the Worst Yet*, THE GUARDIAN (Dec. 29, 2021, 6:00 AM EST), https://www.theguardian.com/technology/2021/dec/29/facebook-capitol-riot-frances-haugen-sophia-zhang-apple (detailing recent scandals that have plagued Facebook).

achieve for users and society generally. This section therefore provides some thoughts on how the common user complaints identified in section I.C above might be addressed through class contracts. Again, these are simply illustrative, nonexclusive examples of issues that users might wish to address. The billions of diverse users across the world's digital platforms would likely have many more concerns that would benefit from class contracting than this Article is able to address.

1. Mental Health

Lead users focused on mental health could negotiate to have platforms solicit input from mental health experts on how to redesign their user interfaces, algorithms, or other portions of the user experience in order to minimize mental health risks. Lead users might also come to an agreement where social media sites such as Facebook and Instagram would agree to prominently display the contact information for a suicide or mental health helpline on their websites.[278] Alternatively, lead users might negotiate for greater parental control over a minor's social media accounts, perhaps enabling parents to turn off notifications, limit the child's time on the platform, restrict use during school hours or sleeping hours, disable features that may promote addictive behavior, or even block their child's devices from the platform altogether.[279] Social media sites might agree to raise the minimum age for opening an account (which is age thirteen on most platforms) and/or to require evidence that a user actually meets the age threshold before opening an account.[280] Additionally, lead users might advocate that social media sites make significant financial contributions to mental health organizations, or perhaps

278. *See, e.g.*, *SAMHSA's National Helpline*, SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., https://www.samhsa.gov/find-help/national-helpline (last visited Mar. 4, 2023) (providing information about the 24-hour helpline).

279. *See, e.g.*, *How To Set Up Facebook Parental Controls*, BARK, https://www.bark.us/guides/app-management/facebook (last visited Mar. 4, 2023) (discussing how "there are no built-in parental controls available through Facebook").

280. *See* Mary Aiken, *The Kids Who Lie About Their Age to Join Facebook*, THE ATLANTIC (Aug. 30, 2016), https://www.theatlantic.com/technology/archive/2016/08/the-social-media-invisibles/497729/ (discussing how many children lie in order to open accounts on social media sites despite being under the purported age limit).

social media sites might pledge to give mental health charities free advertising on their platforms.[281]

2. Speech

Lead users might advocate for a number of improvements related to digital speech. First, those addressing hate speech might advocate that digital platforms adhere to a set of guidelines or best practices set forth by a third-party organization.[282] Alternatively, lead users might push for the involvement of third-party experts in overseeing a given platform's approach to hate speech.[283] Perhaps the platform might consult with a board of experts in designing or updating its hate speech policies, or perhaps the platform would participate in a regular audit of its approach from a third-party group. Lead users might also push for greater oversight of ad content or to increase the number of employees dedicated to addressing hate speech on the platform. Similar steps might be taken in the context of misinformation. For instance, lead users might request platform management to consult with third-party experts in designing or updating misinformation policies, or they might ask a given platform to comply with a set of best practices for addressing online misinformation. Alternatively, lead users might push social media companies and other platforms to ban certain problematic content or topics, or to provide alternative information alongside content flagged as misinformation.[284] In order to address cyberbullying, lead users could advocate that

281. *See* K. Latha et al., *Effective Use of Social Media Platforms for Promotion of Mental Health Awareness*, 9 J. EDUC HEALTH PROMOTION 1, 5 (2020) (discussing how social media platforms can be used to increase mental health awareness).

282. *See, e.g.*, *IDI–Yad Vashem Recommendations for Reducing Online Hate Speech*, THE ISRAEL DEMOCRACY INSTITUTE & YAD VASHEM, https://www.yadvashem.org/yv/pdf-drupal/en/recommendations-for-reducing-online-hate-speech.pdf (last visited Mar. 4, 2023).

283. For example, from 2018 to 2020, Facebook conducted a Civil Rights audit, which began with a six-month period in which auditors "interviewed and gathered the concerns of over 100 civil rights organizations." A similar approach targeting hate speech could be taken at Facebook and other platforms. *Facebook's Civil Rights Audit – Final Report*, FACEBOOK 1, 3 (July 8, 2020), https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf.

