

The New Social Contracts

*Andrew Keane Woods**

Contracts rule our digital world. Platform terms of service determine speech rights, privacy rights, and much more. This is no accident—from the very beginning, the U.S. model of internet governance was explicitly built around private ordering. In this context, it is worth asking what contract law and contract scholarship have to say about the public harms of digital dealmaking.

The answer, quite surprisingly, is: not much. To be sure, the rise of the digital economy has generated over two decades of sustained scholarship and several huge national reform efforts aimed at updating contract law. But this work has largely focused on the procedural fairness of online agreements—especially mutual assent to clickwrap.

If ever there were a case to be made for contract law to interrogate both the substance and the social impact of an agreement, today's platform terms of use are it. These are society-wide pacts, and while they are in part commercial agreements outlining the terms of a market exchange, they are also—unlike other commercial contracts—the basic ground rules for our digital society. Moreover, our public laws, from our speech laws to our surveillance laws, often defer to these private agreements, giving them the power to supply and even to supplant constitutional norms.

This puts contract law in an uneasy place—effectively leaving private law as the chief protector of public values on the internet. Having contract law play this role is not the first-best solution. Yet as long as we allow contracts to rule our digital society—as long as our internet policy is contractarian—contract law will and ought to play a larger role in policing the public impact of these agreements. In a sense, that would mean building a more public-minded contract law of the sort imagined by scholars going back to the Progressive Era. The alternative would be to give contracts less power to set public rules online. Choosing between these options will require comparative institutional analysis of a kind that is not common in law and technology debates.

* Milton O. Riepe Professor of Law, University of Arizona. The author thanks Alex Abdo, Albertina Antognini, Andy Coan, Thomas Haley, David A. Hoffman, Cathy Hwang, Jameel Jaffer, Russell Korobkin, Ramya Krishnan, Kaiponanea Matsumura, Shalev Roisman, Carol Rose, and Simone Sepe.

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*[C]ommerce on the Internet . . . has not fundamentally changed the principles of contract.*¹

INTRODUCTION

Contracts rule our digital world. It is not just that today’s silicon empires are built on clickwrap agreements, but rather the substantive rules for our digital society are set out in private commercial contracts. Terms of service determine users’ privacy rights,² Fourth Amendment rights,³ speech rights,⁴ and more. This is not an accident. From the very beginning, the U.S. model of internet governance was explicitly built around private ordering, even as other countries pursued public regulation.⁵ The result is that terms of service now act as a kind of public law for the internet, setting the rules for our “modern public square.”⁶ In this context, it seems worth asking—apparently for the first time—what contract law has to say about the broader societal impact of today’s online agreements.

The answer, surprisingly, is: not much. This is odd. If ever there were a case for scrutinizing the public impact of private dealmaking, today’s platform contracts are it; these are contracts of unique societal impact. The few courts that have interrogated today’s terms of service have largely enforced them, treating them like any other consumer contract—one-sided boilerplate agreements that waive consumer rights, shift liability, alienate litigation rights, and more.⁷ But whatever

1. Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004).

2. See *infra* Section II.B.

3. See *infra* Section II.A.

4. See *infra* Section II.C.

5. As then-President Clinton put it, the rules for our digital world should be “based on a decentralized, contractual model of law rather than one based on top-down regulation.” William J. Clinton & Albert Gore, Jr., *A Framework for Global Electronic Commerce*, CLINTON WHITE HOUSE (1997), <https://clintonwhitehouse4.archives.gov/WH/New/Commerce/read.html> [<https://perma.cc/GG3M-NAK7>]; see also LEE A. BYGRAVE, INTERNET GOVERNANCE BY CONTRACT 29 (2015) (describing how contract was “the US government’s preferred legal tool” for regulating the internet in the earliest days of internet governance); Ira C. Magaziner, *Creating a Framework for Global Electronic Commerce*, PROGRESS & FREEDOM FOUND. (July 1999), <http://www.pff.org/issues-pubs/futureinsights/fi6.1globeconomiccommerce.html> [<https://perma.cc/E27G-DPZM>] (arguing for a market-oriented model of digital commerce regulation which emphasizes private ordering as opposed to “a traditional regulatory role for government”); Jack Goldsmith, *The Failure of Internet Freedom*, KNIGHT FIRST AMEND. INST. (June 13, 2018), <https://knightcolumbia.org/content/failure-internet-freedom> [<https://perma.cc/2X6G-XPDG>] (describing how the United States has long embraced a “commercial non-regulation principle” that emphasizes markets and individual choice, and de-emphasizes government control).

6. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

7. RESTATEMENT OF THE LAW, CONSUMER CONTRACTS § 2 (AM. L. INST. 2024) (“There is not a single reported case in which clickwrap—when the consumer was required to click on ‘I Agree’

one thinks about boilerplate agreements in general, today's terms of service are something else.⁸

For one thing, the scale is massive.⁹ Facebook has an ongoing contractual relationship with approximately half of the world¹⁰ and over eighty percent of Americans.¹¹ But more importantly, the terms of service on today's platforms are unlike earlier commercial transactions in that they determine the scope of users' civil rights.¹² This is possible both because contract law allows people to contract away their basic rights—including speech and privacy rights—and because our public laws acknowledge and defer to these agreements. For example, courts across the country have concluded that users can waive their Fourth Amendment rights by contract, often as a precondition of using cloud storage.¹³ Similarly, while our speech rules are hypervigilant about state censorship, they allow and even entrench private contractual regimes of opaque information control.¹⁴

Why has contract law had so little to say about this huge, new public rulemaking by private agreement? Part of the story may be timing. By the time the internet arrived, neoliberalism was at its apex in the United States, and contract law was generally uninterested in policing the substance of private agreements, preferring to focus on the procedural elements of a transaction.¹⁵ It is well understood that

to conspicuously presented terms that satisfied the requirements of this Section—was deemed a priori an ineffective mode for adoption of terms.”).

8. The most thoughtful and trenchant critique of today's commercial agreements is MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013), which is discussed in more detail in Section III.E.

9. See *infra* Section I.A (discussing the widespread use of platform contracts).

10. See Stacy Jo Dixon, *Number of Monthly Active Facebook Users Worldwide as of 4th Quarter 2023*, STATISTA (May 21, 2024), <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> [<https://perma.cc/2QP2-2RWV>].

11. Stacy Jo Dixon, *Facebook Usage in the United States – Statistics & Facts*, STATISTA (Aug. 8, 2024), <https://www.statista.com/topics/5323/facebook-usage-in-the-united-states> [<https://perma.cc/VMF5-4EN3>].

12. See *infra* Part II.

13. See Orin S. Kerr, *Terms of Service and Fourth Amendment Rights*, 172 U. PA. L. REV. 287 (2024) (collecting and criticizing court decisions that have found platform terms of service effective waivers of Fourth Amendment rights).

14. See, e.g., Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1199 (2016) (noting the power of modern technology platforms to determine the bounds of free speech today); Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2296 (2014) (“[There have been] significant changes in the practices and technologies of free expression, changes that concern a revolution in the infrastructure of free expression. That infrastructure, largely held in private hands, is the central battleground over free speech in the digital era.”).

15. See G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 433, 436 (1993) (generally documenting a radical shift over the twentieth century toward a libertarian, market-oriented approach that disfavors judicial review of contractual substance and privileges

contract law in the United States today is generally focused on the parties to a contract and relatively uninterested in the rights of third parties.¹⁶ Another part of the story is the very nature of the common law: Most parties to these contracts have neither the standing nor the incentive to sue, so courts have few occasions to evaluate the broader social impact of these agreements.¹⁷

But that does not explain why contracts scholars and reformers have paid so little attention to the public costs of clickwrap.¹⁸ The rise of the digital economy has generated over two decades of sustained contracts scholarship and several huge practical efforts aimed at understanding the role of contract law in the digital era.¹⁹ But this work has largely been concerned with the fairness of online agreements to the parties, especially the question of whether users adequately understand the deals they click their way into.²⁰ Much of the literature on clickwrap echoes the literature on boilerplate agreements, where the focus has been on the power imbalance between the party that generates the contract and the consumer that signs it.²¹ Accordingly,

contract enforcement; noting “appearances notwithstanding, the modern Court has shown a sustained interest in reconstructing the American legal system to better reflect economists’ ideal of strict contract enforcement”).

16. There is a growing body of scholarship about contract law’s general lack of concern for externalities felt by third parties, including the broader public. *See, e.g.*, Aditi Bagchi, *Other People’s Contracts*, 32 YALE J. ON REG. 211, 212 (2015) (“On its face, contract law appears unresponsive to some of the harm contracting parties can do to others by mutual agreement.”); Sarah Winsberg, *Contract’s Covert Meddlers*, 97 NOTRE DAME L. REV. 1265, 1269 (2022) (“Just as in the nineteenth century, today’s courts regularly adjudicate between third-party interests and parties’ own interests—even though they frequently fail to recognize it.”); David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 983 (2021) (“Courts almost always enforce contracts even when they create third-party harms.”); Kishanthi Parella, *Protecting Third Parties in Contracts*, 58 AM. BUS. L.J. 327, 336–37 (2021) (describing the particular problem of third-party interests in supply chains); Adam B. Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 GEO. MASON L. REV. 483, 487 (2010) (proposing that courts decline to enforce illegal contracts only where they produce harm to better “deter potential third-party harm”); *cf.* Omri Ben-Shahar, David A. Hoffman & Cathy Hwang, *Nonparty Interests in Contract Law*, 171 U. PA. L. REV. 1095, 1096, 1098 (2023) (noting that “[c]ontract law often allows parties to ignore the interests of third parties, the community, or the government,” but also finding that “[i]n a rich array of other contexts, courts . . . take nonparty interests into account”).

17. *See infra* Section V.A.

18. *See infra* Section III.D.

19. *See infra* Section III.D.

20. For an example of casebook coverage, see CHARLES L. KNAPP, NATHAN M. CRYSTAL, HARRY G. PRINCE, DANIELLE K. HART & JOSHUA M. SILVERSTEIN, *PROBLEMS IN CONTRACT LAW* 189 (10th ed. 2023) (noting that “courts are now confronting issues involving contracts made over the internet,” and explaining the idea of clickwrap and browsewrap in the context of the mutual assent process).

21. *See* RADIN, *supra* note 8, at 10–12 (describing how boilerplate agreements do not reflect the consent of the parties, and therefore they fail to satisfy a basic premise of our legal system, which is that rights cannot be taken without consent); *see also* Omri Ben-Shahar, *The Myth of the ‘Opportunity to Read’ in Contract Law*, 5 EUR. REV. CONT. L. 1, 14–23, 17 (2009) (arguing that most

the central scholarly concern with online agreements has been the fear that consumers have not actually read these agreements, or cannot understand them, and therefore the agreements do not reflect a fair bargain by informed actors.²² This imagines the problem of online contracting as a problem of mutual assent. It ignores a much bigger problem: a digital world built on private agreement that reflects the parties' wishes, but that produces social harms, even epistemic democratic harms. The problem in this scenario is not that the platform hoodwinks the users; the problem is that contract law looks the other way as users opt into a system of private governance with significant public costs.

We know about some of these costs from the enormous literature about the impact of large private platforms on society. There are articles

consumers cannot understand boilerplate and browsewrap terms, and even if they did, “[t]here is not enough time to read all these texts,” and that this is a feature rather than a bug because it saves consumers time and money). To be sure, several contracts scholars have worried about the external harms of form contracts. See, e.g., David A. Hoffman, *Defeating the Empire of Forms*, 109 VA. L. REV. 1367, 1369–71 (2023) (describing how most contracts scholars have seen form contracts as problematic in one way or another, generally missing the broader social costs of form contracts; in Hoffman’s language, contract scholars miss the forest for the trees); Erik Encarnacion, *Boilerplate Indignity*, 94 IND. L.J. 1305, 1323–24 (2019) (arguing that most criticisms of boilerplate agreements miss the mark because they ignore the dignitary harms that boilerplate agreements imposes on signatories).

22. See, e.g., Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks’ Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1435–36 (2014) (arguing that the vast majority of social media users do not read the terms of service, and that those terms “are systematically unfair and imbalanced” against the user); Michael Karanicolas, *Too Long; Didn’t Read: Finding Meaning in Platforms’ Terms of Service Agreements*, 52 U. TOL. L. REV. 1, 10 (2021) (“While the tensions between contract theory, as foundationally built around ideas like the meeting of the minds, and voluminous contracts of adhesion, which consumers nearly universally sign without reading, is not new, the digital age has pushed this contradiction to a breaking point.”); Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1140 (2019) (arguing that in the online world of clickwrap, “[a]greement’ 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”); Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014) (showing that few consumers read user license agreements); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2277–81 (2019) (showing that most online clickwrap agreements are difficult to read for most users); Tim R. Samples, Katherine Ireland & Caroline Kraczon, *TL;DR: The Law and Linguistics of Social Platform Terms-of-Use*, 39 BERKELEY TECH. L.J. 47 (2024) (documenting the volume and complexity of consumer contracts on today’s typical, phone-based applications); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 552 (2014) (proposing that “the state should jettison the disclosure project of making *all* terms accessible to consumers with the expectation that consumers can read the entire document”).

about platforms' impact on speech,²³ on surveillance,²⁴ on democracy,²⁵ and so much more. Yet very few of these articles are centrally concerned with, let alone reflect, the fact that these digital empires are built on consumer contracts. While scholars rightly worry about the power these new platforms have in society—they are our “new governors,”²⁶ “surveillance intermediaries,”²⁷ and the “new public accommodations”²⁸—much less attention has been paid to the contractual mechanisms by which the platforms attain and enforce that power. Even scholarship that frames internet regulatory problems as public externalities to private activity largely ignores contract law.²⁹ To be sure, scholars have argued for mandatory rules in certain scenarios, such as preventing users from being able to contract away some private

23. See, e.g., Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 548 (arguing that platforms and the rise of attention markets have radically reshaped the speech law environment; noting that “as the expressive environment deteriorates, the First Amendment has been confined to a narrow and frequently irrelevant role”); Balkin, *Old-School/New-School Speech Regulation*, *supra* note 14, at 2296 (“[There have been] significant changes in the practices and technologies of free expression, changes that concern a revolution in the infrastructure of free expression. That infrastructure, largely held in private hands, is the central battleground over free speech in the digital era.”); Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526 (2022) (arguing that the standard approach to thinking about speech problems—which focuses on individual hard cases—is a poor fit for the huge scale of internet content moderation).

24. See, e.g., LAURA K. DONOHUE, *THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE* (2016) (arguing that the old legal regimes built around surveillance practices are inadequate to protect civil rights in the digital age without significant change); BERNARD E. HARCOURT, *EXPOSED: DESIRE AND DISOBEDIENCE IN THE DIGITAL AGE* (2015) (providing an intellectual history of the surveillance state and exploring the political implications of our modern expository society); Kristen E. Eichensehr, *The Cyber-Law of Nations*, 103 GEO. L.J. 317 (2015) (arguing that cyberspace presents new governance problems in the surveillance context, especially given the rise of powerful private actors).

25. See, e.g., Richard H. Pildes, *Democracies in the Age of Fragmentation*, 110 CALIF. L. REV. 2051, 2052 (2022) (describing the article's core contribution, which is to clarify “the role of the communications revolution—the rise of cable television, the internet, and social media—in driving fragmentation in political parties and democratic politics”); Aziz Z. Huq, *Militant Democracy Comes to the Metaverse?*, 72 EMORY L.J. 1105, 1115 (2023) (sketching the “[d]emocratic [c]lase [a]gainst [d]igital [p]latforms”); Neil Netanel, *Applying Militant Democracy to Defend Against Social Media Harms*, 45 CARDOZO L. REV. 489, 490 (2023) (“Social media inflict multiple harms on liberal democracy.”).

26. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1662 (2018).

27. Alan Z. Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99, 99 (2018).

28. Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017).

29. This is especially odd to see from contracts scholars. See, e.g., Omri Ben-Shahar, *Data Pollution*, 11 J. LEGAL ANALYSIS 104, 107 (2019) (defining the “externality problem,” as the problem of “how allowing one's data to be harvested affects other individuals and the public as a whole”). In this piece, Ben-Shahar is not focused on contracting, but instead on showing how individual privacy rights are a poor frame for addressing the kinds of widespread social harms common in today's digital economy.

information.³⁰ But those arguments are usually motivated by a particular policy goal, like enhancing privacy or stemming the spread of misinformation. They do not address what I take to be the central digital-policy challenge for the United States: how to square the need to impose limits on contract with an internet governance regime that is built around freedom of contract. So far, there has been no sustained inquiry into contract law's role in enabling and potentially policing the public impacts of these new contracts.³¹ That is the task of this Article.