284. *See, e.g.*, Kari Paul, *Facebook Bans Misinformation About All Vaccines After Years of Controversy*, THE GUARDIAN (Feb. 8, 2021, 18:44 PM), https://www.theguardian.com/technology/2021/feb/08/facebook-bans-vaccine-misinformation (discussing Facebook's decision to ban all misinformation related to vaccines after significant controversy on the subject).

digital platforms conduct research into cyberbullying prevention, or that they make financial contributions to fund mental health resources for victims of cyberbullying. Lead users might push for digital platforms to respond more quickly to reports of cyberbullying, to adopt artificial intelligence technologies to assist in cyberbullying detection (or ideally, prevention), or to warn users before posting problematic content.[285]

3. Privacy

Lead users focused on digital privacy might negotiate with platforms to give members the right to opt out of the sale of personal information and/or the right to view and delete personal information, as is available to California residents under the California Consumer Privacy Act of 2018.[286] Lead users might also seek to extend the "right to be forgotten," or the right to request to have personal data removed from search results, to represented users or even a particular subgroup such as minors.[287] Alternatively, lead users might seek to have the default on digital platforms shifted from data collection to anonymity, with users needing to affirmatively opt in[288] before data is collected or sold.[289] Lead users could further advocate that digital platforms adopt best practices for digital privacy as set out by a particular organization, such as the best practices recently developed by the Federal

285. *See, e.g.*, Sameer Hinduja, *How Social Media Companies Should Combat Online Abuse*, CYBERBULLYING RSCH. CTR., https://cyberbullying.org/how-social-media-companies-should-combat-online-abuse (last visited Feb. 8, 2023).

286. CAL. CIV. CODE §§ 1798.100–20.

287. *See Right to Be Forgotten*, INTERSOFT CONSULTING, https://gdpr-info.eu/issues/right-to-be-forgotten (last visited Mar. 4, 2023); *see also* Edward J. George, *The Pursuit of Happiness in the Digital Age: Using Bankruptcy and Copyright Law as a Blueprint for Implementing the Right to Be Forgotten in the U.S.*, 106 GEO. L.J. 905, 913–931 (2018) (discussing the right to be forgotten and how it might be implemented in the United States).

288. For a discussion on how form of choice architecture can induce people to act in predictable ways that might benefit or harm them, see generally RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

289. Such an approach is likely to be very popular with digital users. When surveyed, three-quarters of respondents indicated that they would prefer if digital websites requested consent before tracking users' data. Jason Cohen, *Attention, Big Tech: 3 Out of 4 People Want Opt-In Data Tracking*, PC MAG (Aug. 13, 2021), https://www.pcmag.com/news/attention-big-tech-3-out-of-4-people-want-opt-in-data-tracking ("Instead of simply being tracked in exchange for using a service, people would prefer to opt into ad tracking. Invisibly found that 75%—or three out of four respondents—said they preferred to be asked for consent before being tracked.").

Trade Commission (FTC).[290] Lead users might also negotiate for the right to have stored biometric identifiers deleted, to set defaults against the collection and storage of biometric data, or to require user consent before biometric data is stored or used.[291] Another approach might be to negotiate for a guaranteed financial payment to all impacted users in the event of a data breach in order to incentivize proper storage and security practices.

4. Digital Dependency, Overuse, & Addiction

Lead users focused on digital dependency, overuse, and addiction might negotiate for a number of different changes. First, such representatives might negotiate to have the platform remove or set protective defaults that automatically disable features that may contribute to addiction and overuse, such as infinite scroll (or a feature that allows users to endlessly view new content without affirmatively clicking to view such content),[292] autoplay (or videos that automatically play without a user affirmatively clicking play),[293] notifications from the application that automatically pop up on a phone or other device,[294] "like" validation systems,[295] or

290. *Careful Connections: Building Security in the Internet of Things*, FED. TRADE COMM'N, https://www.bulkorder.ftc.gov/system/files/publications/pdf0199-carefulconnections-buildingsecurityinternetofthings.pdf (last visited Mar. 4, 2023).

291. For further discussion of approaches to protecting users' biometric information, see generally Lauren Stewart, *Big Data Discrimination: Maintaining Protection of Individual Privacy Without Disincentivizing Businesses' Use of Biometric Data to Enhance Security*, 60 B.C. L. REV. 349 (2019) (examining existing approaches to regulating biometric data storage and identifying priorities for future regulation in this area); Hannah Zimmerman, *The Data of You: Regulating Private Industry's Collection of Biometric Information*, 66 KAN. L. REV. 637 (2018) (describing the existing landscape of biometric privacy laws and exploring priorities for further regulations).

292. Nir Eyal, *Infinite Scroll: The Web's Slot Machine*, PSYCH. TODAY (Aug. 29, 2012), https://www.psychologytoday.com/us/blog/automatic-you/201208/infinite-scroll-the-webs-slot-machine (discussing how infinite scroll induces compulsive use and overuse of digital platforms).

293. Alex Hern, *US Could Ban 'Addictive' Autoplay Videos and Infinite Scrolling Online*, THE GUARDIAN (July 31, 2019, 05:57 AM), https://www.theguardian.com/media/2019/jul/31/us-could-ban-addictive-autoplay-videos-and-infinite-scrolling-online (discussing a bill to ban autoplay because of its addictive nature).