If our digital world is to conform to the basic rules of society, we are left with essentially three options: (1) we can pull back from the contractarian model of governance, and legislatures can impose mandatory rules about what can and cannot be done by contract; (2) we can reduce the extent to which public law defers to contract; or (3) we can ask contract law to play a bigger role in policing the broader societal harms wrought by digital contracts. Any of these would be a radical departure from the status quo. All of them turn on contract law's role in shaping the bounds of the American internet. None are entirely desirable. In order to better understand this puzzle, this Article tries to unpack the strange situation we find ourselves in, where contracts play an essential role in setting out the rules of our digital society, but contract law looks the other way.

Ultimately, I suspect that courts will be forced to weigh the public policy implications of today's platform terms of service. It may sound provocative to suggest that contract law, especially as enforced by judges, ought to stand in the way of a private deal struck without

30. See, e.g., Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1675 (1999) (proposing a set of mandatory rules to control the extent of collection and use of personal data by commercial firms); see also Paul M. Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy Control, and Fair Information Practices*, 2000 WIS. L. REV. 743, 745 (stating that "[w]here private bargaining about data processing is unlikely to be successful, mandatory rules should set immutable standards to prevent failure in negotiations from producing social harm"); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1246–65 (1998) (discussing the effects of certain "default rules" in cyberspace security); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2404 (1996) (discussing what the appropriate "default rule" is in the context of disclosures); Paul M. Schwartz, *Privacy and the Economics of Personal Health Care Information*, 76 TEX. L. REV. 1, 54–55 (1997) (noting the difference between "mandatory rules" and "default rules," and discussing a "privacy default rule").

31. As far as I can tell, the lone exception to this claim is Lee Bygrave's monograph. See BYGRAVE, *supra* note 5, at 2. But that work is both framed at a very high level of generality and is principally interested in contract as a mode of internet governance mechanisms; it is neither concerned with the substance of platforms' terms of service, nor with contract doctrine. See *id.* ("In keeping with its remit of delineating basic regulatory patterns in Internet governance, the book generally focuses on the function and structure of contracts rather than their content."). This is passingly described in Hoffman, *supra* note 21, at 1369–71.

any defect in the mutual assent process.³² It is certainly out of step with prevailing contracts jurisprudence. But the idea that courts ought to scrutinize private dealmaking for broader societal harms is an old one. As the Supreme Court noted over 150 years ago,

It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions.³³

There are good reasons to be wary of court intervention in private dealmaking. Yet given the scope and public import of today's platform terms of service, it would seem the choice is not whether to review these deals, but when and by whom: *ex ante* by legislatures, or *ex post* by courts. In some cases, I think, both will be necessary.

Before going any further, a few disclaimers are in order. Most contract disputes are not litigated in court but instead go to arbitration.³⁴ For that reason, nearly any inquiry into how public courts interpret contracts captures only a small slice of the overall picture. Moreover, contract law is fundamentally a state-law subject. There are fifty-plus regimes, and this is not a survey of all fifty states. But there are nonetheless generalizable themes and conclusions to be drawn about both contract law, across the state courts and the U.S. Supreme Court, and contracts scholarship. I hope to convince the reader that taken as a whole, there is clearly a mismatch between the massive social impact of today's platform terms and the relative silence about that social impact in both contract law and contract scholarship.

This Article proceeds in five parts. Parts I and II establish the stakes. Part I details the unique nature of today's platform agreements,

32. Indeed, courts typically uphold contracts that do not have any defect in mutual assent, and there is a general policy in contract law in favor of contract enforcement. See CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, *PROBLEMS IN CONTRACT LAW* 643–47, 654–58 (6th ed. 2007) (“[T]here is a strong public interest in the freedom to contract and there must be a well established basis for any public policy that would deny enforcement of a contract.”). For this reason, judicial invalidation of contracts for public policy reasons is highly disfavored. In his empirical study of public policy in state courts, David Friedman wrote:

When a party asks a court to refrain from enforcing an otherwise valid bargain on the grounds that it would offend public policy, the party asks the court to do something out of the ordinary. Instead of requesting the court to apply a traditional common law defense, the court is being asked to discern public policy, or possibly pronounce public policy.

David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 565 (2012). As English jurist Burrough put it, with more color, “Public policy . . . is a very unruly horse, and when once you get astride you never know where it will carry you.” Richardson v. Mellish, 2 Bing. 229, 252 (Ct. Com. Pl. 1824).

33. Marshall v. Balt. & Ohio R.R., 57 U.S. 314, 334 (1853).

34. See Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600, 607 (2020) (“[S]tate common law has largely disappeared.”).

which are all-of-society contracts that set out the basic rules for speech and privacy. Part II shows that our actual public law—including our speech, privacy, and surveillance laws—often defers to these private deals, effectively giving them the power to delimit constitutional norms. Part III describes how courts have given a blank check to private ordering, effectively abdicating their role in ensuring that the state is not sanctioning private contracts that harm the broader public. Part IV makes the normative case for a more public-minded contract law and outlines some reform options. Part V gets specific, sketching what a lawsuit might look like where the common law of contracts is asked to police our digital empires. This illustration highlights why in many ways, this would not be the first-best solution to our internet governance challenges. And yet it may be unavoidable.

I. THE NEW SOCIAL CONTRACTS

Contracts play an outsized role in today's digital world, and today's digital contracts are unlike anything that has come before. This Part explains how this came to be. Technology has enabled contracting that is both (1) society-wide and (2) designed to set the rules for digital society. This is intentional. From the earliest days of technological development, the official U.S. internet governance policy was contractarian—delegating rulemaking authority to private market actors, with few legal constraints apart from the common-law rules of contract. The role of contract law in setting digital norms is striking on its own, but today's online contracts are even more important than they would otherwise be, because as we will see in the next Part, they so often supplant public law protections.

A. Society-Wide Contracts

One notable thing about today's platform contracts is their scale. We are talking about contracts to which nearly every member of society is a party. Of course, massive contracts are not new; Walmart contracts with customers across the globe, as do so many other commercial actors.³⁵ But even Walmart is contracting with far fewer customers than today's platforms. For example, in the United States, Walmart claims to have 140 million customers, which is roughly half of the United States.³⁶ Meanwhile, Facebook has an estimated 239 million

35. J.D. Byrum, *The Grocery List: Why 140 Million Americans Choose Walmart*, WALMART (Oct. 3, 2016), <https://corporate.walmart.com/news/2016/10/03/the-grocery-list-why-140-million-americans-choose-walmart> [https://perma.cc/55T5-C2VF].

36. *Id.*

U.S. customers; this does not include Instagram or WhatsApp, which also have hundreds of millions of users in the United States.³⁷

When commercial activity reaches this level, it takes on a public significance that a private deal brokered between two people does not have. If two people agree to some transaction—to sell a car, perhaps—the rules around that transaction are of interest to the two parties and maybe a single third party, perhaps the bank financing the purchase or an insurance firm. But the vast majority of the public has no interest in the transaction. The same cannot be said for the contract between Facebook and its customers, by the simple fact that the majority of the public are customers. We are not all a party to Adam and Betty’s car sale; we are all a party to Facebook’s terms of use.

B. Rules for Society

More important than their scale is the role today’s terms of service play in setting out the rules for membership in our digital society. These contracts are “community standards.”³⁸ To be sure, today’s platform agreements share many similarities with other large-scale commercial contracts. For example, Facebook’s terms of service include liability disclaimers and assignments of rights, just like any other merchant’s contracts with its customers. But quite distinct from other commercial contracts, Facebook’s user contracts also outline the rules that govern the shared community space.³⁹ These include things like speech rules, privacy expectations, obligations, and more.⁴⁰ In that sense, they are hybrid agreements that read in part like standard commercial contracts and in part like homeowners association (“HOA”) agreements.

37. Jack Shepherd, *33 Essential Facebook Statistics You Need to Know in 2023*, SOCIAL SHEPHERD, <https://thesocialshepherd.com/blog/facebook-statistics> (last updated Apr. 23, 2024) [<https://perma.cc/BG7X-JNRH>].

38. See, e.g., *Facebook Community Standards*, META TRANSPARENCY CTR., <https://transparency.fb.com/policies/community-standards/> (last visited Aug. 5, 2024) [<https://perma.cc/2B9M-RJ73>] (“The Facebook Community Standards outline what is and isn’t allowed on Facebook.”). These community standards are incorporated into Meta’s Terms of Service, which every Facebook user agrees to. See *Meta Terms of Service*, FACEBOOK, <https://www.facebook.com/legal/terms/> (last updated July 26, 2022) [<https://perma.cc/7AZD-4VP3>] (noting at term 2.1, “You may not use our Products to do or share anything: That violates these Terms, the Community Standards, or other terms and policies that apply to your use of our Products”).

39. Meta’s terms of service, for example, explain what services Meta provides to users and describe the funding of the service through advertising, but the terms also outline “[y]our commitments to Facebook and our community,” which sets out the community standards provisions. See FACEBOOK, *supra* note 38.

40. *Id.*

This has made some scholars wonder whether they are contract terms at all. For example, Przemysław Palka argues that terms of service are property rules, not contract rules.⁴¹ Palka's reasoning is that terms of service are rules about how one should behave upon being granted access to another's property; on this reading, platform terms of service are like a bookstore posting a sign that reads "No ice cream in the book store."⁴² This reflects the community-rules aspect of platform terms of service. But terms of service are in fact legally enforceable contracts, as every court to consider the matter has concluded.⁴³ And unlike entering a store, users must first agree to the terms before entering the site. This makes them much closer to HOA rules, which are rules implemented by contract that are designed to limit property use. Terms of service are also like HOA rules because they are community rules. They are social in nature. They dictate what should and should not be allowed in a shared, quasi-public space. The common areas of a private living community are, strictly speaking, not public land, but they are recognized as having a public quality. Many internet communities are similar. They are community spaces with a public quality—commons where people come to share and interact in a non-private way. To be sure, not all internet communities are like this. But many are.

This makes today's platform agreements distinct from other kinds of commercial contracts. The idealized story about contracts, told by American contract law, is that two (it is typically two) legal persons get together and strike a bargain, often one party selling something in exchange for money. Even if the way contract law is taught overemphasizes the ideal of a dickered deal (since so many deals are boilerplate), contract law is still understood fundamentally to be a field about *deals*—private market transactions bargained for mutual gain. It is a field of market exchange, not a field that is centrally concerned with setting the rules for society. Take, for example, one theory of contract law formation—Randy Barnett's consent theory—where contract law is best understood as the "part of a system of entitlements that identifies those circumstances in which entitlements are validly transferred from

41. Przemysław Jacek Palka, *Terms of Service Are Not Contracts—Beyond Contract Law in the Regulation of Online Platforms*, in *EUROPEAN CONTRACT LAW IN THE DIGITAL AGE* 135, 136 (Stefan Grundmann ed., 2018).

42. *Id.* at 144.

43. Mark A. Lemley, *The Benefit of the Bargain*, 2023 WIS. L. REV. 237, 250 ("Because the user has 'signed' the contract by clicking 'I agree,' every court to consider the issue has held clickwrap licenses enforceable.").

person to person by their consent.”⁴⁴ The aim of this theory, like most other contract theories, is to justify the enforcement of deals, of market exchange. It is not a moral justification for private arrangements for the rules of society.

This is all to say that platform terms of service are contracts, but they are novel contracts that may, as we will see, merit special consideration.

C. Internet Governance by Contract

The role that contracts play in governing the digital world is novel, but it is not entirely unexpected. From the very beginning, American internet governance was designed around the market—and, in particular, the contract. As Lee Bygrave puts it, the United States’ pro-contract view “fitted well with the contemporary preferences of numerous U.S. policy entrepreneurs for a ‘bottom-up’ private ordering of the digital world that would permit emergent cyber-communities to constitute themselves with little interference from government.”⁴⁵ It was a libertarian vision of internet governance.⁴⁶

The idea was that the internet would enable new, frictionless ways to engage in private ordering. And indeed it has. Ride-sharing apps, home-sharing apps, dating apps—these all enable people to solve coordination problems in elegant ways. These tools can give people an efficient means to connect with others for all sorts of market transactions. The logic of these tools is to connect as many people as possible; the value of being on a given network is that everyone else is there. It is a totalizing logic.⁴⁷ And so these platforms have become not just tools for efficient contract—they have become platforms for contracting with all of society. And societies need rules. In a digital world of private ordering where the efficient coordination takes place

44. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 270 (1986); see also Hanoch Dagan, *Types of Contracts and Law’s Autonomy-Enhancing Role*, in EUROPEAN CONTRACT LAW AND THE CREATION OF NORMS 109, 110 (2021) (“The main function of contract law in this account is to prescribe the transfer rules of law in line with the rightsholders’ consent, in order to delineate the boundaries of protected domains.”).

45. Lee A. Bygrave, *The Predilection for Contract in Governing Digital Networks: Micro-Management’s Face Off with Accountability*, in DATA AND PRIVATE LAW 51 (Damian Clifford, Kwan Ho Lau & Jeannie Marie Paterson eds., 2023).

46. See GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICAN AND THE WORLD IN THE FREE MARKET ERA 161–63 (2022) (discussing early conceptions of the digital space, which “articulated well the vision of individual freedom, deeply associated with market freedom, that made neoliberal revolution so compelling to so many people”).

47. See Andrew Keane Woods, *Public Law, Private Platforms*, 107 MINN. L. REV. 1249, 1288 (2023) (“[M]any digital platforms seek to control their entire market.”).

on a corporate platform, those rules come from a platform's terms of use—unless public law says otherwise.

II. PUBLIC LAW LOOKS TO CONTRACT

The scope and scale of platform contracts are enough reason to warrant special scrutiny. But these agreements are even more important than they would otherwise be because public law rights so often give way to them. Thirty years ago, Cass Sunstein noted that the Court's approach to public law is essentially premised on deference to common-law norms or "baseline[s]," consistent with the *Lochner* Court's view about the primacy of private ordering.⁴⁸ In adapting public law values to the internet, today's courts have extended this logic to the digital world. In a variety of ways, the consumer contracts of today's major platforms implicate criminal law, speech law, privacy, and much more. For the purposes of brevity, and for illustration only, this Part focuses on three examples.

A. Criminal Law

The core of modern Fourth Amendment analysis—and therefore whether a warrant is required for law enforcement to access a given thing—turns on whether one has a reasonable expectation of privacy in that thing.⁴⁹ And in the technology space, courts often determine whether a user has a reasonable expectation of privacy by looking to the user's contracts with a digital platform. Indeed, there is now a considerable number of cases where courts "look to Terms of Service to define Fourth Amendment rights, finding that such Terms often reduce or entirely eliminate otherwise-existing constitutional protections."⁵⁰

For example, in *Commonwealth v. Dunkins*, the Pennsylvania Supreme Court held that a college student accused of robbery did not have a reasonable expectation of privacy in any data shared on the college Wi-Fi network because he had signed the college network's

48. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 1–8 (1990) (describing how conservative constitutional-interpretive theories echo the *Lochner* Era preference for private ordering over public ordering); *see also* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 883–902 (1987) (describing how a wide range of constitutional law issues "depend on *Lochner*-like baselines" rooted in the common law).

49. *See* *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (stating that "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'").

50. Orin S. Kerr, *Terms of Service and Fourth Amendment Rights*, 172 U. PA. L. REV. 287, 294 (2024).

terms of service.⁵¹ One term in that clickwrap contract, agreed to by the student, stated that a user “cannot and should not have any expectation of privacy with regard to any data . . . created or stored on computers within or connected to the institution’s network.”⁵² The Court found that this was an effective waiver of the student’s Fourth Amendment rights in the data:

By assenting to the Computing Resources Policy and logging on to the Moravian College WiFi network on his cell phone thereafter, appellant specifically agreed he “cannot and should not have any expectation of privacy with regard to any data . . . created or stored on computers within or connected to the institution’s network.”⁵³

In a concurrence, Justice Wecht distinguished the Court’s holding from *Carpenter v. United States*, which found that a user had a reasonable expectation of privacy in weekslong cell-site location data,⁵⁴ by noting that unlike with cell-site data, a user “simply can choose not to connect to a particular Wi-Fi network, or can choose to log off of the internet at any time.”⁵⁵ This logic has been followed in a range of other cases.⁵⁶

In another case, the Minnesota Supreme Court found that the Defendant had given up his Fourth Amendment rights by using Dropbox to store child sexual abuse material.⁵⁷ The terms of service noted: The firm “may disclose your information to third parties if we determine that such disclosure is reasonably necessary to (a) comply with the law; (b) protect any person from death or serious bodily injury; (c) prevent fraud or abuse of Dropbox or our users; or (d) protect Dropbox’s property rights.”⁵⁸ This was relevant to the Fourth Amendment analysis, the Court noted, because under the private search doctrine, a person does not have a reasonable expectation of privacy in material that they allow another private party to search, even if that party subsequently hands the material over to the police.⁵⁹

51. 263 A.3d 247, 254 (Pa. 2021).

52. *Id.* at 255.

53. *Id.*

54. 585 U.S. 296, 320 (2018).

55. *Dunkins*, 263 A.3d at 269 (Harlan, J., concurring).