294. John Herrman, *How Tiny Red Dots Took Over Your Life*, N.Y. TIMES (Feb. 27, 2018), https://www.nytimes.com/2018/02/27/magazine/red-dots-badge-phones-notification.html (discussing how notifications lead to overuse of digital platforms).

295. *See* NIR EYAL, HOOKED: HOW TO BUILD HABIT-FORMING PRODUCTS 39–41 (2014) (describing how to design products and services that encourage the formation of habits in

other habit-forming features. Digital platforms might alternatively agree to adhere to a set of best practices, such as those set forth by the Center for Humane Technology, that outlines steps to reduce the addictive nature of websites and apps.[296] Lead users might seek to give users the right to bar their IP address from accessing certain platforms, much as compulsive gamblers can self-exclude from casinos and online gambling sites.[297] Additionally, lead users might negotiate to have digital platforms make a financial contribution to fund research on digital addiction and its treatment, or to conduct audits of their platforms to identify and eliminate addictive features. Platforms might agree to place digital addiction experts on an advisory board or to consult with experts when new features are under consideration. Alternatively, digital platforms might agree to provide users of their sites with free resources to combat addiction and overuse, such as those developed by various third-party applications.[298]

5. Platform Features

Lead users might push for new or altered features for their supporters. In some instances, lead users might advocate for a new and improved user interface for digital platforms, or a change in its algorithm that favors or disfavors certain content.[299] Similarly, lead users might advocate that the platform revert back to a prior layout or reinstate popular former features that have since been removed.[300] Lead users might also express a willingness to pay

their users, including how likes and other validation systems can encourage users to come back to the platform).

296. *See For Technologists*, CTR. FOR HUMANE TECH., https://www.humanetech.com/technologists (last visited Mar. 4, 2023).

297. AM. GAMING ASS'N., RESPONSIBLE GAMING REGULATIONS AND STATUTES GUIDE 4 (Sept. 2022), https://www.americangaming.org/wp-content/uploads/2019/09/AGA-Responsible-Gaming-Regs-Book_FINAL.pdf (reporting that thirty-four states require casinos to facilitate self-exclusion as of 2022).

298. *See*, Lauren Sharkey, *These Reward-Based Apps Make Kicking Your Smart Phone Addiction SO Much Easier*, BUSTLE (Aug. 13, 2018), https://www.bustle.com/p/7-apps-for-smartphone-addiction-because-its-a-very-real-problem-10066400 (discussing various applications to help with smartphone addiction).

299. *See, e.g.*, Tati Bruening, *Make Instagram Instagram Again*, CHANGE.ORG, https://www.change.org/p/make-instagram-instagram-again-saveinstagram (last visited Mar. 4. 2023) (calling for a change to Instagram's algorithm that favors photos).

300. *See, e.g.*, *id.* (providing the text of a petition signed by over 325, 000 Instagram users to reinstate prior features).

a fee for a specialized version of the platform, and they could negotiate with platforms over the terms of such an arrangement.[301] Additionally, users with disabilities might meet with platform representatives to discuss modifications or new features or tools that would increase a platform's navigability and accessibility.[302] Alternatively, lead users might advocate for platforms to comply with the Web Content Accessibility Guidelines, which are the "consensus standard for digital accessibility."[303] Platforms and lead users might collaboratively work towards the development of new features based upon user input, and there is almost limitless potential for innovation and personalization of the user experience through such a dialogue.

6. Fairness of Payment Structures

Lead users representing digital sellers might negotiate to have digital platforms reduce the fees they charge or to structure fees or revenue sharing more equitably. For example, representatives might bargain to have flat fees reduced, to have fee splits reduced after a certain volume of sales has been achieved, or to give sellers the ability to opt out of mandatory "ad fees."[304] In this way, digital sellers may be able to substantially increase their income in a way that they could not achieve through individual negotiations.[305] In addition, lead users might also bargain for access to certain benefits, perhaps receiving access to employer-sponsored health

301. *See, e.g.*, Tracey Lien & David Pierson, *Would You Pay For an Ad-Free Facebook?*, CHI TRIB. (Apr. 16, 2018, 8:25 AM), https://www.chicagotribune.com/business/blue-sky/ct-biz-ad-free-facebook-20180416-story.html (reporting survey data showing that twenty-three percent of respondents would be willing to pay for an ad-free Facebook).

302. *Why Americans With Disabilities Use The Internet Less Frequently*, BUREAU OF INTERNET ACCESSIBILITY (Feb. 17, 2022), https://www.boia.org/blog/why-americans-with-disabilities-use-the-internet-less-frequently.