56. Orin Kerr collects the following: *United States v. Sporn*, No. 21-10016, 2022 WL 656165, at *9–10 (D. Kan. Mar. 4, 2022) (regarding child sexual abuse material (“CSAM”) found in a Twitter user account); *United States v. Bohannon*, 506 F. Supp. 3d 907, 915 (N.D. Cal. 2020) (regarding CSAM found in a Microsoft OneDrive account); *United States v. Stratton*, 229 F. Supp. 3d 1230, 1240–42 (D. Kan. 2017) (regarding CSAM found in a Sony PlayStation account). Kerr, *supra* note 50, at 298–99.

57. *State v. Pauli*, 979 N.W.2d 39, 52 (Minn. 2022).

58. *Id.* at 43.

59. *Id.* at 46 (citing *United States v. Jacobsen*, 466 U.S. 109, 117 (1984) (holding that the police did not violate a reasonable expectation of privacy when they tested the contents of a package that had already been searched by a private shipping company)); see also 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.8 (6th ed. 2020).

The Court upheld the lower court's decision that the Defendant "voluntarily stored his child-pornography content with Dropbox despite clear and unambiguous warnings that such content violated Dropbox's policies," which meant that he consented to a private search, which permitted the later government search.⁶⁰

The third-party doctrine is another area where courts have found that a Fourth Amendment interest is diminished by one's contract with a service provider. The core of the third-party doctrine is, simply put, that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."⁶¹ This includes phone records kept by the phone company,⁶² financial records passed on to a bank,⁶³ and more. In *VanDyck v. United States*, the Defendant challenged a warrantless search of his America Online files.⁶⁴ The U.S. Court of Appeals for the Ninth Circuit affirmed,⁶⁵ and the search was not a violation of the Defendant's Fourth Amendment rights because the "[p]olice opened the email attachment without a warrant based on the third-party doctrine."⁶⁶ The Supreme Court narrowed the third-party doctrine in *Carpenter*, noting that "[g]iven the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection."⁶⁷ But the Court also insisted that its holding was narrow, would only apply to so many days' collection of cell-site location data, and would not apply to other investigative techniques.⁶⁸ For that reason, many courts, like the Ninth Circuit in *VanDyck*, have declined to extend it to the searching of cloud storage or email providers.⁶⁹ In cases like those, a defendant's Fourth Amendment rights

60. *Pauli*, 979 N.W.2d at 46.

61. *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979).

62. *Id.*

63. *United States v. Miller*, 425 U.S. 435, 446 (1976).

64. No. CV-21-00399-TUC-CKJ, 2022 WL 17689168 (D. Ariz. Dec. 15, 2022).

65. *VanDyck v. United States*, No. 23-15198, 2024 WL 1477398 (9th Cir. Apr. 5, 2024).

66. *VanDyck*, 2022 WL 17689168, at *2 (citing *Carpenter v. United States*, 585 U.S. 296, 308 (2018)).

67. *Carpenter*, 585 U.S. at 309.

68. *Id.* at 316:

Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information.

69. *See, e.g., State v. Pauli*, 979 N.W.2d 39 (Minn. 2022) (applying the third-party doctrine to data shared with cloud storage service Dropbox, removing any Fourth Amendment protections in that data).

turn on what they have shared with the service provider—always pursuant to the platform terms of service. In those instances, the contractual relationship between the parties is determining the user’s Fourth Amendment rights.

B. Privacy Law

If there is a core tenet to American privacy law, it is the idea of “notice and consent.”⁷⁰ Unlike the top-down privacy regime in Europe, under the U.S. model, “businesses outline their information privacy practices, including representations, rights, and risk allocations in privacy policies, which are typically incorporated by reference in general Terms of Service contracts, to which users must agree.”⁷¹ This is a contractual model of privacy. The Federal Trade Commission (“FTC”), the chief regulator of private firms’ privacy policies,⁷² has long embraced this contractual model of privacy regulation.⁷³

This longstanding emphasis on consent has led many privacy scholars to worry that people do not in fact read their contracts, or that

70. This is also known as notice and choice. *See, e.g.*, Fred H. Cate, *The Failure of Fair Information Practice Principles*, in CONSUMER PROTECTION IN THE AGE OF THE ‘INFORMATION ECONOMY’ 341, 350 (Jane K. Winn ed., 2006) (outlining the “five core principles of privacy protection,” including “notice/awareness” and “choice/consent”); Robert H. Sloan & Richard Warner, *Beyond Notice and Choice: Privacy, Norms, and Consent*, 14 J. HIGH TECH. L. 370, 370 (2014) (“Notice and Choice (sometimes also called ‘notice and consent’) is the current paradigm for consent online.”); Fred H. Cate & Viktor Mayer-Schönberger, *Notice and Consent in a World of Big Data*, 3 INT’L DATA PRIV. L. 67, 67 (2013) (describing how the Fair Information Practices inform “most privacy legislation around the world,” which, at their core, require that personal information collection is “explicitly permissible under law or the individual whose personal data is being processed has—after being informed of the reason, context, and purpose of the processing—given consent”).

71. Kevin E. Davis & Florencia Marotta-Wurgler, *Contracting for Personal Data*, 94 N.Y.U. L. REV. 662, 663 (2019).

72. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 588 (2014) (“FTC regulation is thus the largest and arguably the most important component of the U.S. privacy regulatory system.”).

73. FED. TRADE COMM’N, PRIVACY ONLINE: A REPORT TO CONGRESS 7 (1998), <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf> [<https://perma.cc/985J-4M3V>] (“Consumers should be given notice of an entity’s information practices before any personal information is collected from them. Without notice, a consumer cannot make an informed decision as to whether and to what extent to disclose personal information.”); *see also* FED. TRADE COMM’N, INTERNET OF THINGS: PRIVACY & SECURITY IN A CONNECTED WORLD, at v (2015), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf> [<https://perma.cc/T75W-HUZQ>] (“The Commission staff believes that consumer choice continues to play an important role.”). There is, however, some evidence that the FTC might finally be questioning this contractual model. *See* Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (proposed Aug. 22, 2022) (to be codified at 16 C.F.R. pt. 1).

people somehow do not know the nature of the deal they are striking.⁷⁴ The concern has shifted over time from a fear about notice to a fear about manipulation through dark patterns.⁷⁵ The FTC's recent Advance Notice of Proposed Rulemaking regarding commercial surveillance heavily implies this with its opening line: "Whether they know it or not, most Americans today surrender their personal information to engage in the most basic aspects of modern life."⁷⁶ This problem is worsened by the fact that so many privacy policies use vague and ambiguous language to confuse users and give the platforms maximum flexibility.⁷⁷ This contractual model has been heavily criticized. As Paul Schwartz noted over two decades ago, it is inconsistent with longstanding privacy practices in some heavily regulated industries, like health care.⁷⁸ More recently, Jack M. Balkin has argued that "the contractual model of privacy protection, in short, begs some of the most important questions about privacy regulation."⁷⁹

One of the most well-known examples of privacy that was lost through contract is the Cambridge Analytica scandal. In 2014, Cambridge University researcher Aleksandr Kogan developed a personality quiz for Facebook users, and some 270,000 users agreed to the app's terms.⁸⁰ Facebook's own developer platform gave app developers like Kogan access to not just the data of the users that

74. Katherine J. Strandburg, *Free Fall: The Online Market's Consumer Preference Disconnect*, 2013 U. CHI. LEGAL F. 95, 130–52 (discussing factors that prevent consumers from accurately estimating the increments in expected harm associated with data collection); see, e.g., Cate, *supra* note 70, at 351; Solon Barocas & Helen Nissenbaum, *On Notice: The Trouble with Notice and Consent*, in PROCEEDINGS OF THE ENGAGING DATA FORUM: THE FIRST INTERNATIONAL FORUM ON THE APPLICATION AND MANAGEMENT OF PERSONAL ELECTRONIC INFORMATION (Oct. 2009), <http://senseable.mit.edu/engagingdata/downloads.html> [<https://perma.cc/BH5S-TV68>].

75. Compare Solove & Hartzog, *supra* note 72, at 634 (concerned with online privacy policies' "insufficient notice"), with Jamie Luguri & Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43, 81 (2021) ("[I]t appears that several frequently employed dark patterns can be very effective in prompting consumers to select terms that substantially benefit firms.").

76. Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (proposed Aug. 22, 2022) (to be codified at 16 C.F.R.).

77. See Balkin, *Information Fiduciaries and the First Amendment*, *supra* note 14, at 1199:

[T]he flip side of the contract theory is that if there is no contract (or reliance-inducing promise), there is no constitutionally enforceable privacy right. And because companies like Uber and Facebook can state their privacy policies in vague terms, or change their privacy policies more or less at will, relying on terms of service or end user license agreements may offer only very limited privacy protections.

78. Paul M. Schwartz, *Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence*, 52 STAN. L. REV. 1559, 1565–66 (2000) (noting the tension between the use of medical records and the privacy policies of many firms).

79. Balkin, *Information Fiduciaries and the First Amendment*, *supra* note 14, at 1202.

80. See Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> [<https://perma.cc/7MGD-NYQB>].

agreed to use the developer’s app but the data of their friends as well.⁸¹ This meant that approximately fifty million Facebook users had some data shared with Kogan.⁸² And, alarmingly, it seems that at least in theory, the users had all agreed to this data sharing when they signed up for Facebook.⁸³ The Cambridge Analytica scandal was described in the news as a “breach” of user data, but as Facebook’s then–chief security officer put it, “It is incorrect to call this a ‘breach’ under any reasonable definition of the term.”⁸⁴ Facebook’s deputy general counsel Paul Grewal agreed, noting that Kogan obtained data from “users who chose to sign up to his app, and everyone involved gave their consent.”⁸⁵ The disconnect between the widespread outrage over the Cambridge Analytica scandal and the fact that users “agreed” to Facebook’s terms of service illustrates how minimally platform contracts track user expectations around privacy.

C. Speech Law

To an alarming degree, the core questions about speech in modern democratic society—including who has access to what information—depend on the terms of service of large technology companies.⁸⁶ What users can say and what users see are dictated by platform terms of service, which typically embed the platforms’ ever-changing moderation policies.⁸⁷ The First Amendment, with its focus on state action, effectively says that platform speech is a matter between the platform and the users, even if the same censorship by a state would be problematic.⁸⁸ As a broad range of scholars has noted recently, the First Amendment is inapt, unhelpful, and even a barrier to resolving many pressing questions about digital speech, including whose voice is amplified or suppressed, how true and false information are sorted, and

81. *Id.*

82. *Id.*

83. Lorenzo Franceschi-Bicchierai, *Why We’re Not Calling the Cambridge Analytica Story a ‘Data Breach,’* VICE (Mar. 19, 2018, 1:41 PM), <https://www.vice.com/en/article/facebook-cambridge-analytica-not-a-data-breach/> [<https://perma.cc/7MGD-NYQB>].

84. *Id.*

85. *Id.*

86. See Klonick, *supra* note 26, at 1599 (“[P]rivate online platforms have an increasingly essential role in free speech and participation in democratic culture.”).

87. Even beyond the terms of service, speech platforms often make content-moderation decisions according to internal guidelines. *Id.* at 1641 (“[T]he external policy—or Community Standards—provided to the public is not the same as the internal rulebook used by moderators when trying to assess whether content violates a platform’s terms of service.”).

88. Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 85 (2021) (“Facebook’s and Twitter’s community standards, for example, have many content-based regulations that would be unconstitutional if imposed by government actors.”).

more.⁸⁹ This is in part because the Supreme Court's First Amendment speech jurisprudence is largely aimed at a relatively particular scenario—one where state actors suppress speech in a world in which information is scarce. But in today's world, where speech is inexpensive and everywhere, the most difficult free speech questions have less to do with government suppression of information and more to do with amplification, distribution, and quality of speech.⁹⁰

While the First Amendment constrains only state actors, Section 230 of the Communications Decency Act applies to private actors.⁹¹ The Telecommunications Act of 1996, a major part of President Clinton's broader internet governance initiative, sought to immunize platforms from liability based on the content posted by their users.⁹² The aim of the law was to give platforms the freedom and incentive to take steps to moderate the content flowing through their networks, without fear of being held liable for that content as publishers.⁹³ It certainly accomplished that aim.⁹⁴ Today, the largest platforms employ tens of thousands of moderators to delete, flag, and monitor the posts of users—all in service of enforcing the speech rules set out in their

89. See, e.g., Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1635 (2021):

Many of the fundamental assumptions on which free speech theory and doctrine have long rested are thus now unstable. That longstanding First Amendment doctrine rests on an inaccurate model of how speech actually works invites us to reconsider aspects of free speech doctrine that fail to adjust and account for these realities;

Wu, *supra* note 23 (describing how the First Amendment is focused on a different problem—one of government control of scarce information—than the current speech problems, where information is cheap and what matters is amplification and distribution); Balkin, *Old-School/New-School Speech Regulation*, *supra* note 14, at 2296 (describing how “the central battleground over free speech in the digital era” is no longer governmental action, but rather private choices about speech).

90. See Wu, *supra* note 23, at 554 (noting that for most of the Court's First Amendment jurisprudence, “the government is assumed to be the main threat to the ‘marketplace of ideas’ through its use of criminal law or other coercive instruments to target speakers (as opposed to listeners) with punishment or bans on publication”).

91. 47 U.S.C. § 230.

92. See GERSTLE, *supra* note 46, at 164:

[The Communications Decency Act] often receives less attention than other Clinton initiatives, such as welfare reform. But it needs to be rescued from this neglect, for it did more than any other piece of legislation in the 1990s to free the most dynamic sector of the economy from regulation and dramatically accelerate the building of a new economy based on neoliberal principles.

93. See JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 85 (2019) (providing a history of Section 230 and noting the incentives for immunizing platforms from liability for user content).

94. *Id.*

contracts with users.⁹⁵ But Section 230 also largely insulates firms from liability for their own design choices about how harmful content is distributed. As Danielle Citron and Ben Wittes put it recently, by expansively interpreting Section 230, “Courts have built a mighty fortress protecting platforms from any accountability for unlawful activity on their systems—even when they actively encourage such activity or deliberately refuse to address it.”⁹⁶ With no constitutional speech controls and statutory indemnification for any speech harms, what is left to shape the speech rules on platforms are the private agreements that the platforms strike with their users. User speech rights in this context turn on contract.⁹⁷

When users’ posts are censored, or their voices are silenced—or shadow banned—or when they are kicked off a platform entirely, they have no recourse. The examples of users who feel frustrated by platform content-moderation policies include people on both sides of the political aisle.⁹⁸ Indeed, there seems to be a national consensus that the platforms are not adequately managing the speech ecosystem.⁹⁹ This is the reason why Texas and Florida have passed laws requiring large platforms to explain their content-moderation policies and constraining the platforms’ abilities to control both what users can say and what users can see.¹⁰⁰ Whatever the merits of those laws, they reflect a desire

95. See, e.g., Billy Perrigo, *Inside Facebook’s African Sweatshop*, TIME (Feb. 14, 2022, 7:30 AM), <https://time.com/6147458/facebook-africa-content-moderation-employee-treatment/> [<https://perma.cc/5K5Q-334V>] (“[Facebook] contracts the services of more than 15,000 content moderators globally, most of whom are employed by third-parties.”); Casey Newton, *The Trauma Floor*, THE VERGE (Feb. 25, 2019, 8:00 AM), <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona> [<https://perma.cc/788E-Z3VT>] (describing roughly fifteen thousand content moderators and the challenging work environment).

96. See Danielle Keats Citron & Benjamin Wittes, *The Problem Isn’t Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 458 (2018) (“Courts have built a mighty fortress protecting platforms from any accountability for unlawful activity on their systems—even when they actively encourage such activity or deliberately refuse to address it.”).

97. See Balkin, *Information Fiduciaries and the First Amendment*, *supra* note 14, at 1202 (noting that the contractual model of privacy that determines user rights in the online information environment “tends to conflate First Amendment freedom with contractual freedom”).

98. Emily A. Vogels, Andrew Perrin & Monica Anderson, *Most Americans Think Social Media Sites Censor Political Viewpoints*, PEW RSCH. CTR. (Aug. 19, 2020), <https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/> [<https://perma.cc/BN7M-GCG5>].

99. *Id.*

100. The Florida law, S.B. 7072 (the “Stop Social Media Censorship Act”), prohibits social media platforms from blocking or censoring political candidates and the vaguely defined “journalistic enterprises.” FLA. STAT. § 501.2041 (2023). Meanwhile, the sprawling and more complicated Texas law, H.B. 20, bans platforms with more than fifty million users from censoring users based on political viewpoint, among other things. TEX. BUS. & COM. CODE §§ 120.103–104 (West 2021); TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002(a)(2) (West 2021). Both laws are the

by the states to limit the speech controls that large social media platforms may enact through their terms of service.¹⁰¹ In the wake of the Supreme Court's recent decision in *Moody v. NetChoice*, both of those laws seem destined to fail First Amendment scrutiny in upcoming as-applied challenges.¹⁰² That will leave us back where we started: Users' speech rights on social media platforms are almost entirely controlled by contract.

* * *

The internet is in private hands, and it is largely governed by private contracts between platforms and their users. These are social contracts of a scale never before seen. They are contracts with all of society, and they are contracts that in many ways set the rules for society. It is as if, when it comes to the digital world, we have all signed private HOA agreements that set the rules for our world. These agreements are even more influential than they otherwise would be because so many of our public laws defer to them to determine the scope of our speech, privacy, and criminal law rights. This is all consistent with the original plan; the American internet governance model has always been built around private ordering, built around contract.

But now that the internet has produced its share of hard social problems—from democratic concerns to public health concerns—the large, lurking policy question is what, if anything, ought to be done. The standard approaches have taken two tracks. One set of scholars and reformers has turned to antitrust to ask whether market competition can solve this problem.¹⁰³ The other set turns to positive-law reforms in the respective areas affected by the platform society—including proposed legislation regarding privacy, criminal law, artificial

subject of the Court's combined ruling in *Moody v. NetChoice*, which dismissed the platforms' facial challenges to both laws, while the majority opinion strongly suggested that it would uphold an as-applied challenge to the laws. See 144 S. Ct. 2383 (2024).

101. See Tim Wu, Opinion, *The First Amendment Is Out of Control*, N.Y. TIMES (July 2, 2024), <https://www.nytimes.com/2024/07/02/opinion/supreme-court-netchoice-free-speech.html> [<https://perma.cc/4JH7-WZ2C>] (“Even if one has concerns about the wisdom and questionable constitutionality of the Florida and Texas laws (as I do), the breadth of the court's reasoning should serve as a wake-up call.”).

102. 144 S. Ct. at 2399 (noting that, despite dismissal of the facial challenge, as-applied challenges might succeed because “[t]he Fifth Circuit was wrong in concluding that Texas's restrictions on the platforms' selection, ordering, and labeling of third-party posts do not interfere with expression,” and “the court was wrong to treat as valid Texas's interest in changing the content of the platforms' feeds”).

103. See, e.g., Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 797–802 (2017) (calling for a radical shift in antitrust policy to address large online firms like Amazon); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018) (arguing for the breakup of big technology firms to increase market competition and make consumers better off); Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 1956 (2021) (“[S]ustainable competition in platform markets is possible for most aspects of their business,” and therefore antitrust laws are well suited to regulating the platform economy).

intelligence, speech, and more.¹⁰⁴ A different approach—in some ways, a more intuitive approach, once we understand the powerful role that contracts play in this new digital world—would be to turn to contract law. But so far, contract law has looked the other way.

III. CONTRACT LAW LOOKS THE OTHER WAY

At the same time that contracts have taken on an outsized role in determining the shape of public law rights online (as documented in Parts I and II), courts have largely proscribed the role of contract law. To be sure, contract law neglected the public impact of private ordering well before the internet arrived. But as the internet washed over every corner of society—and as the official government policy was to leave internet governance to private actors engaged in private ordering—the pressure on contract law to interrogate these agreements grew. Yet courts largely looked the other way. As two privacy law scholars put it when describing contract law’s role in protecting privacy (though they could easily have been describing other public rights), “[C]ontract law—formal contract and promissory estoppel—plays hardly any role.”¹⁰⁵

Why does contract law do so little to address the public harms of today’s social contracts? The answer requires a look at a number of important aspects of contract law, most of which predate the rise of digital networks. First, contract law is primarily—often exclusively—focused on procedural fairness in mutual assent and reluctant to inquire into whether a deal is substantively fair.¹⁰⁶ Second, when courts have looked to substance, they have largely blessed the idea of parties contracting away basic rights. Third, American contract law is largely oriented around the contracting parties and largely reluctant to acknowledge third-party or public harms. Finally, and most surprisingly, this all persists today despite the fact that contracts scholars and practitioners have been actively attempting to clarify the role that contract law plays in the digital era. While the rise of private digital platforms has drastically changed the contracting landscape,

104. Among the bills proposed in recent years, a few examples include the following: American Data Privacy and Protection Act, H.R. 8152, 117th Cong. (2021); Protecting Speech from Government Interference Act, H.R. 140, 118th Cong. (2023); Algorithmic Accountability Act of 2022, H.R. 6850, 117th Cong. (2022); The Fourth Amendment Is Not for Sale Act, S. 1265, 117th Cong. (2021).

105. Solove & Hartzog, *supra* 72, at 596. They were describing privacy law in particular, but the sentiment applies more broadly.

106. Jacob Hale Russell offers a useful corrective to the general idea that unconscionability is a dead doctrine. Jacob Hale Russell, *Unconscionability’s Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965 (2019) (showing that unconscionability is used by courts much more frequently than the conventional story suggests).

removing friction and enabling massive updateable consumer contracts, modern scholarly efforts do not yet grapple with the public externalities of society-wide digital contracts.

This Part reviews these issues in turn. First, it details contract law's emphasis on procedure. Second, it reviews contract law's willingness to enforce agreements where users bargain away substantive rights. And finally, it looks at three major efforts to better understand the role of contract law in the digital era.

A. Emphasis on Procedural Fairness

When courts are faced with a contract claim, they have at least two important sets of questions: They could inquire into the procedures that led to the contract (did the parties have all the information they needed, and does the deal reflect their mutual assent?), or they could focus on the contract itself (is it the kind of contract that ought to be enforced, however it came about?). American contract law has for some time now largely taken the former tack.¹⁰⁷ This is reflected in the doctrine, where the bulk of common-law claims is aimed at making sure that the parties intended to strike the deal they struck. Of the core doctrines of contract defense, the overwhelming majority are focused on bargaining problems: mistake, duress, undue influence, minority, and mental capacity. Only a few—unconscionability and public policy— inquire as to the substantive fairness of the deal.¹⁰⁸ Longstanding consideration doctrine holds that courts ought not to ask whether the bargain is a good one, at least for the two parties.¹⁰⁹ In general, courts want to be in the business of finding ways to enforce agreements.¹¹⁰

Part of this story predates the internet. Over the recent decades, there has been a general turn—consistent with the broader neoliberal turn in American policy¹¹¹—toward a world where courts are reluctant

107. See Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 923, 927 (1974) (explaining the shift from an equitable evaluation of contractual obligations to a system that aims to enforce private deals).

108. See Hoffman & Hwang, *supra* note 16, at 983 n.15 (“Though exceedingly rare, courts will sometimes decline to enforce contracts as written. But those circumstances are narrowly drawn—the relatively disfavored defenses of unconscionability, public policy, duress, mistake, and the like.”).

109. See, e.g., *Batsakis v. Demotsis*, 226 S.W.2d 673, 675 (Tex. Civ. App. 1949) (“Mere inadequacy of consideration will not void a contract.”).

110. See Steven Shavell, *On the Writing and the Interpretation of Contracts*, 22 J.L. ECON. & ORG. 289, 290 (2006) (“[C]ourts fill gaps in contracts, resolve conflicts and ambiguities of language, and sometimes replace the parties’ express terms with the courts’ terms.”).

111. See GERSTLE, *supra* note 46, at 4; see also KNAPP ET AL., *supra* note 32, at 127 (noting that modern contract law reflects and is consistent with “a society in which the law fully supports a

to interfere in private market transactions, even where those transactions have public consequences. As Richard Shell put it when describing Supreme Court contract decisions in the 1980s and 1990s, “[T]he modern Court is, in important respects, more market-oriented than the *Lochner* Court.”¹¹² And as Morton Horwitz describes, the classical view of consideration, under which “the extent of contractual obligation depends upon the convergence of individual desires,” represents a stark shift from the earlier conception of exchange, which imposed an “equitable limitation on contractual obligation.”¹¹³

But, of course, the law has also adapted to meet the particular needs of the internet market—and these changes reflect contract law’s preference for policing procedure over substance. Doctrinally, the most important elements of the law that enable today’s terms of service are about mutual assent—boilerplate agreements, clickwrap agreements, and updateable terms. Each of these has sparked intense debate, and each has ultimately been sanctioned by courts. Crucially, the concern in each case is about procedural fairness to the parties, and not substantive justice either to the parties or to society as a whole.

1. Boilerplate Agreements

The precursor to today’s platform terms of service is the boilerplate agreement—the kind of one-sided, take-it-or-leave-it agreement that is handed to consumers in many common commercial transactions.¹¹⁴ Boilerplate agreements have been both criticized and celebrated,¹¹⁵ but as a matter of law, their validity is well settled: Consumers are regularly bound by agreements that are drafted by a

‘free market’ economy, permitting commercial entities (individuals or corporations) to make whatever agreements of exchange they wish, at whatever relative values they can agree to, with the backstop of legal enforceability”).

112. Shell, *supra* note 15, at 437.

113. Horwitz, *supra* note 107, at 923. *But see* A. W. B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979) (disputing that there was such a shift).

114. Radin refers to boilerplate agreements as forms that change the background distribution of rights. *See* RADIN, *supra* note 8, at xvi (“Instead of the set of rights belonging to each of these people under the legal system, they had only the constricted set of legal rights allowed by the firms who delivered paperwork (or its electronic equivalent) to them.”). “Because we cannot change them, these forms are called ‘boilerplate.’” *Id.*

115. Radin’s monograph is the most thorough critique. *See id.* For a defense of boilerplate agreements, see Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883 (2014) (reviewing RADIN, *supra* note 8); *see also* G. Marcus Cole, *Rational Consumer Ignorance: When and Why Consumers Should Agree to Form Contracts Without Even Reading Them*, 11 J.L. ECON. & POL’Y 413, 414 (2015); Jens Dammann, *Flytraps, Scarecrows, and the Transparency Paradox: The Case for Redesigning the Law on Vague Boilerplate Agreements*, 2018 U. ILL. L. REV. 185, 187 (noting that “the law’s approach to vague language in boilerplate contracts is fundamentally flawed” because it often focuses on non-harms while ignoring real harms from vague language).

larger and more sophisticated entity, which consumers do not negotiate and which no one expects them to read.¹¹⁶ There are instances when these agreements have been held unconscionable, but only in rare circumstances.¹¹⁷

Boilerplate is such a challenge for contract law scholars because, as the American Law Institute (“ALI”) in its recent *Restatement of Consumer Contracts* notes, courts must recognize that consumers are often agreeing to a contract with many terms that they will not be aware of—a recognition that is “all the more relevant and concerning in the digital era, when businesses can draft longer lists of terms and attempt to incorporate them into the transactions more often.”¹¹⁸

2. Clickwrap Agreements

There was a time, at the dawn of the internet era, when contracts scholars were worried about how online contracting would work.¹¹⁹ Would it be enough to simply post terms on a website and expect that anyone who visited the site was bound?¹²⁰ Such browsewrap

116. See Bakos et al., *supra* note 22, at 2 (“All sides in this debate realize that, in many circumstances, a majority of buyers do not read fine print. For many buyers, too much time is required to read and give meaningful assent, and fine print can be too difficult to understand or may seem unimportant.”).

117. While many courts that have considered the matter have found boilerplate contracts to be procedurally unconscionable, most have also found the terms of those to be substantively fine. Since the unconscionability doctrine typically requires both procedural and substantive unconscionability, boilerplate agreements have survived judicial scrutiny. See KNAPP ET AL., *supra* note 32, at 642–43.

118. RESTATEMENT ON CONSUMER CONTS. intro. note (AM. L. INST. 2024).

119. Much of the earliest scholarly debate was among intellectual property scholars studying software licenses. See, e.g., David A. Rice, *Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Prohibitions Against Reverse Engineering*, 53 U. PITT. L. REV. 543, 551 (1992) (examining “whether and to what extent federal law preempts enforcement of software license terms that prohibit reverse engineering”); Maureen A. O’Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479, 517–41 (1995) (describing how courts struggled to weigh preemption concerns when parties contracted around the rules set out in the Copyright Act); Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1239 (1995) (arguing that intellectual property “is well on its way to becoming irrelevant in the computer world” because of “the role of contract law in setting rights”); Robert P. Merges, *Intellectual Property and the Costs of Commercial Exchange: A Review Essay*, 93 MICH. L. REV. 1570, 1572 (1995) (reviewing PETER A. ALCES & HAROLD F. SEE, *THE COMMERCIAL LAW OF INTELLECTUAL PROPERTY* (1994)) (advocating for a “truly integrated contract law governing intellectual property-based transactions”). Of course, contracts scholars were also attuned to the unique challenges of online contract drafting. See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 475–76 (2002) (arguing that online boilerplate agreements can benefit consumers if companies identify the efficient allocation of contractual risks between consumers and businesses).

120. So-called browsewrap was fairly quickly found to be insufficient, largely because it produced no evidence of consent. See, e.g., *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 980–82

agreements were sometimes invalidated, giving rise to the now commonplace clickwrap agreements, where users are given a prompt, usually a pop-up window, that they can dismiss if they indicate their agreement to the website's terms.¹²¹ The benefit of clickwrap agreements from the perspective of contract law is *not* that users suddenly know what kind of deal they are getting into, but rather that there is evidence of their assent to the terms of the deal.¹²² Requiring digital contracts to be clicked is like a digital version of the statute of frauds: Forcing the parties to memorialize the deal does not ensure that the parties are in fact fully informed, but it does produce evidence that will help a court sort things out after the fact.¹²³

As a general matter, the legality of clickwrap agreements is settled. As Mark Lemley put it more than fifteen years ago, "Every court to consider the issue has found 'clickwrap' licenses, in which an online user clicks 'I agree' to standard form terms, enforceable."¹²⁴ Today, the picture is largely the same.¹²⁵ Many of us spend huge portions of our lives online using digital services, and these are largely governed by clickwrap agreements. The volume of clickwrap is so overwhelming that no one is expected to read these agreements.¹²⁶ Indeed, it would be illogical to spend one's time reading clickwrap terms, not only because of the time it would require but also because they are typically offered

(E.D. Cal. 2000) (invalidating a browsewrap license agreement that was indicated on a website in small gray text on a gray background because of lack of notice and, therefore, lack of mutual consent). See generally *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 n.1 (E.D. Pa. 2007):

A clickwrap agreement is distinguishable from a "browsewrap" agreement, which "allow[s] the user to view the terms of the agreement, but do[es] not require the user to take any affirmative action before the Web site performs its end of the contract," such as simply providing a link to view the terms and conditions.

(quoting James J. Tracy, *Browsewrap Agreements: Register.Com, Inc. v. Verio, Inc.*, 11 B.U. J. SCI. & TECH. L. 164, 164–65 (2005)).

121. See generally *Feldman*, 513 F. Supp. 2d at 236 ("A clickwrap agreement appears on an internet webpage and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction.").

122. See, e.g., *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366–67 (E.D.N.Y. 2009) (noting the key distinction between browsewrap and clickwrap, which is the latter's requirement that the user give affirmative assent, thereby proving they have notice of the site's terms).

123. See *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 402 (E.D.N.Y. 2015) ("[U]ntil useful consumer studies demonstrate that average consumers using the computer understand what contract terms are being accepted when a purchase is made, preemptive rules in favor of vendors who do not forcefully draw purchasers' attention to terms disadvantageous to them should be rejected.").

124. Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459 (2006).

125. See RESTATEMENT ON CONSUMER CONTS. § 2 cmt. f (AM. L. INST. 2024) ("There is not a single reported case in which clickwrap—when the consumer was required to click on 'I Agree' to conspicuously presented terms that satisfied the requirements of this Section—was deemed a priori an ineffective mode for adoption of terms.").

126. See Ben-Shahar, *supra* note 21, at 17.

on a take-it-or-leave-it basis.¹²⁷ And while no one is forced to sign these agreements, today's biggest technology platforms are often an inescapable fact of life, from advertising one's business to following White House news.¹²⁸

3. Updateable Terms

It is now common for terms of service to include the right to unilaterally update the terms of the agreement. So, for example, Facebook's terms of service include this provision: "We reserve the right, at our sole discretion, to change, modify, add, or delete portions of these Terms of Use at any time without further notice."¹²⁹ This kind of agreement-as-a-blank-check, where users can see but are not notified of the new terms, is new. Leaving something in a contract unfinished or agreeing to finalize details later—neither of these is new.¹³⁰ But it was not possible before for a commercial entity to offer to millions of people boilerplate terms that were subject to change. One study of over five hundred websites found that 95.8% had clickwrap agreements with change-of-terms clauses, allowing the drafters to change the agreement unilaterally, largely without constraints on scope, time, or notice.¹³¹ This approach has been blessed by the ALI's *Restatement of Consumer Contracts*, the major reform effort in this area. The *Restatement*, in Section 3, allows for an assumption of assent to clickwrap agreements with change-of-terms clauses.¹³²

* * *

It was true before the rise of the digital economy, but it is even more true today: Contract law inquires into procedural fairness but rarely asks broader questions about whether the agreement is fair to both parties or society. The classic view of contract largely defers to the parties to determine their own bargain, "with the court's role being

127. *See id.* at 19.

128. *See, e.g.*, Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019) (holding that the president's Twitter account was a public forum, and that the First Amendment prohibited the president from blocking users from seeing his posts).