303. *Id.*

304. *See, e.g.*, Lauren Debter, *Etsy's Push To Compete With Amazon Leaves Sellers Squeezed By Rising Costs*, FORBES (Feb. 27, 2020) https://www.forbes.com/sites/laurendebter/2020/02/27/etsy-sellers-rising-costs-free-shipping-advertising/ (describing controversy over mandatory ad fees on Etsy).

305. A similar result has been achieved through collective bargaining in the context of labor unions. *See, e.g.*, Richa Naidu, *Retail Workers in Unions Reap Higher Wages Even as U.S. Organizers Suffer Setbacks*, REUTERS (July 9, 2021, 6:59 AM), https://www.reuters.com/business/retail-workers-unions-reap-higher-wages-even-us-organizers-suffer-setbacks-2021-07-09/ (discussing the wage advantage for retail workers in unions).

plans provided they achieve a certain volume of sales on the platform.[306]

7. Mistreatment of Workers

Although users have interests that are generally distinct from those of workers, many users may also be concerned about how large digital platforms treat their workers. As a result, lead users may wish to negotiate for improved working conditions for the platform's employees. For instance, perhaps they might advocate that Amazon drivers and other delivery personnel be given increased breaks or regular access to rest stations,[307] rather than allegedly having no choice but to urinate in bottles and defecate in bags.[308] Lead users might also support ongoing efforts of workers to unionize, and/or they might collaborate with existing worker unions to push for improved worker welfare.[309] Lead users might also focus on workplace injuries, perhaps pressuring companies to research and develop policies and procedures that reduce the risk of injury or harm. Alternatively, lead users could seek to have companies provide increased support for a particular subgroup of

306. *See* Jason Del Rey, *Amazon is Teasing a New Health Care Offering – for its Sellers*, VOX (Apr. 16, 2020, 12:45 PM), https://www.vox.com/recode/2020/4/16/21223458/amazon-sellers-health-care-health-insurance (indicating that Amazon has considered offering health care for its sellers in the past).

307. *See* Farhad Manjoo, *The Force That Can Help Amazon's Workers? Amazon's Shoppers*, N.Y. TIMES (Apr. 10, 2021), https://www.nytimes.com/2021/04/10/opinion/amazon-warehouse-workers-rights-unions.html (discussing how pressure from customers could lead to improved working conditions at Amazon).

308. *Amazon Apologizes for Wrongly Denying Drivers Need to Urinate in Bottles*, BBC NEWS (Apr. 4, 2021), https://www.bbc.com/news/world-us-canada-56628745; Kari Paul, *Leaked Memo Shows Amazon Knows Delivery Drivers Resort to Urinating in Bottles*, THE GUARDIAN (Mar. 25, 2021, 20:37 PM) ("Workers told the Intercept the issue was commonly referred to in internal discussions, with one former Amazon employee telling the publication that drivers are 'implicitly forced to do so, otherwise we will end up losing our jobs for too many undelivered packages.'") (internal quotation marks omitted).

309. *See* Laurel Wamsley & Vanessa Romo, *Uber And Lyft Drivers Are Striking – And Call On Passengers To Boycott*, NPR NEWS (May 8, 2019, 7:05 AM), https://www.npr.org/2019/05/08/721333408/uber-and-lyft-drivers-are-striking-and-call-on-passengers-to-boycott (indicating that striking Uber and Lyft drivers were calling on passengers to simultaneously boycott these platforms).

workers, such as disabled workers, pregnant workers,[310] or workers who are the victims of harassment on the job.[311]

8. Environmental Impacts

To address environmental concerns, lead users might push online retailers to abandon short delivery windows for certain products or to increase fees on short delivery windows, since such windows are associated with substantially increased carbon emissions.[312] Alternatively, lead users might push for "green" subscription options, which guarantee that deliveries are made by electric vehicles, that all packaging uses post-consumer recycled products, and/or that the retailer will pick up and recycle used packaging. Lead users might also encourage platforms to commit to only or predominantly using renewable energy or to offsetting carbon emissions for all deliveries. Additionally, lead users might pressure corporations to make financial contributions to environment-focused NGOs or to ban environmentally harmful products from their digital marketplaces, such as those that use palm oil or other products that are not sustainably sourced.[313] Likewise, lead users could encourage digital platforms to contribute to reforestation campaigns or to use only Forest-Stewardship-Council-certified packaging.[314]

310. *See* Alina Selyukh, *Senators Want An Investigation Of How Amazon Treats Its Pregnant Workers*, NPR NEWS (Sept. 11, 2021), https://www.npr.org/2021/09/10/1033247833/u-s-senators-call-for-probe-of-amazons-approach-to-pregnant-workers (discussing controversy over Amazon's treatment of pregnant workers).