129. *Terms of Use*, FACEBOOK, <https://www.law.washington.edu/students/streetlaw/lessons/casestudy2.pdf?noeo4gf> (last updated Nov. 15, 2007) [<https://perma.cc/9QTP-WWYU>].

130. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 2.9, at 44–45 (6th ed. 2009) (discussing three different ways that contracts can be indefinite: gaps, misunderstandings, and agreements to agree).

131. Shmuel I. Becher & Uri Benoliel, *Sneak in Contracts*, 55 GA. L. REV. 657, 681–82 (2021).

132. RESTATEMENT ON CONSUMER CONTS. § 3 (AM. L. INST. 2024). For criticism of this approach, see Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute's Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 392–95 (2020).

limited to confirming that a bargain had in fact been struck.”¹³³ This has continued in the digital era.

B. Allowing Parties to Contract Away Rights

In addition to and consistent with the focus on procedural fairness, courts have also reduced the substantive limits on what parties can contract away.¹³⁴ As the *Restatement Second of Contracts* notes, “In general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance.”¹³⁵ Today, more than ever, we have the ability to contract away a huge range of public rights, including speech rights, access to the courts, and more. It was not always so, but as Morton Horwitz writes, this shift was one component of the much larger pro-market turn in American contract law: “By 1850, it was common for courts to permit parties to contract out of common law duties, which only one generation earlier had been regarded as beyond their power to alter.”¹³⁶ There are times when courts are reluctant to enforce a waiver of some rights—especially waivers of liability for anything beyond negligence—but these are rare.¹³⁷ These cases typically feature quite a lot of hand wringing to justify the unusual restriction on freedom of contract; they are the exceptions that prove the rule.¹³⁸ Ultimately, “the modern Court has shown a sustained interest in reconstructing the American legal system to better reflect economists’ ideal of strict contract enforcement.”¹³⁹

To understand this trend, it might help to look at three areas where courts have considered but ultimately declined to place substantive limits on contract: (1) alienation of litigation, (2) limitations on liability, and (3) waivers of rights.

1. Alienation of Litigation

Increasingly, contracts include arbitration provisions that waive one’s right to sue in public court. As David Hoffman and Erik

133. KNAPP ET AL., *supra* note 20, at 125.

134. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 194 (1994) (“The law of contracts, the legal paradigm of voluntary market relations, was, as we have seen, especially resistant to any attempts to judge the fairness of contracts by their results.”).

135. RESTATEMENT (SECOND) OF CONTS. ch. 8, intro. note (AM. L. INST. 1981).

136. Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982).

137. See Edward K. Cheng, Ehud Guttel & Yuval Procaccia, *Unenforceable Waivers*, 76 VAND. L. REV. 571, 579–82 (2023) (reviewing the case law).

138. See *id.* (collecting case law).

139. Shell, *supra* note 15, at 436.

Lampmann put it, “The last two decades have seen an explosion of arbitration in contract cases.”¹⁴⁰ These arbitration provisions “effectively bar employees or consumers from going to court, instead diverting legal claims into an arbitration procedure that is established by the agreement drafted by the company.”¹⁴¹ The 1925 Federal Arbitration Act (“FAA”)¹⁴² was passed in response to court cases finding arbitration provisions unconscionable.¹⁴³ The Act provides that contracts to arbitrate are valid and binding.¹⁴⁴ In interpreting the FAA, the Supreme Court has found that even where terms appear unconscionable, “courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties’ consent.”¹⁴⁵ California courts had previously held that class-action waivers in arbitration agreements were unconscionable.¹⁴⁶ But in *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court found that the FAA preempts those state laws attempting to place substantive limits on contractual arbitration clauses.¹⁴⁷ That holding has been reinforced several times.¹⁴⁸ Most recently, in *Epic Systems*, the Court noted that this is not

140. David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 217 (2019); see also CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<https://perma.cc/2BLK-TL8N>] (showing the proliferation of arbitration clauses that include class-action waivers in a range of consumer contracts).

141. Alexander J.S. Colvin, *The Metastasis of Mandatory Arbitration*, 94 CHI.-KENT L. REV. 3, 3 (2019).

142. 9 U.S.C. §§ 1–14.

143. See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 110 (2006); Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 103 (2002) (the Supreme Court has interpreted the FAA to mean “state laws restricting the arbitration of such [covered] disputes are preempted”).

144. 9 U.S.C. § 2:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

145. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 509 (2018) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011)).

146. *Discover Bank v. Superior Ct.*, 36 Cal. 4th 148 (2005).

147. 563 U.S. at 343–44.

148. To be sure, there is some pushback by the states. See, e.g., *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 366, 385 (noting that “the FAA does not prevent states through legislative or judicial rules from addressing the problems of affordability and accessibility of arbitration,” and “[c]onsistent with this understanding, the United States Supreme Court’s FAA jurisprudence—with one exception discussed below—consists entirely of disputes involving the parties’ own rights and obligations, not the rights of a public enforcement agency”).

a question left to courts: “Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings.”¹⁴⁹ These rulings are consistent with earlier cases where the Court effectively overruled state legislative efforts to shape contract doctrines.¹⁵⁰

In the employment context, the Court has held that an employee can contract away their right to sue for employment discrimination.¹⁵¹ In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that an employee’s age-discrimination claim under the Age Discrimination in Employment Act can be “subject to compulsory arbitration pursuant to an arbitration agreement in a securities registration application.”¹⁵² The Court emphasized that “it is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA,” and the Court proceeded to list a range of different domains where courts have upheld arbitration agreements.¹⁵³ *Gilmer* was followed by *14 Penn Plaza LLC v. Pyett*, which held that a union can bargain away a member’s right to sue for employment discrimination.¹⁵⁴

2. Limitations on Liability

Traditionally, common-law courts have been suspicious of commercial contract clauses that seek to insulate one party from wrongdoing.¹⁵⁵ There are two reasons for this. First, exculpation clauses “reduce the incentives of parties performing important services to the public-at-large” to behave in the public interest.¹⁵⁶ Second, the clauses “may shift risks of loss to parties, such as consumers and small businesses, who are ill-equipped to bear them.”¹⁵⁷ This suspicion of limitations on liability was evident in the *Lochner* Court, which “refused to enforce attempts by companies to exculpate themselves from negligence liability through stipulations in maritime towage contracts, passenger tickets, and bills of lading.”¹⁵⁸ For example, in *The Steamer*

149. *Epic Sys. Corp.*, 584 U.S. at 502.

150. Shell, *supra* note 15, at 483 (“Using the concept of federal preemption, the Court in *Southland Corp. v. Keating* wiped out all state statutory objections to arbitration clause enforcement in cases involving interstate commerce.” (footnote omitted)).

151. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

152. *Id.* at 23.

153. *Id.* at 26.

154. 556 U.S. 247, 274 (2009).

155. Shell, *supra* note 15, at 463.

156. *Id.*

157. *Id.*

158. *Id.* at 464 (footnotes omitted).

Syracuse, the Court invalidated a liability waiver in a towing contract—the waiver said that the boat was being towed from Albany to New York City “at the risk of her master and owner”—because the tug master’s duty of reasonable care could not be contracted away.¹⁵⁹

But today, courts regularly uphold liability waivers in a huge range of cases. Ohio courts, for example, will uphold a liability waiver as long as the “ordinarily prudent and knowledgeable individual would have understood the provision as a release from liability for negligence.”¹⁶⁰ In many states, there are some limitations on how waivers of liability work—like whether they cover anything beyond ordinary negligence.¹⁶¹ But in at least forty-six states, “a well-written, properly administered waiver, voluntarily and knowingly signed by an adult, can protect the drafter of the waiver from liability for injuries resulting from ordinary negligence.”¹⁶² The once-steadfast rule against waivers of liability is eroding.

3. Alienation of Basic Rights

Modern American courts’ commitment to freedom of contract extends even to basic rights, which parties are often free to contract away despite being thought of as inherently unalienable. This too is a change from the past. This shift can be seen across a wide swath of public law rights. For example, in *Cohen v. Cowles Media Co.*,¹⁶³ the Supreme Court held that a newspaper can “waive First Amendment free press rights when a reporter promises to keep confidential the identity of a news source.”¹⁶⁴ In *D. H. Overmyer Co. Inc., of Ohio v. Frick Co.*,¹⁶⁵ the Court enforced a waiver of procedural due process claims—something that had not been allowed before.¹⁶⁶ And in *Town of Newton v. Rumery*, the Court upheld a contract waiving Section 1983 statutory civil rights claims.¹⁶⁷ This has trickled down to state courts, of course, which, “citing modern Supreme Court precedent, have adopted highly

159. 79 U.S. 167, 169–70 (1870).

160. *Hall v. Woodland Lake Leisure Resort Club, Inc.*, No. 97CA945, 1998 WL 729197, at *7 (Ohio Ct. App. Oct. 15, 1998).

161. Cheng et al., *supra* note 137, at 580 (“[D]isclaimers of gross negligence, recklessness, and intentional conduct are almost always [found to be] against public policy.”).

162. *Exculpatory Agreements and Liability Waivers in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C., <https://www.mwl-law.com/wp-content/uploads/2018/05/EXCULPATORY-AGREEMENTS-AND-LIABILITY-WAIVERS-CHART.pdf> (last visited Sept. 13, 2024) [<https://perma.cc/R26F-BZZK>].

163. 501 U.S. 663 (1991).

164. Shell, *supra* note 15, at 479.

165. 405 U.S. 174 (1972).

166. Shell, *supra* note 15, at 477.

167. 480 U.S. 386 (1987).

flexible views of contractual waivers of constitutional rights ranging from termination of parental rights to waivers of First Amendment, protection against self-incrimination, due process, and jury trial rights.”¹⁶⁸

In a U.S. Court of Appeals for the Seventh Circuit case regarding an arbitration provision, Judge Easterbrook noted, “[T]he Supreme Court has never held that *any* entitlement is outside the domain of contract, unless the statute forbids waiver.”¹⁶⁹ Judge Easterbrook went on to outline the cases where contracting away basic rights has been sanctioned by the Supreme Court, including “the right to a jury trial, the standard of proof beyond a reasonable doubt, the right to political expression, the right to attorneys’ fees, and ‘an entire civil rights claim.’”¹⁷⁰ The courts’ enthusiasm for contracting away rights is so palpable that two scholars reviewing this case law recently wondered, “Are there any rights so fundamental that they may not be bargained away?”¹⁷¹

C. Inattention to Social Costs

Contract law is surprisingly inattentive to broader public harms, despite the fact that nearly every contract has the potential to affect others.¹⁷² For example, commercial contracts occur in a market where each party to a deal may have other contracts—upstream or downstream—that will be affected by their performance.¹⁷³ And even seemingly private deals, like an agreement between *A* and *B* for some piece of property, will have an impact on others, like neighbors, with an interest in how the land will be used.¹⁷⁴ Then there are contracts like nondisclosure agreements, where the public at large may have an interest in the information being suppressed.¹⁷⁵ In many ways, contract law is infused with public interest because there is always the risk that “private-party contracting inflicts negative externalities upon the public.”¹⁷⁶

168. Shell, *supra* note 15, at 485–86.

169. Metro E. Ctr. for Conditioning & Health v. Qwest Commc’ns Int’l, Inc., 294 F.3d 924, 928 (7th Cir. 2002).

170. Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 833 (2009).

171. *Id.* at 837.

172. Bagchi, *supra* note 16, at 212.

173. *Id.* at 217.

174. *Id.*

175. See Hoffman & Lampmann, *supra* note 140, at 174.

176. Hoffman & Hwang, *supra* note 16, at 996.

And yet, as Clare Dalton puts it, “Since at least the mid-nineteenth century, the discourse of contract doctrine has tried to portray contract as essentially private and free.”¹⁷⁷ Dalton notes that while contract law has traditionally acknowledged the public impact of private deals, “this public aspect has traditionally been assigned a strictly supplemental role; indeed, a major concern of contract doctrine has been to suppress ‘publicness’ by a series of doctrinal moves.”¹⁷⁸ Reviewing the question of contract law’s willingness to acknowledge its public impact more recently, David Hoffman and Cathy Hwang come to a similar conclusion.¹⁷⁹ As they note, “Courts almost always enforce contracts even when they create third-party harms.”¹⁸⁰

There are many doctrines for policing contracts, but only one—public policy—that focuses on broader harms to the public.¹⁸¹ This is in some ways a natural consequence of contract law’s preference for policing procedure over substance. It is an outgrowth of the view that contract is a purely private matter between two individuals. As Horwitz notes, “The watering-down of doctrines like the rule that equity will not enforce unfair contracts was inspired by the idea that contract is an entirely private institution between consenting individuals in which the state should have no interest.”¹⁸²

There are doctrines—like unconscionability—that actually inquire whether a deal is substantively fair and, in some limited instances, ask the court to step in and overrule party intent.¹⁸³ But these doctrines are aimed at protecting the weaker party; they are not aimed at protecting society. Only one rule—that contracts against public policy will not be enforced—explicitly asks courts to consider a contract’s impact on the wider society. And as the best study of the public policy doctrine notes, courts have significantly chipped away at that doctrine.¹⁸⁴

177. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1010 (1985).

178. *Id.*

179. See Hoffman & Hwang, *supra* note 16, at 996.

180. *Id.* at 983.

181. *Id.* at 983 n.15 (“With the exception of public policy, none focuses on broader social consequences.”).

182. Horwitz, *supra* note 136, at 1425.

183. See, e.g., *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 355–56 (Cal. Ct. App. 2007) (finding that the adhesive nature of the agreement, which the Court described as a “minimal degree of procedural unconscionability,” combined with the one-sided terms waiving class-action rights, constituted an unconscionable term).

184. See Shell, *supra* note 15, at 452 (discussing how “the modern Court has expressly rejected the notion that public policy defenses may be based on judicial preferences of any kind,” and noting “the Court has jettisoned public policy defenses that have dominated the Court’s view of contract for over one hundred years”).

The public policy rule “is a principle of law whereby a contract provision will not be enforced if it has a tendency to be injurious to the public or against the public good.”¹⁸⁵ Courts look principally to law—statutes, the U.S. Constitution, and case law—to identify public policy, but courts also have the chance to make policy by declaring that a contract threatens societal values in some way.¹⁸⁶

At the turn of the century, courts were often willing to entertain policy arguments in contracts cases. Richard Shell notes:

Drawing on notions of public policy from the broadest set of sources, including constitutions, statutes, case precedents, and the Justices’ own notions of the public interest, the *Lochner* Court applied the public policy defense . . . to such agreements as fee-sharing contracts between attorneys in bankruptcy proceedings, profit-sharing contracts between bidders for public works projects, and [more].¹⁸⁷

The idea that private deals should be invalidated where they frustrate public policy has the seeds of its own contradiction because enforcing contracts is itself a stated public policy. For this reason, courts are often reluctant to define public policy expansively. As Clare Dalton puts it, “Although we concede that the law of contract is the result of public decisions about what agreements to enforce, we insist that the overarching public decision is to respect and enforce private intention.”¹⁸⁸ As the Supreme Court noted in the mid-century case *Muschany v. United States*, because “the term ‘public policy’ is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy,” as “ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”¹⁸⁹

Perhaps it is unsurprising then that as courts have considered contracts disputes related to today’s digital platforms, policy arguments have played a surprisingly small role. In the few cases where public policy has come up in the context of platform litigation, courts have not found a platform contract that contravened the public interest. But there is a split among courts in how they treat public policy. One set of courts has insisted that litigants claiming that a contract is void as against public policy must point to positive law articulating a particular preference against contract enforcement in specific circumstances. For example, when Facebook sued a company that it alleged wrongfully

185. *Johnson v. Peterbilt of Fargo, Inc.*, 438 N.W.2d 162, 163 (N.D. 1989).

186. *Id.* at 164 (“[W]hen a contract provision is inconsistent with fair and honorable dealing, contrary to sound policy and offensive to good morals, courts have the authority to declare the provision void as against public policy.”).

187. Shell, *supra* note 15, at 448–49 (footnotes omitted).

188. Dalton, *supra* note 177, at 1014.

189. *Muschany v. United States*, 324 U.S. 49, 66 (1945).

collected information about the service in contravention of the terms of service, the U.S. District Court for the Northern District of California decided that “questions of public policy are primarily for the legislative department to determine,” and thus declined to find that Facebook’s terms of service were invalid.¹⁹⁰

That case, *Meta v. BrandTotal*, seemed in theory to acknowledge the potential broader public harms from digital contracts. BrandTotal is an advertising firm that developed an app that customers installed on their browsers to send BrandTotal data about what digital advertisements were appearing as the customers browsed Facebook.¹⁹¹ Facebook filed a complaint alleging breach of contract, unjust enrichment, violation of the Computer Fraud and Abuse Act, and more.¹⁹² BrandTotal, in reply, argued that Facebook’s terms of use were, among other things, inconsistent with “public policies related to consumer data ownership.”¹⁹³ The Northern District of California quoted the U.S. Supreme Court’s decision in *Safeway Stores, Inc.*, which held that “anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel, is against public policy.”¹⁹⁴ But the District Court ultimately found that the policy in favor of upholding contracts, and the general importance of judicial restraint in policy matters, outweighed the potential policy concerns raised by BrandTotal.¹⁹⁵

There is a broader view taken by only a handful of courts, that in fact, the relevant inquiry is whether the contract contravenes a public interest at large, which can be identified through public policy. This inquiry does not require that the legislature identify specifically when or how a particular public interest outweighs the countervailing policy in favor of contract enforcement. That determination is left for the courts. This view is the most consistent with the idea that courts, as arms of the state, ought not to be in the business of enforcing agreements that undermine other aspects of state policy.

The latter view can be seen in the dispute between Epic Games and Apple—a huge, sprawling court fight over Apple’s control of its App Store platform. Epic argued that Apple’s contracts with developers were

190. *Meta Platforms, Inc. v. BrandTotal Ltd.*, 605 F. Supp. 3d 1218, 1245–1247 (N.D. Cal. 2022) (quoting Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., 425 P.3d 1, 8 (Cal. 2018)).

191. *Id.* at 1232.

192. *Id.*

193. *Id.* at 1243.

194. *Id.* (quoting *Safeway Stores, Inc. v. Retail Clerks Int’l Ass’n*, 261 P.2d 721, 726 (Cal. 1953)).

195. *Id.* at 1243–45.

inconsistent with public policy.¹⁹⁶ The same court that would decline to consider the public policy implications of Facebook’s terms of service in *Meta v. BrandTotal* found that Apple’s terms of service for developers seeking access to its App Store were not inconsistent with public policy.¹⁹⁷ Approvingly quoting a mid-century California case, the Court noted that public policy is meant to protect the broad interests of society: “The authorities all agree that a contract is not void as against public policy unless it is injurious to the interests of the public as a whole or contravenes some established interest of society.”¹⁹⁸ But the Court went on to note that the contract did not in fact violate any public policy in California—specifically with regard to anticompetitive behavior—so the contract in question was not invalid.¹⁹⁹ To date, no court in the United States has invalidated a large digital platform’s contract as inconsistent with public policy.

D. Reform Efforts

Just as technology has changed so many other areas of life, it has changed the way we contract. Contract law scholars acknowledge this and have undertaken several significant reform efforts to address the new landscape for digital contracts. In a sense, it would be unfair to expect contract law today to have dealt with all of the novel questions that arise given the technological changes that have driven the creation of today’s digital marketplace.²⁰⁰ Before criticizing contract law’s blindness to these admittedly novel harms, it would be worth a moment reviewing existing reform efforts to address the gap between pre-digital contract law and today’s world.

Broadly speaking, there have been three major areas where reformers have sought to adapt contract law to better accommodate the new digital environment: software contracts, commercial contracts, and data contracts. These efforts include (1) the proposal of a new Article 2B

196. *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898 (N.D. Cal. 2021), *aff’d in part, rev’d in part and remanded*, 67 F.4th 946 (9th Cir. 2023).

197. *See id.* at 1061 (“[T]hese DPLA provisions are not contrary to the interests of the public as a whole and do not contravene some established interest of society.”).

198. *Id.* at 1060 (quoting *Rosenberg v. Raskin*, 80 Cal. App. 2d 335, 338 (1947)).

199. *Id.* at 1061.

200. *See* PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS intro. cmt. (AM. L. INST. 2010) [hereinafter ALI SOFTWARE PRINCIPLES] (“[T]he law governing the transfer of hard goods is inadequate to govern software transactions because, unlike hard goods, software is characterized by novel speed, copying, and storage capabilities, and new inspection, monitoring, and quality challenges.”).

to the Uniform Commercial Code,²⁰¹ (2) the failed Uniform Computer Information Transactions Act,²⁰² (3) the ALI's *Principles of Data Privacy*,²⁰³ (4) the ALI's *Principles for the Data Economy*,²⁰⁴ (5) the ALI's *Restatement of Consumer Contracts*,²⁰⁵ and (6) the *Principles of the Law of Software Contracts*.²⁰⁶ This is not an exhaustive list. Yet, as a brief review of these initiatives reveals, only one was a serious effort to police the substantive terms of online contracts, and that initiative was driven by non-contracts scholars.²⁰⁷ The overwhelming thrust of American contract law's reform efforts is aimed at enabling private ordering, encouraging courts to continue to police the procedures through which contracts are struck—typically the notice that users receive about terms of service—and there is little acknowledgement of the problem of addressing societal harms.

But the reform efforts, for all their ambition, are nearly entirely silent on the questions raised here—on the new, more public, and more social role that contract has taken on in our digital world. The concern of these reform efforts continues to be ensuring mutual assent—ensuring that digital deals reflect the desires of the parties. As two contracts scholars put it recently, the problem with platform contracts is that “consumers are deemed to have consented to the use of their private information in ways that they would not agree to had they known the purposes to which their information would be put and the

201. See UNIFORM COMMERCIAL CODE ARTICLE 2B LICENSES i, xix (AM. L. INST., Members Consultative Group Draft No. 1, 1996) (discussing efforts to draft Article 2B); see also David A. Rice, *Digital Information as Property and Product: U.C.C. Article 2B*, 22 U. DAYTON L. REV. 621, 627–28 (1997) (providing a history of the Article 2B project).

202. See UCITA, 2BGUIDE, <http://www.2bguide.com/drafts.html> (last visited Sept. 13, 2024) [<https://perma.cc/9MKJ-4XKK>] (discussing the draft proposal of the Uniform Computer Information Transactions Act and its rejection in 2003); see also Bruce H. Kobayashi & Larry E. Ribstein, *Uniformity, Choice of Law, and Software Sales*, 8 GEO. MASON L. REV. 261, 261–63 (1999) (providing a history of the Uniform Computer Information Transactions Act).

203. See PRINCIPLES OF THE LAW, DATA PRIVACY § 2 cmt. g (AM. L. INST., Tentative Draft No. 3, 2018) [hereinafter ALI PRIVACY PRINCIPLES] (detailing efforts to create data privacy principles and “facilitate greater harmonization of the law between the United States and the EU”).

204. See NEIL COHEN & CHRISTIANE WENDEHORST, AM. L. INST. & EUR. L. INST., PRINCIPLES FOR A DATA ECONOMY: DATA TRANSACTIONS AND DATA RIGHTS (2021), https://principlesforadataeconomy.org/fileadmin/user_upload/p_principlesforadataeconomy/Files/Principles_for_a_Data_Economy_ELI_Final_Council_Draft.pdf [<https://perma.cc/XD6A-XMUA>] (detailing efforts to create data economy principles).

205. See RESTATEMENT ON CONSUMER CONTS. (AM. L. INST. 2024).

206. See ALI SOFTWARE PRINCIPLES, *supra* note 200.

207. See ALI PRIVACY PRINCIPLES, *supra* note 203. Contracts scholars reviewing this initiative were critical of the effort to impose substantive limits on contracts. See Davis & Marotta-Wurgler, *supra* note 71, at 665 (noting that some of these proposals “depart from fundamental principles and rules of contract law that govern other types of market transactions” by imposing mandatory rules, rather than default rules).

entities . . . with whom their information would be shared.”²⁰⁸ This concern with notice and mutual assent is essential as courts try to adapt contract law to the digital world. But it is not obvious that the first or primary question about online contracts should center on mutual assent; it seems at least as important, if not more, to ask whether these are the kinds of deals that ought to be enforced.

So far, however, despite the fact that these huge initiatives are aimed at updating the law, they largely extend the pre-existing deference to private ordering into the digital era.²⁰⁹ These too are focused almost exclusively on the fairness of the deal between the parties.²¹⁰

1. Digital Contracts

There has been a succession of ambitious reform efforts to address the unique circumstances of the digital contracting environment. The most recent of these is the ALI’s *Principles of the Law of Software Contracts*.²¹¹ The *Principles* were designed as a follow-on effort after two earlier failed reform efforts—the proposed Article 2B of the Uniform Commercial Code and the subsequent failure of the Uniform Computer Information Transactions Act, which has only been adopted by two states and has been expressly opposed by a handful more.²¹² The struggles over these initiatives speak to their ambition and to the general lack of agreement on a huge range of essential topics.²¹³ The Introduction to the *Principles* argues that “perhaps no other commercial subject matter is in greater need of harmonization and clarification.”²¹⁴

Unsurprisingly, the key disputes in these three huge reform initiatives revolved around market obligations between the buyers and

208. Nancy S. Kim & D. A. Jeremy Telman, *Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent*, 80 MO. L. REV. 723, 723, 731–37 (2015).

209. This is unsurprising; they are consensus initiatives led by prominent private law scholars and practitioners.

210. 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, 167 (2011) (noting that “[t]he Principles’ drafters emphasize the regulation of disclosure rather than the regulation of terms”).

211. ALI SOFTWARE PRINCIPLES, *supra* note 200.

212. For a history, see Juliet M. Moringiello & William L. Reynolds, *What’s Software Got to Do with It? The ALI Principles of the Law of Software Contracts*, 84 TUL. L. REV. 1541, 1541–42 (2010).

213. See, e.g., Robert A. Hillman & Maureen A. O’Rourke, *Principles of the Law of Software Contracts: Some Highlights*, 84 TUL. L. REV. 1519, 1522–37 (2010) (summarizing some of the key disputes).

214. ALI SOFTWARE PRINCIPLES, *supra* note 200, intro. cmt.

sellers of software. For example, the most controversial of the ALI's proposed principles is the “nondisclaimable warranty of no material, hidden defects.”²¹⁵ There has been very little debate—and very little acknowledgment—of the wider role that digital contracts play in today's society and their public impact. Across three major reform efforts, contracts scholars have not attempted to address the social impacts of digital contracting.²¹⁶ The focus of reforms has been, as with contract law more generally, “the regulation of disclosure rather than the regulation of terms.”²¹⁷

2. Consumer Contracts

A similarly ambitious reform effort has been underway to bring coherence to the law of consumer contracts. For over a decade, the ALI has been at work on a novel *Restatement of Consumer Contracts*, a special initiative apart from the standard contracts restatement, to acknowledge the unique circumstances of most consumer contracts.²¹⁸ As the drafters put it, “Consumer contracts present a fundamental challenge to the law of contracts, arising from the asymmetry in information, sophistication, and stakes between the parties to these contracts—the business and the consumers.”²¹⁹ This is a restatement aimed at the unique problems that arise in a world of business-to-consumer boilerplate agreements. Although the initiative was concerned with consumer contracts, and not exclusively digital contracting, digital contracting was a significant focus. As the reports of the *Restatement* acknowledge, “the most significant changes in consumer contract law came about in the past generation with the rise of digital platforms for the formation of contracts.”²²⁰

The core goal for the project was to ascertain how courts currently address consumer contracts, a question that the reporters of the *Restatement* sought to answer empirically.²²¹ The resulting project was controversial. As one commentator notes, from the very beginning,

215. Hillman & O'Rourke, *supra* note 213, at 1520.

216. This is not to say that they have ignored public policy. As Hillman and O'Rourke note, public policy can play an important role in ensuring the adequacy of intellectual property rules. *See id.* at 1529 (endorsing the view that “public policy has a role to play in policing contractual provisions in standard forms that conflict with traditional federal and state intellectual property policies”).

217. Marotta-Wurgler, *supra* note 210, at 167.

218. RESTATEMENT ON CONSUMER CONTS. (AM. L. INST. 2024).

219. *Id.* at intro. note.

220. Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7, 15 (2017).

221. *Id.* at 8.

debate centered on “the controversial issue of assuring meaningful assent by consumers to contract terms, especially online contracts.”²²² The core question, then, was about mutual assent. This seemed especially important in the consumer context since, as two of the reporters noted in an earlier draft, “[i]t is well known, and empirically established, that consumers rarely read the contracts that govern so many aspects of their everyday life. And, without reading, there is no meaningful assent to the concrete content of the contracts.”²²³

Another area of considerable debate regarded the reporters’ finding that privacy policies are contracts. As the reports note—after compiling a novel dataset of case law regarding privacy policy disputes—since 2005, “courts have predominantly recognized privacy policies as contracts, evidencing a trend in favor of enforcement.”²²⁴ This finding was contested by Gregory Klass, who suggested that the reports were incorrectly coding some case law.²²⁵ A later study by a group of consumer law scholars then reviewed the case law and “concluded that Professor Klass’s readings were uniformly correct.”²²⁶ These later authors argued that “[t]he extent of these errors raises questions about the accuracy and soundness of the entire project and has the potential to undermine the legitimacy of the ALI Restatement drafting process.”²²⁷ In addition to the debates about mutual assent and privacy policies, there was also considerable debate about deception of consumers and the definition of unconscionable terms.²²⁸ Despite over a decade of debate and controversy about the new concerns raised by our digital contracting landscape, the *Restatement* was ultimately passed in 2022, and neither the reporters of the *Restatement of Consumer Contracts* nor the many critics tended to how today’s digital commercial agreements implicate broader social costs.²²⁹

222. Dee Pridgen, *ALI’s Restatement of the Law of Consumer Contracts: Perpetuating a Legal Fiction?*, 32 LOY. CONSUMER L. REV. 540, 546 (2020).

223. OREN BAR-GILL & OMRI BEN-SHAHAR, RESTATEMENT OF THE LAW THIRD, CONSUMER CONTRACTS 1 (2012), <https://www.ballardspahr.com/-/media/files/alerts/2012-12-06-outline.pdf> [<https://perma.cc/AMJ3-UYZF>].

224. Bar-Gill et al., *supra* note 220, at 28.

225. Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REGUL. 45 (2019).

226. Adam J. Levitin, Nancy S. Kim, Christina L. Kunz, Peter Linzer, Patricia A. McCoy, Juliet M. Moringiello, Elizabeth A. Renuart & Lauren E. Willis, *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. ON REGUL. 447, 450 (2019).

227. *Id.* at 451.

228. Pridgen, *supra* note 222, at 549–50.

229. RESTATEMENT ON CONSUMER CONTS. intro. cmt. (AM. L. INST. 2024) (indicating that the membership voted to approve this draft at the 2022 Annual Meeting, subject to the approved motion to add a new Section 2, a discussion at the meeting, and editorial prerogative).

3. Data and Privacy Reforms

Of course, not all efforts to reform online contracting focused on contract law—and outside contract law, we see significant recognition that digital contracts have a wider impact beyond the parties to the contract. One of the major areas of reform over the last decade has been in the special considerations that arise in the new data economy, especially privacy. One of these efforts, the ALI's *Principles on the Data Economy*, is especially notable because it was undertaken jointly with the European Law Institute (“ELI”). As ALI Director Richard L. Revesz stated about the *Principles*, “There is uncertainty, both in the United States and in Europe, concerning the legal rules that should apply to the data economy.”²³⁰ While the principles are focused largely on defining the scope of the data economy and what data contracts are distinct from other kinds of contracts, there is also considerable attention paid to broader impacts on nonparties. The reporters note:

While, e.g., supply or sharing of data are, primarily, about a transaction between two or more parties and about the contractual rights and remedies these parties may have against each other, there are also third parties who may be affected by the transaction and who may have a word to say.²³¹

The reporters’ interest in third parties is largely about the individual rights of third parties—where a specific person might have a privacy interest in some piece of data that has been shared without their consent, for example.²³² The concern is with a contract between *A* and *B* that affects the interests of *C*. The *Principles* are not concerned with more diffuse societal harms of the sort described here, where *A*, *B*, and *C* all agree to a contractual regime that creates rules for all of society, replacing or supplanting the public law.

Another significant reform effort is the ALI's *Principles on Data Privacy*, led by Paul Schwartz and Daniel Solove.²³³ This initiative, echoing many scholars and several of the privacy bills that have been proposed, seeks to impose mandatory rules around what kinds of information can be collected by firms.²³⁴ This idea of replacing default rules with mandatory rules has been called out by contracts scholars

230. *Principles for a Data Economy Is Approved*, AM. L. INST. (May 18, 2021), <https://www.ali.org/news/articles/principles-data-economy-approved/> [https://perma.cc/4FKL-ZAEN]; see also Cohen & Wendehorst, *supra* note 204 (a final draft of the principles).

231. Cohen & Wendehorst, *supra* note 204, at 12.

232. The examples given in the *Principles* relate to intellectual property rights and privacy rights of a third party who might have an interest in a data contract. *Id.*

233. ALI PRIVACY PRINCIPLES, *supra* note 203.

234. See, e.g., Schwartz, *Privacy and Democracy in Cyberspace*, *supra* note 30, at 1675; Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy Control, and Fair Information Practices*, *supra* note 30, at 745.

who argue that it will reduce flexibility for contracting parties.²³⁵ Kevin Davis and Florencia Marotta-Wurgler note that these proposals “depart from fundamental principles and rules of contract law that govern other types of market transactions.”²³⁶ The reporters of the *Principles on Data Privacy* think that mandatory rules will enhance individual user autonomy; their critics disagree. But despite this disagreement, the reporters of the *Principles on Data Privacy* and their critics assume that the focus of contract law is and ought to be on protecting the concerns of the two parties to the transaction; neither raises broader questions about the social impacts of contracting.