311. Jason Del Rey, *Amazon Hit by 5 More Lawsuits from Employees Who Allege Race and Gender Discrimination*, VOX (May 19, 2021, 6:59 PM, https://www.vox.com/recode/2021/5/19/22444177/amazon-five-more-lawsuits-employees-allege-race-and-gender-discrimination-charlotte-newman (discussing allegations that Amazon retaliated against workers who reported harassment on the job).

312. *See* Lydia DePillis, *America's Addiction to Absurdly Fast Shipping has a Hidden Cost*, CNN BUS. (July 15, 2019, 1:40 PM), https://www.cnn.com/2019/07/15/business/fast-shipping-environmental-impact/index.html (discussing the environmental impact of short shipping windows).

313. *See 8 Things to Know About Palm Oil*, WORLD WILDLIFE FUND, https://www.wwf.org.uk/updates/8-things-know-about-palm-oil (last visited Mar. 4, 2023).

314. *Packaging*, FOREST STEWARDSHIP COUNCIL, https://anz.fsc.org/packaging, (last visited Mar. 4, 2023).

9. Overall

Overall, this section has attempted to highlight the near-infinite possibilities for positive change that could be generated through class contracts. Currently, digital platforms operate in a virtual vacuum. They are able to set unfavorable terms with little recourse available to their customers because most people have no choice but to continue with their digital activities. However, if lead users assume a seat at the bargaining table, they would be able to collaborate with platform leadership to collectively generate innovative solutions to some of today's most pressing problems.

C. Costs & Benefits of Class Contracts

Any proposal to change the status quo must confront both the costs and benefits of that change. Section III.C.1 examines some potential costs that may be associated with a move from captive contracts to class contracts, while section III.C.2 considers the benefits of such a transition. Section III.C.3 weighs the costs against the benefits, and it argues that the benefits would considerably outweigh the costs.

1. Costs

There would be a number of costs associated with facilitating class contracts. First, the CCB would require significant taxpayer funding, including funds for the salaries of CCB employees and the costs associated with running an active federal agency.[315] The costs associated with federal agencies are often the subject of considerable controversy,[316] and these expenses do represent a

315. The budgetary resources of U.S. federal agencies vary considerably. Given the relatively limited scale of its obligations, it is likely that the CCB would require less funding than many other federal agencies. As an upper bound, its budget might approximate the budget of the FTC with budgetary resources of roughly $500 million. *Federal Trade Comission (FTC)*, USASPENDING, https://www.usaspending.gov/agency/federal-trade-commission?fy=2023 (last vistied Mar. 4, 2023) (listing the budgetary resources of the FTC).

316. *See, e.g.*, Graham Bowley, *Trump Tried to End Federal Arts Funding. Instead, It Grew,* N.Y. TIMES (Jan. 15, 2021), https://www.nytimes.com/2021/01/15/arts/trump-arts-nea-funding.html (describing opposition to funding the National Endowment for the Arts); Jason Plautz, *How to Eliminate Almost Every Federal Agency*, THE ATLANTIC (Aug. 12, 2014), https://www.theatlantic.com/politics/archive/2014/08/how-to-eliminate-almost-every-federal-agency/452961/ (summarizing various proposals to eliminate a dozen different

significant drawback to the class contracting framework. However, there is already mounting pressure to establish some type of federal agency to oversee digital platforms.[317] Because the CCB would be focused on only very large platforms and because much of the oversight of digital platforms would actually be undertaken by lead users rather than the CCB itself, the class contract model could serve to be a cost-effective approach that limits wasteful spending while still achieving meaningful improvements for users. Furthermore, the status quo is not without significant costs for users and society at large,[318] and the expense associated with the CCB must be considered in light of the ongoing costs of inaction.

Second, lead users would also face some costs, including the costs to prepare and submit the required paperwork, the costs to research issues of concern, and the costs of the negotiation process itself. Given these expenses, lead users might need to raise funds from other users in order to pay for activities related to class contracting, although in some instances lead users might be willing to assume duties on a voluntary basis.[319] Representatives might fund their efforts by seeking voluntary contributions from users or other concerned parties, and/or they might receive funding from existing non-profits, charitable foundations, and other interest groups.

federal agencies); *but see Public Expresses Favorable Views of a Number of Federal Agencies*, PEW RSCH. CTR. (Oct. 1, 2019), https://www.pewresearch.org/politics/2019/10/01/public-expresses-favorable-views-of-a-number-of-federal-agencies/ (finding that 14 of 16 federal agencies are viewed more favorably than unfavorably by survey respondents).