E. Scholarly Reactions

While the rise of clickwrap and boilerplate agreements has rightly led to a great deal of debate among contracts scholars—perhaps even the central debate among contracts scholars since digital contracting arose—the concern has largely been with the *procedures* by which contracts arise. Consider perhaps the most prominent and sustained scholarly work about the rise of today’s clickwrap agreements, Peggy Radin’s excellent book *Boilerplate*.²³⁷ The book argues that boilerplate agreements ought not to be considered contracts because the parties (with good reason) do not read the terms.²³⁸ Radin’s central claim is that “mass-market boilerplate should not be treated as contract” because it erodes the basic “liberal story that undergirds private ordering,” which presumes voluntary agreement.²³⁹ Because the procedures are bad, the contracts are bad, and this leads to normative degradation.²⁴⁰ Even in this broad-minded scholarship about the social harms of modern contracts, then, there is a central focus on procedure and party consent.

Radin’s book sparked an important debate about modern forms of contracting. In reviewing Radin’s book, Omri Ben-Shahar says it reflects a widespread worry about the lack of consent to these one-sided

235. Davis & Marotta-Wurgler, *supra* note 71, at 665.

236. *Id.*

237. RADIN, *supra* note 8.

238. *Id.* at 14–15 (asking “whether boilerplate should be considered contractual” and “urg[ing] that it should not” because it is flawed “when it comes to the issue of agreement or consent”).

239. Margaret Jane Radin, *What Boilerplate Said: A Response to Omri Ben-Shahar (and a Diagnosis)* 4 (Univ. of Mich. L. & Econ. Working Papers, Paper No. 98, 2014), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1208&context=law_econ_current [<https://perma.cc/55KQ-9ZBL>].

240. For a related and compelling argument, one sounding in moral philosophy, see Encarnacion, *supra* note 21, at 1323–24.

take-it-or-leave-it agreements.²⁴¹ Ben-Shahar criticizes this view because, in his view, boilerplate agreements actually improve people's lives.²⁴² The core of the debate is about whether in fact consumers want the deals they enter into. Autonomists like Radin argue that boilerplate agreements do not—cannot—give people what they want because they do not read the terms. Boilerplate apologists, like Ben-Shahar, argue that this is wrong, that boilerplate agreements must represent what consumers want because they keep signing up for them.²⁴³ One side says consumers are not getting what they want, and the other side says they are. The disagreement between the two sides is about the alignment between consumer preferences and boilerplate contracts.

But what if the true harms from boilerplate agreements have nothing to do with party intent? What if boilerplate agreements *do* capture the agreement between the parties—and it is what each wants—but nonetheless are bad for society? In fact, the widespread social harms that endure from clickwrap contemplated here have nothing to do with mutual assent and everything to do with the terms of the agreement. Radin rightly interrogates boilerplate agreements' impact on liberalism, but her account turns on a lack of consent. Facebook's services, which billions have opted into, are in a sense the kind of private ordering that liberalism embraces. But they are also a novel puzzle for liberal theory because they allow citizens to opt into private governance regimes—and often out of public governance regimes—on a sweeping scale.

At the core of liberal theory is the social contract. Hobbes, among others, argued that the best alternative to anarchy is for members of society to contract with a sovereign, and that this contracting mechanism was an unprecedented tool for coordination in the interests of society.²⁴⁴ Jean Hampton showed how Hobbes's view was essentially a form of game theory: “[T]he structure of one of the problems faced by

241. Ben-Shahar, *supra* note 115, at 884 (“Many of those adopting this perspective, and Radin prominently among them, are critical of boilerplate and find the process, as well as its consequences, intolerable. I need a term for those favoring this approach, and I will borrow the term ‘autonomists.’”).

242. *Id.* at 885 (“Boilerplate apologists regard the fine print as merely a feature of mass-produced products, and a welfare-increasing feature at that—reducing transactions costs and prices and allowing firms to focus on improving product features that people actually care about.”).

243. *Id.* at 897 (giving the example of customers lining up for the Apple iPhone 5 and saying this is “*not* a picture of a market failure or of gullible consumers”).

244. 1 THOMAS HOBBS, *LEVIATHAN* 115 (G.A.J. Rogers & Karl Schuhmann eds., 2005) (1651):

[T]here must be some coercive Power, to compell men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by the breach of their Covenant; and to make good that Propriety, which by mutuall Contract men acquire, in recompence of the universall Right they abandon: and such power there is none before the erection of a Common-wealth.

the inhabitants of Hobbes's state of nature is a variant of what is called a 'coordination' problem,"²⁴⁵ and the Leviathan, the strong state, solves this problem that could not be solved in a state of nature through pure contract.²⁴⁶ Solving coordination problems is one of the great virtues of today's technological platforms. They allow you and a taxicab to find each other in the middle of the night on a deserted street, for example, or allow you to reconnect with someone from your childhood who lives on the other side of the world. But what if the amazing coordination the platforms enable is also a tool for opting out of public norms—a kind of digital secession? This private society building by contract erodes the public law and leaves ill-equipped private law with the burden of enforcing society's public values.

* * *

For some time now, American contract law has been largely aimed at policing the procedures of contracting, not the substance. This has not changed in recent years, despite the radical changes in contracting that have occurred as a result of the digital revolution. Some of the reform efforts that aim to update contract law for the digital age have flirted with policing the actual contracts themselves, but these efforts have been spearheaded by privacy advocates, not contracts scholars—and in fact, these proposals have been contested by contracts scholars. More importantly, all these efforts—in consumer law, contract law, and privacy law—are aimed at individual rights, not social harms. There remains no serious attention, by courts or scholars or reformers, to the widespread social harms that can be wrought by collective contracting in the digital age.

IV. TOWARD A MORE SOCIAL CONTRACT LAW

To recap: The internet has wrought huge changes in contracting behavior, and contract law scholars and reformers have largely been concerned with ensuring that the parties to a transaction are getting a fair deal. These reforms are aimed at ensuring a fair contractual process—the imposition of stronger notice requirements to ensure that consumers know what they are agreeing to, and the invalidation of boilerplate agreements because they are not read or do not capture

245. JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* 138 (Cambridge Univ. Press ed., 1986).

246. Russell Hardin shared this view. See Russell Hardin, *Hobbesian Political Order*, 19 *POL. THEORY* 156, 165 (May 1991) ("Because the common interest on which we all would want to coordinate in creating a sovereign is the interest in having a sovereign capable of coercing any defectors, defection would likely entail either being suppressed by the government or going into exile.").

mutual assent. The reforms are not aimed at the social harms brought about by society-wide contracting. But this misses something important.

If there is a grave problem with the contracts propagated by today's digital platforms, it is *not*—contrary to what conventional contracts scholarship suggests—that people are being held to deals they do not want, or that they are being swindled or tricked into giving away their privacy or their speech rights. Rather, the problem is that as a society, we have opted for a kind of collective contract that acts as a private governance regime for our digital lives. And what does contract law say about society-wide dealmaking that imposes society-wide harms? Not enough, it turns out.

This Part makes the case for a more social contract law and then briefly sketches some reform options. There are basically three reform options: (1) pull back from the contractarian model of governance and impose mandatory rules about what can and cannot be done by contract, (2) reduce the extent to which public law defers to contract, and (3) ask contract law to play a bigger role in policing the broader societal harms wrought by digital contracts.

A. *The Normative Case*

Contract law is the quintessential private law field, but it is also a matter of public concern. Even scholars who are maximally committed to private ordering acknowledge that contract law has a public element. As John Stuart Mill put it, “[T]rade is a social act. Whoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society.”²⁴⁷ Private deals depend on courts for enforcement, and courts are an arm of the state. Even though the vast majority of contractual disputes are never litigated, parties bargain in the shadow of the state.²⁴⁸ And of course, many private deals have public consequences.²⁴⁹ If one accepts that private ordering has public limits, as I think one must, then the case for these limits is even stronger for today's platform contracts. If my descriptive story is right—that terms of service are effectively the public rules for the internet—then it seems that any earlier justification

247. JOHN STUART MILL, ON LIBERTY 161 (Floating Press ed., 2009) (1859).

248. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (exploring “the impact of the legal system on negotiations and bargaining that occur *outside* the courtroom”).

249. Hoffman & Hwang, *supra* note 16, at 982.

for a public-minded contract law would be strengthened as applied to the internet.

1. The Public Has Always Had an Interest in Private Ordering

Despite contract law's significant procedural focus, as described in Part III, there is a rich tradition in contracts scholarship of acknowledging that contracts between private parties have broader social impacts. As Hoffman and Hwang wrote recently, "While seats at the contract-negotiation table are primarily occupied by the contracting parties themselves, one spot is always implicitly reserved for another party: the public."²⁵⁰ This was especially true for the legal realists like Robert Hale, Roscoe Pound, and Morris Cohen who argued that private law was effectively a kind of public law, since it both implicated broader societal interests and depended on state coercion for enforcement.²⁵¹ Again, as historian Morton Horwitz puts it, "The culmination of this view in the scholarly literature was Morris Cohen's assertion in 'The Basis of Contract' (1933) that the power to contract was nothing more than a choice to delegate public power to individuals based on social considerations."²⁵² Indeed, Cohen famously argued that contract law is effectively a branch of public law:

A contract . . . between two or more individuals cannot be said to be generally devoid of all public interest. If it be of no interest, why enforce it? For note that in enforcing contracts, the government does not merely allow two individuals to do what they have found pleasant in their eyes. Enforcement . . . puts the machinery of the law in the service of one party against the other. When that is worthwhile and how that should be done are important questions of public policy. . . . [T]he notion that in enforcing contracts the state is only giving effect to the will of the parties rests upon an utterly untenable theory as to what the enforcement of contracts involves.²⁵³

Cohen thought that any deal between private parties would necessarily implicate the interests of all of society—not just because the contract's subject matter might implicate third parties, but also because

250. *Id.* at 982.

251. *See, e.g.*, MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* 103 (1982) (describing contracts as "a subsidiary branch of public law"); Robert L. Hale, *Law Making by Unofficial Minorities*, 20 *COLUM. L. REV.* 451, 452 (1920) ("[E]ach party to [a] contract, by the threat to call on the government to enforce his power over the liberty of the other, imposes the terms of the contract on the other." (emphasis omitted)); ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 198–99 (1921) (describing restrictions on individual freedom of contract as a natural expression of state power to protect broad societal interests); *see also* BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 87 (1998) (describing Hale's view that "all exercises of private rights constitute state action, since they rely for their efficacy on either state enforcement or 'voluntary' cooperation extracted from others under the implicit threat of state enforcement").

252. HORWITZ, *supra* note 134, at 207.

253. Morris R. Cohen, *The Basis of Contract*, 46 *HARV. L. REV.* 553, 562 (1933).

every contract has the potential force of the state behind it.²⁵⁴ If either party has a problem with their contract, they may ask the state to intervene to interpret or enforce the agreement. The public has an interest in the fair and efficient interpretation of contracts, both because we might be parties to the agreement and because we all benefit when everyone is coordinating their conduct using the same rules.

We see these points clearly in relation to modern contracts disputes as well. Consider, for example, hush contracts, where someone is paid money to not speak about some misconduct.²⁵⁵ These are private agreements. Yet, as Hoffman and Lampmann note, there are “social costs to hush contracts.”²⁵⁶ In particular, when someone covers up their wrongdoing with hush money, they make it harder for the public to learn about that abuse: “[W]hen hush contracts keep secret the details of sexual misconduct, they make it next to impossible for new entrants to the workplace (or community, market, etc.) to be certain of their safety.”²⁵⁷ In the case of a presidential candidate, this kind of hush contract sparks an even greater public interest.²⁵⁸

To be sure, there is a public interest in favor of freedom of contract, an idea that Justice Holmes caricatured in his *Lochner* dissent as “[t]he liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same.”²⁵⁹ But as Justice Holmes pointed out, freedom of contract is not absolute. In *Adkins v. Children’s Hospital*, a follow-on case to *Lochner* and another era-defining decision, the Court again embraced the hollow notion of “liberty of contract.”²⁶⁰ Justice Holmes again lashed out at the Court, noting that contract “is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.”²⁶¹ He went on to list a wide range of restrictions on contract in the public interest, ranging from

254. *Id.*

255. See Hoffman & Lampmann, *supra* note 140, at 167 (“This Article considers the emerging political and legal movement surrounding *hush contracts*—which we define as nondisclosure agreements covering sexual misconduct.”).

256. *Id.* at 174.

257. *Id.* at 178.

258. *Id.* at 215 (“[T]here is a strong political and moral case for preventing presidential candidates from using contract law to keep information from the public.”).

259. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

260. 261 U.S. 525, 568 (1923) (Holmes, J., dissenting). The case involved a Fifth Amendment challenge to a federal minimum-wage statute. It was ultimately overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

261. *Adkins*, 261 U.S. at 568.

usury laws (which “prohibit contracts by which a man receives more than so much interest for the money that he lends”) to Sunday laws (which “prohibit practically all contracts during one-seventh of our whole life”).²⁶² Justice Holmes was not arguing against private ordering; he was just insisting in the vacuousness of the “dogma” of some liberty notion in contract.²⁶³

To state this another way, the idea of freedom of contract is not normatively flawed; it is descriptively flawed. There is no contract law without the state, so insisting on some blanket restriction on state interference in the market is incoherent.²⁶⁴ This is not to say that we cannot debate the right level of state-imposed constraints on contracts. To be sure, there are public interests in upholding private agreements. It is in the public interest—the collective interest—that we task our courts with reviewing, interpreting, and ultimately enforcing contracts. That is, it is in the public interest to enforce private agreements. So private ordering and public interest are not inherently in tension. As Robert Mnookin and Lewis Kornhauser note, one can advocate for private ordering without negating “important social interests”; rather, the key policy questions are “ones of emphasis and degree.”²⁶⁵

As long as there has been contract law, there have been courts reluctant to enforce private agreements that abridge broader social interests. The old English decision in *John Dyer’s Case* is illustrative. John Dyer’s employer had asked him to promise to not ply his trade for six months—what today we would call a noncompete clause—and the King’s Bench found that the promise was unenforceable, both because it lacked consideration and because it was wrong as a policy matter.²⁶⁶ A later case involving bakers in London held that noncompete clauses were acceptable as long as they were supported by consideration, were reasonable in scope, and did not injure the public.²⁶⁷ Those English cases were the seed for our public policy doctrine in the United States. In 1853, the Supreme Court in *Marshall v. Baltimore & Ohio Railroad* invalidated an agreement between a railroad and a lobbyist, where the lobbyist hid from the legislature the fact that he was being paid by the railroad.²⁶⁸ The Court noted,

262. *Id.*

263. *See id.*

264. And yet, as we have seen, it is essentially what we say about the internet. This is changing, fortunately, but at the moment it is a uniquely American perspective.

265. Mnookin & Kornhauser, *supra* note 248, at 951.

266. YB 2 Hen. 5, fol. 5, pl. 26 (1414).

267. *Mitchel v. Reynolds* (1711) 24 Eng. Rep. 347 (KB).

268. 57 U.S. 314 (1853).

It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy, or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions.²⁶⁹

The logic of that holding has informed more modern cases. Today, courts in every state regularly apply the public policy doctrine to invalidate a wide range of contracts across a range of settings, including confidentiality agreements, surrogacy contracts, contracts for the sale of drugs, and much more.²⁷⁰ There is no common thread that unites these cases, except for the fact that the agreements, by their operation, implicate and often conflict with an identifiable public policy. The wide-ranging nature of the public policy doctrine has drawn the ire of many critics. It has been described as an “unruly horse.”²⁷¹ But even critics of the doctrine recognize it as essential.

Roscoe Pound famously wrote in the *Harvard Law Review* that while public policy arguments are often based on “arbitrary distinctions,” there were a few domains where policy arguments were well founded. One of these was contracts that interfere with the political branches: “As to political institutions, there is a recognized policy against acts promotive of crime or violation of law—in other words, a policy of upholding legal institutions—and a policy against acts prejudicially affecting the public service performed by public officers.”²⁷² There is, in other words, a deep public interest in invalidating private contracts that contravene the performance of public institutions.

This is all to say that it is now settled that the public has an interest in private contracts. This interest is not the same in every case. In some instances, the public merely has an interest in seeing the fair and efficient resolution of a private dispute. In other cases, however, the public has a more direct interest in the subject matter of the dispute—which implicates broader societal values.

2. The Public’s Interest Is Even Greater in Today’s Social Contracts

If the public has an interest in private disputes between two parties, the public has an even greater interest in the new social contracts that govern today’s digital platforms. The common law has long acknowledged two kinds of public interest in contracts: (1) an interest in having contract disputes be interpreted fairly and efficiently,

269. *Id.* at 334.