317. *See, e.g.*, Tom Wheeler, *A Focused Federal Agency is Necessary to Oversee Big Tech*, BROOKINGS INST. (Feb. 10, 2021), https://www.brookings.edu/research/a-focused-federal-agency-is-necessary-to-oversee-big-tech (arguing for "a new federal agency staffed with digital expertise and the focused responsibility to oversee protection of consumers and promotion of competition in the services that are critical to our lives and livelihoods."); Cat Zakrzewski, *Senator Introduces Bill Giving Big Tech its Own Federal Watchdog*, WASH. POST (May 12, 2022, 8:00 AM), https://www.washingtonpost.com/technology/2022/05/12/1247arvard-bennet-big-tech-regulator/ (discussing a bill to establish an agency charged with oversight of digital platforms and noting that "Consumer advocates have called for such a body for years"); *The Value and Challenges of Regulating Big Tech*, HARV. KENNEDY SCH. (Dec. 16, 2020), https://www.hks.harvard.edu/faculty-research/policy-topics/business-regulation/value-and-challenges-regulating-big-tech (arguing for the need to "establish a pro-competition digital regulator").

318. For a discussion of some of the problems associated with digital platforms under the status quo, see *supra* Section I.C.

319. *See, e.g.*, Marco Silva, *Climate Change: Small Army of Volunteers Keeping Deniers Off Wikipedia*, BBC NEWS (Dec. 24, 2021), https://www.bbc.com/news/blogs-trending-59452614, (describing how a volunteer "army" is focused on keeping climate change denial off of Wikipedia).

For example, marketplace sellers may be willing to make small donations to facilitate negotiations about payment structures that may net significantly greater income than the status quo,[320] or a group such as the Forest Stewardship Council might be willing to invest in negotiations that would increase the use of sustainable packing by large online retailers.[321] Given the vast scale of digital platforms and the relatively small costs associated with serving as a lead user, it is likely that such costs would not prove to be a significant obstacle for causes of substantial concern. In some ways, the costs associated with serving as a lead user might even prove beneficial, providing a check limiting class contracting efforts to only those situations where users or other concerned parties were willing to contribute financially.

Third, in addition to the costs of bargaining, there would also be financial costs borne by the digital platforms. These would include the costs of their involvement in the negotiation process as well as the potential costs associated with whatever changes they eventually make for users. For example, digital platforms might incur costs to modify their websites to meet users' demands, or they might receive reduced revenue if digital sellers negotiate for higher payment. Additionally, digital platforms might lose ad revenue if concerned users boycott the platforms after unsuccessful negotiations with a class of users. Given the considerable financial and other resources at Big Tech firms, these firms very likely could absorb any associated costs.[322] Furthermore, many Big Tech platforms have caused significant controversy over their very light

320. For instance, the Indie Sellers Guild has already established itself as a nonprofit dedicated to "promoting the interests of online sellers of handmade, unique, vintage and craft goods." *See Home*, INDIE SELLERS GUILD, https://indiesellersguild.org/ (last visited Mar. 4, 2023).

321. *See Mission and Vision*, FOREST STEWARDSHIP COUNCIL, https://us.fsc.org/en-us/what-we-do/mission-and-vision (last visited Mar. 4. 2023) (describing its mission "to promote environmentally sound, socially beneficial and economically prosperous management of the world's forests").

322. *See, e.g.*, Rani Molla, *As Covid-19 Surges, the World's Biggest Tech Companies Report Staggering Profits*, VOX (Oct. 30, 2020, 10:35), https://www.vox.com/recode/2020/10/30/21541699/big-tech-google-facebook-amazon-apple-coronavirus-profits (describing Big Tech's "staggering" profits of $38 billion in a single quarter).

tax burdens,[323] and the costs of class contracting could merely be considered an effort to restore some economic balance.

2. Benefits

Class contracts have the potential to achieve a number of benefits for users, from the very concrete, such as those outcomes outlined in section B above, to more intangible benefits, such as giving users a greater voice and a venue to express their concerns. First, class contracts would be *user-driven*, with users themselves able to support or reject a proposed lead user. Because of this, lead users would be focused on users' real-world concerns, and only those representatives with substantial user support would be successful in being certified as a lead user. Unlike extant arrangements between platforms and users, where the terms are unilaterally set by platform management, class contracting would restore some equity between the parties to digital contracts. Not only are there intangible benefits to simply being heard,[324] but the opportunity to have concerns addressed constructively would likely also lead to considerable tangible improvements.

Additionally, class contracts would be highly *responsive*, both to evolving user concerns and to changes in the digital landscape, which occur frequently. Lead users could quickly emerge to address new issues, so long as there was a sizable awareness of and concern about the issue amongst users. For example, if these proposals were already in place, a lead user could have emerged in response to recent controversies surrounding Amazon's treatment of its warehouse and delivery workers[325] or mental health harms on

323. *See, e.g.*, Erik Sherman, A *New Report Claims Big Tech Companies Used Legal Loopholes to Avoid Over $100 Billion in Taxes. What Does That Mean for the Industry's Future?*, FORTUNE (Dec. 6, 2019, 3:32 PM), https://fortune.com/2019/12/06/big-tech-taxes-google-facebook-amazon-apple-netflix-microsoft/ (discussing a report finding that the six largest Big Tech companies used legal loopholes to reduce their tax payments by over $100 billion).

324. *See* Emile G. Bruneau & Rebecca Saxe, *The Power of Being Heard: The Benefits of 'Perspective-Giving' in Intergroup Conflict*, 48 J. EXPERIMENTAL SOC. PSYCH. 855, 860–66 (Mar. 2012) (discussing research findings on the psychological benefits of being heard).

325. Jack Kelly, *A Hard-Hitting Investigative Report Into Amazon Shows That Workers' Needs Were Neglected In Favor Of Getting Goods Delivered Quickly*, FORBES (Oct. 25, 2021, 1:28 PM), https://www.forbes.com/sites/jackkelly/2021/10/25/a-hard-hitting-investigative-report-into-amazon-shows-that-workers-needs-were-neglected-in-favor-of-getting-goods-delivered-quickly/?sh=453b5bf351f5 (describing a controversy over working conditions at Amazon).

Instagram[326] in a relatively short time frame (i.e., the amount of time it would take to receive certification by the CCB). In contrast, regulators have been slow to act on issues such as these, with many controversies ultimately going unaddressed entirely.[327] The risk that users might initiate class contracting could even have a deterrent effect, encouraging platforms to proactively respond to user concerns as soon as they emerge or to avoid engaging in controversial practices in the first place.

Further, class contracts would promote increased *experimentation* on digital platforms. By bringing an alternative perspective to the table, lead users could push for outcomes that may not have been developed unilaterally by Big Tech but would lead to significantly increased user satisfaction at a minimal cost.[328] For example, social media platforms might agree to prominently display contact information for mental health helplines alongside certain content. At the cost of a small change to the digital appearance of the site, platforms could save many lives.[329] Relatedly, lead users would be poised to build off of successful approaches taken in other contexts or to imitate models set out by law in specific jurisdictions. Currently, a legislative victory in one jurisdiction often does not benefit users outside that jurisdiction, which leads to disparate and potentially arbitrary results for users.[330] Through class contracts, users need not wait for legislative action but could push digital platforms to apply successful policy approaches in new contexts through negotiations.

Class contracting could also result in greater *customization* of digital platforms. Currently, digital platforms predominantly are

326. *See* Wells et al., *supra* note 86 (describing how Facebook's own data shows that Instagram has a negative impact on teen girls' mental health).

327. *See, e.g.*, Jacob Carpenter, *Congress Can't Get its Act Together on Big Tech*, FORTUNE (Dec. 2, 2021, 11:03 AM), https://fortune.com/2021/12/02/congress-tech-social-media-regulation/ (describing legislative inaction on Big Tech controversies).

328. *See* ROGER FISCHER ET AL., GETTING TO YES (2011) 58–82 (discussing the potential for mutual-gain negotiations).

329. *See, e.g.*, Thomas Niederkrotenthaler et al., *Association of Logic's Hip Hop Song "1-800-273-8255" with Lifeline Calls and Suicides in the United States: Interrupted Time Series Analysis*, 375 BMJ 1, 4–8 (Dec. 13, 2021) (finding that a rap song which provided the phone number to a mental health helpline in its lyrics and title may have prevented hundreds of suicides).

330. Leo Kelion, *Google Wins Landmark Right to be Forgotten Case*, BBC NEWS (Sept. 24, 2019), https://www.bbc.com/news/technology-49808208 (discussing how the right to be forgotten is only applicable to E.U. citizens and for search results in Europe).

one-size-fits-all arrangements. Through class contracts, it would be possible to achieve customized arrangements with digital platforms, where subgroups of users have access to features that are of a particular interest to them. For example, users struggling with internet addiction and their supporters might push for the right to "self-exclude" their IP addresses from accessing certain social media or other sites. Self-exclusion could be a powerful tool that improves the quality of life for these individuals without changing the experience on the platform for other parties. Other options for customization could include a more accessible user interface or mode of access for individuals with disabilities, or the option to disable certain addictive or habit-forming features. By facilitating customization, class contracts would provide users with the opportunity to establish more tailored relationships with digital platforms.

Finally, the *scale* of digital platforms means that interest groups engaging in negotiations would be able to have a considerable impact. For example, there are nearly 300 million regular users of Facebook in the United States,[331] and an estimated 76.6 million U.S. households had Amazon Prime accounts as of 2022.[332] Users concerned with pressing issues like climate change or mental health could have a wide-ranging global impact if they were empowered to organize and to engage in class contracting with digital platforms of such great scale. Moreover, users likely have concerns that are related to multiple digital platforms, such as sustainability at digital retailers or mental health at social media sites. There is no reason why a lead user could not negotiate with similar platforms simultaneously, which would significantly increase the potential impact of organizing efforts. Ultimately, although the scale of Big Tech platforms currently makes them behemoths, their scale also represents massive potential for positive change.

3. Weighing the Benefits Against the Costs

Would the benefits of class contracts outweigh the costs? The answer, of course, depends upon whom you ask. Taxpayers would

331. S. Dixon, *Number of Facebook Users in the United States from 2018 to 2027*, STATISTA (Mar. 2023), https://www.statista.com/statistics/408971/number-of-us-facebook-users/.

332. Stephanie Chevalier, *Total Number of Households in the United States with an Amazon Prime Subscription from 2018 to 2022*, STATISTA (Feb. 2022), https://www.statista.com/statistics/861060/total-number-of-households-amazon-prime-subscription-usa/.

be asked to fund the governmental infrastructure to facilitate class contracts. However, such costs would arguably be lower than many other approaches to regulating Big Tech which rely on regulatory action, as well as lower than the social and economic costs of preserving a status quo where billions of users are subject to undesirable terms set unilaterally by many of the world's most powerful companies. Given widespread concern over various harms associated with Big Tech, class contracting would likely prove to be beneficial on balance from the perspective of taxpayers.

Lead users, and those who support them, would also be likely to find that the benefits far outweigh the costs, since class contracting would enable users to gain a seat at the table with Big Tech. By design, the class contracting process is highly discretionary—lead users voluntarily assume their roles, lead users require the voluntary support of a subset of users to become certified representatives, funding for negotiations would be on a voluntary or charitable basis, and users generally must voluntarily opt in to be impacted by the outcome of negotiations. Because user participation would be elective, users and lead users would likely be supportive of class contracting overall, as they would be able to opt in to changes they found beneficial on a fully voluntary basis.

In contrast, management at digital platforms would likely prefer the status quo. Indeed, the reason that digital platforms are not currently solicitous of user concerns is that such platforms prefer to establish one-sided arrangements that benefit the platforms at the expense of users.[333] From the perspective of Big Tech, then, the costs would likely outweigh the benefits, although there is the possibility that negotiations would yield innovative "win-win" changes that benefit all parties (e.g., additional membership fees could more than offset the costs of a hypothetical "Amazon Green" program) or that negotiations would improve the reputations of Big Tech companies. Despite likely opposition by Big Tech, the associated costs for Big Tech companies would likely be

333. *See* Roger McNamee, *Op-Ed: Recovering from Big Tech's lost decade*, L.A. TIMES (Jan. 1, 2023, 3:05 AM), https://www.latimes.com/opinion/story/2023-01-01/big-tech-went-wrong-pointless-products-and-bad-business-models ("Today's tech industry, much of which dates only to the early 2000s, has been allowed to operate with no regulatory constraints. Entrepreneurs and investors have focused their energy on growing as rapidly as possible to massive scale and profits, without consideration for community values such as consumer safety, democracy, public health and human autonomy.").

low in an absolute sense when compared to the financial resources of these companies.

Ultimately, the enormous potential for positive change associated with class contracts outweighs the costs, particularly since many such costs will accrue only to large digital platforms, lead users who voluntarily assume their roles, supporters who make voluntary financial contributions, and users who opt in to representation. Indeed, the voluntary nature of many such costs necessarily implies that they would be assumed only by those who believed the benefits outweighed the costs.

CONCLUSION

Under the current contracting system, power between digital platforms and users is deeply imbalanced because digital platforms unilaterally set the terms of engagement. Although user dissatisfaction abounds, users have resigned themselves—and under the status quo, effectively *must* resign themselves—to accepting whatever contractual terms the dominant digital platforms decide to offer.

However, the current system is neither necessary nor inevitable. In fact, given the enormous scale of usership for most digital platforms as well as their high degree of technological sophistication, we have reached a point where users, or a class thereof, *could* relatively easily express shared concerns to platform management and extract meaningful changes from platform owners. The only missing ingredient is regulatory backing for a system of class contracting in the digital space.

This Article therefore proposes congressional action to facilitate class contracting between Big Tech companies and their users. Specifically, the Article calls on Congress to create a new federal agency, the Class Contracts Bureau (CCB). Once established, the CCB will provide the infrastructure necessary to enable users to have a meaningful voice on issues of concern and to negotiate with digital platforms.