270. For a summary, see KNAPP ET AL., *supra* note 32, at 640–53.

271. *Richardson v. Mellish* (1824) 130 Eng. Rep. 294, 303 (Burrough, J.) (Ct. Com. Pl.).

272. Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 7 (1943). Another well-known scholarly treatment of public policy arguments is featured in Walter Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679 (1935).

and (2) an interest as third parties to the contracts entered into by others. But today's platform contracts implicate the public in a more direct way. When everyone in society—*A, B, C, D, E*, and so on—agrees to a particular kind of contractual regime for social rules, their agreement has an air of publicness to it. The public's interest in the agreement is not hypothetical or general—it is real and specific. The public is effectively also party to the contract, even though each member of the public entered into the agreement individually.

These arguments for the public interest in private contracts are all the stronger for platform contracts because they are agreements by nearly the entire contracting public and for all of society. So while contract law should attend to the social harms of private agreements, it should especially be attentive to the social harms of these very public agreements. If we think that Cohen is right to suggest that contract law is better understood as “a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction,” then that view is especially true with regard to societal contracts of the sort described here.²⁷³

Consider again the comparison between platform agreements and homeowners association agreements. HOA agreements have always been held to a different standard than normal commercial transactions.²⁷⁴ Accordingly, many states have passed statutes extending constitutional protections to HOA agreements.²⁷⁵ And when it comes to constitutionally protected rights, courts regularly strike down private HOA agreements that purport to restrict those rights. Courts seem especially unwilling to enforce HOA agreements where they involve limits on political speech. In Arizona and Texas, for example, HOA agreements can restrict homeowner uses of signs, but they may not restrict the use of political signs in the lead-up to and aftermath of an election.²⁷⁶ And in Arizona, HOA agreements cannot limit “door-to-door political activity,” including “circulation of a

273. MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY*, 103–04 (Transaction Books ed., 1982).

274. See, e.g., Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1527–28 (1982) (describing how “familiar principles of contract law justify strict judicial enforcement of the provisions of a private constitution,” like an HOA, but that “[e]xternal legal norms of course constrain the contracting process, and in some instances should lead to the judicial invalidation of offensive ‘constitutional’ provisions, such as those that would regulate the racial characteristics of association members” (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948))).

275. See, e.g., ARIZ. REV. STAT. ANN. § 33-1808C (2023); TEX. ELEC. CODE ANN. § 259.002 (West 2019) (detailing when and how HOAs may restrict the display of flags and political signs).

276. ARIZ. REV. STAT. ANN. § 33-1808C (2023); TEX. ELEC. CODE ANN. § 259.002 (West 2019).

petition.”²⁷⁷ In California, HOA agreements cannot restrict peaceful assembly to discuss political issues.²⁷⁸ In *Mazdabrook Commons Homeowners’ Ass’n v. Khan*, a New Jersey court used the public policy doctrine to invalidate an HOA agreement that prohibited homeowners from posting signs supporting political candidates.²⁷⁹ The Court found the public interest in free speech to outweigh the narrower private interests at stake: “Balancing the minimal interference with Mazdabrook’s private property interest against Khan’s free speech right to post political signs on his own property, we conclude that the sign policy in question violates the free speech clause of the State Constitution.”²⁸⁰ Beyond speech, courts have struck down a wide range of HOA agreements as inconsistent with public policy. For example, HOA agreements that limit family size or who counts as part of a family have been struck down as inconsistent with antidiscrimination statutes.²⁸¹

The core issue in all of these cases is that private rulemaking about public norms implicates wider societal interests, and courts scrutinize that rulemaking accordingly. This reflects the insight by Henry Hart and Albert Sacks that the government is happy to have private parties make the rules for themselves, up to a point: “Every society necessarily assigns many kinds of questions to private decision, and then backs up the private decision, if it has been duly made, when and if it is challenged before officials.”²⁸² But, as Hart and Sacks note, those private decisions must be squared with public norms.²⁸³

One might fairly ask how these harms are any different from harms that arise from other forms of society-wide contracting. For example, people might all contract to eat unhealthy foods, or to smoke cigarettes, and this could produce externalities for everyone else. Or people might opt into a religious faith that promotes views that are inconsistent with broader public policy goals. These are all examples of voluntary choices that have consequences for the wider society. Today’s social agreements are a bit like a mix of these examples. They are like smoking because they are private market choices that affect more than just the market participants; they are unlike smoking because contracts

277. ARIZ. REV. STAT. ANN. § 33-1808G (2023).

278. CAL. CIV. CODE § 4515(b) (West 2023).

279. 46 A.3d 507, 522 (N.J. 2012).

280. *Id.* at 510.

281. *See, e.g.*, *Gorski v. Troy*, 929 F.2d 1183 (7th Cir. 1991) (invalidating an HOA agreement as inconsistent with antidiscrimination rules against family status).

282. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 7 (Cambridge tent. ed. 1958).

283. *Id.*

for the sale of cigarettes are not rules for society. In that sense, today's platform terms of service are more like some religious commitments, which provide some of the ground norms for society. Though, religious commitments are typically not commercial transactions governed by prevailing contract law. Today's platform agreements are, as we have seen, rules *for society*—rules for information distribution, socialization, affiliation, and more. The pervasiveness of these agreements will only increase if we spend more time in privately owned virtual worlds, as many expect.²⁸⁴ That is the case for taking them seriously as a distinct kind of contracting externality.

If it were ever defensible for contract law to only be narrowly concerned with mutual assent—and not concerned with the fairness of the deals—the logic for that would turn on the social value of market transactions. As Nate Oman puts it, “[W]ell-functioning markets are morally desirable, and contract law should be organized to support such markets.”²⁸⁵ This view is compelling and, I think, well represented by current contract law doctrine. But this is an argument that applies only to those contracts that are fundamentally market transactions.²⁸⁶ It would seem much harder to justify the classically liberal view that contracts are a private matter when they are society-wide agreements and dictate the public norms for society. Of course, it is neither feasible nor desirable for courts to scrutinize every contract for special social impacts. But specifically in the context of platform contracts, where the agreement is struck with billions of users—effectively a society-wide agreement—and where the substance of the agreement sets out rules for society, there is a strong normative case for courts to scrutinize the substance of these contracts.

It is not news that contracts have externalities. Scholars are increasingly attentive to the fact that contracts between two parties can harm others. But the novel issue—the one we face today—is one where

284. It is obviously impossible to know how much time we will spend in digital worlds, but so far the trend is to spend more and more time in these environments. The rise of both augmented-reality and virtual-reality devices is expected to accelerate this, both for leisure and work. See Adario Strange, *People Expect to Spend at Least 4 Hours a Day in the Metaverse*, QUARTZ (Aug. 19, 2022), <https://qz.com/people-expect-to-spend-at-least-4-hours-a-day-in-the-me-1849406012> [<https://perma.cc/8Y9N-XAVC>] (reporting results of recent surveys finding that “Gen Z, millennials, and Gen X consumers expect to spend between four and five hours a day in the metaverse in the next five years”).

285. NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* 1 (2016).

286. *Id.* at 8 (“The link between contract law and markets is so palpable . . . that the relative absence of markets and commerce as a topic of moral theorizing in contemporary contract law theory is striking.”); see also Brian H. Bix, *Contract Law and the Common Good*, 9 WM. & MARY BUS. L. REV. 373, 388 (2018) (reviewing Oman’s book and noting that a “connection between Contract Law and markets is straightforward” and obvious).

nearly everyone in society voluntarily and with open eyes contracts into a system that produces societal harms.²⁸⁷ This contracting was done without any material defect in the contracting process. We can and should make sure that parties to these contracts understand the terms of the exchange, but if I am right that there is no real mutual assent problem, then clarifying the terms will not change user behavior. People will continue to opt in because fundamentally this is not a problem that can be solved by better notice or more attention to mutual assent. Clickwrap is not the problem. Our collective choice is the problem. In that world, should contract law sanction the choice? In some cases, perhaps not.

B. Reform Options

If we think the state ought to be in the business of limiting the kinds of social harms born of widespread contracting, the reform options are relatively straightforward. Perhaps the most obvious reform is external to contract law: Public law should be less willing to defer to private contracts. Within contract law, legislatures can place substantive limits on certain kinds of social contracts—those most likely to create social harms. And finally, of course, since contracts are ultimately enforced or not enforced by courts, judges could decline to enforce contracts where doing so would be inconsistent with public policy.

1. Public Law Defers Less to Contract

We saw in Part II that public law often defers to private contracts to determine the scope of public law protections. This is a mistake. As Orin Kerr notes, regarding the Fourth Amendment, “[C]ourts should reject a dystopian future in which our Fourth Amendment rights are at the mercy of form contracts written by lawyers for multinational corporations.”²⁸⁸ Terms of service are private agreements, not agreements with the government—and accordingly, they should not be understood as a vehicle for determining one’s rights vis-à-vis the government.²⁸⁹

In the privacy context, de-emphasizing contract would mean a considerable shift away from the FTC’s longstanding contractual

287. To be clear, I am not arguing that the world we live in is net negative or positive in terms of harms—only that there are well-recognized harms that seem to have society-wide repercussions and that are the result of massive, society-wide contracting.

288. Kerr, *supra* note 50, at 290.

289. *Id.* at 300.

approach to privacy regulation. Rather than relying on notice-and-choice, as the FTC has done, it would mean federal or state authorities set explicit rules for data collection and use. Fortunately, it seems this is the direction in which things are slowly developing; the FTC has moved away from its contractual approach and is more aggressively scrutinizing the privacy practices of major platforms.²⁹⁰

2. Legislative Limits to Contract

Of course, asking public law to override private ordering is complicated in a liberal society built around the idea of a separation between public and private authority.²⁹¹ In the context of speech, the First Amendment's state-action requirement is a natural limit on the extent to which our free speech rules will apply to private corporate conduct; the law implicitly defers to private speech controls.²⁹² But it is not a hard and fast limit.²⁹³ Congress could decide, for example, that the platforms are effectively public utilities and subject them to special rules, especially in particular contexts like advertising and campaigns for public office.²⁹⁴

Legislatures could also limit the kinds of terms that parties can contract into. This is the approach of proposed national privacy legislation, which has not made much progress.²⁹⁵ This would be a limitation on contracts—limiting what platforms do with private information as part of their terms of service. This would limit *ex ante*

290. Amy Gordon & Ryan P. Blaney, *FTC Seeks to Move Beyond Notice and Consent to Restrict Data Collection and Use*, PROSKAUER ON PRIVACY (Dec. 22, 2021), <https://privacylaw.proskauer.com/2021/12/articles/data-privacy-laws/ftc-seeks-to-move-beyond-notice-and-consent-to-restrict-data-collection-and-use/> [<https://perma.cc/ART7-CUSR>] (reporting on one Federal Trade Commissioner's speeches expressing agency desire to move beyond "notice-and-consent" and toward imposing mandatory rules on what kinds of data contracts can be struck).

291. Horwitz, *supra* note 136, at 1424 ("[O]ne can find the origins of the idea of a distinctively private realm in the natural-rights liberalism of Locke and his successors.").

292. *See* U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 433–34 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (per curiam) (noting that "the real threat to free speech today comes from private entities such as Internet service providers, not from the Government," and yet the government may not "regulate the editorial decisions of Facebook and Google").

293. *See, e.g.*, OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 18 (1996) ("A shift from the street corner to CBS compels us to recognize the hybrid character of major social institutions; it begins to break down some of the dichotomies between public and private presupposed by classical liberalism.").

294. *See, e.g.*, K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234 (2018) (making the case for regulating internet platforms as public utilities).

295. *See* CONG. RSCH. SERV., LSB10776, OVERVIEW OF THE AMERICAN DATA PRIVACY AND PROTECTION ACT, H.R. 8152 (Aug. 31, 2022) (describing the scope of the most recent national privacy bill, which includes replacing many default rules with mandatory rules that would affect platform terms of service).

the kinds of deals that can be struck, where the legislature supposes those deals produce some harm for the individual. A different approach would be to ask whether courts might do something on the back end to limit existing contracts—something courts could do more or less immediately.

3. Judicial Limits to Contract

The third reform option would be for courts to scrutinize platform contracts for widespread harms. As we have seen, contract law in general tends to focus on the procedural elements of the contract, and even when it does evaluate the substance of the agreement, contract law's main concern is the parties.²⁹⁶ Courts do inquire into wider social harms when they ask whether a contract is consistent with broader public policy, but the public policy doctrine is relatively odd as a contracts doctrine,²⁹⁷ and it has fallen out of favor.²⁹⁸ If there is a case to be made for expanding its use, the huge impact of today's platform contracts on today's society, including its public policy, is a good candidate.

C. Comparing Reform Options

In many ways, having courts review and in some cases invalidate platform terms of service for their consistency with public policy is a second-best solution to the problem of internet platform externalities. It would seem preferable to have an informed legislature make rules *ex ante* about what can and cannot be contracted for. It would be more democratic, more comprehensive, and more predictable than judicial overrides of contracts *ex post*. Judicial review of contract terms could be undemocratic; it happens on a case-by-case basis, and it often upsets the expectations of the parties. This is not the first-best way to fix society-wide problems born of internet contracting empires. Moreover, it has been argued that judges are poorly situated to make

296. See *supra* Part I.

297. Friedman, *supra* note 32, at 565:

When a party asks a court to refrain from enforcing an otherwise valid bargain on the grounds that it would offend public policy, the party asks the court to do something out of the ordinary. Instead of requesting the court to apply a traditional common law defense, the court is being asked to discern public policy, or possibly pronounce public policy.

298. See generally Shell, *supra* note 15, at 436 (highlighting the judiciary's transition from substantive contract review to prioritizing contract enforcement).

technology policy by resolving individual cases.²⁹⁹ Even scholars like Bagchi who worry about contract law's inattention to third-party harms worry about the ad hoc nature of judicial case law as a tool for addressing society-wide problems.³⁰⁰ A better solution, these scholars argue, is for legislatures to regulate these societal harms ex ante.³⁰¹

But what if there is no legislation? In the case of platform contracts, judicial review should be considered precisely because there is no meaningful alternative on the reform table. Privacy legislation has been around the bend for decades, yet it is not here.³⁰² The same could be said of attempts to reform how the Fourth Amendment works online³⁰³ and reforms to Section 230 of the Communications Decency Act.³⁰⁴ As the drafters of the ALI's *Restatement on Consumer Contracts* noted, "One possible approach to the marking of boundaries is a set of presumptions that certain provisions are unfair and unenforceable. This approach, widely followed in foreign jurisdictions, *has only limited presence in American law.*"³⁰⁵ Judicial review of the broader social harms stemming from platform contracts is worth taking seriously because there does not seem to be a legislative alternative.

And in at least one area of recent internet reforms, court decisions have been shown to spark legislative reform in meaningful ways. This is precisely what happened with the extraterritorial aspects

299. See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 867–82 (2004) (explaining that the ex post review process and the general lack of information make courts poorly suited to regulating fast-changing technology). Kerr, however, noted that the common-law method was better suited to private law questions. *Id.* at 883 ("I find this argument [for the common law approach to regulating new technology] persuasive in a civil law context, but not in the context of criminal procedure.").

300. Bagchi, *supra* note 16, at 232 ("The ad hoc quality of private law adjudication is also especially problematic for diffuse externalities.").

301. *Id.* at 236 ("Where private actions burden legal interests of a large number of anonymous people, we can expect a public regulatory response.").

302. See Jessica Rich, *After 20 Years of Debate, It's Time for Congress to Finally Pass a Baseline Privacy Law*, BROOKINGS INST. (Jan. 14, 2021), <https://www.brookings.edu/articles/after-20-years-of-debate-its-time-for-congress-to-finally-pass-a-baseline-privacy-law/> [<https://perma.cc/V5RT-G5SH>] ("Congress failed to act in 2000, and still, over twenty years later, despite exhaustive debate and many dozens of bills and hearings, has failed to pass a comprehensive federal law protecting our data privacy and security.").

303. See Dell Cameron, *Rival US Lawmakers Mobilize to Stop Police from Buying Phone Data*, WIRED (July 18, 2023, 11:46 AM), <https://www.wired.com/story/fourth-amendment-is-not-for-sale-act-2023/> [<https://perma.cc/G925-HM9X>] (describing the Fourth Amendment Is Not For Sale Act).

304. See Adi Robertson, *Section 230 Is 25 Years Old, and It's Never Been More Important*, VERGE (Feb. 8, 2021, 12:08 PM), <https://www.theverge.com/22268421/cda-section-230-25th-anniversary-reform-stakes-big-tech-internet> [<https://perma.cc/5GTF-6BVL>].

305. RESTATEMENT ON CONSUMER CONTS. intro. cmt. (AM. L. INST. 2024) (emphasis added). This is one of the only places where the *Restatement* alludes to the possibility of wider harms from these contracts.

of the Stored Communications Act.³⁰⁶ The U.S. Court of Appeals for the Second Circuit had decided that the statute did not apply to data held on servers in Ireland, so the U.S. government could not compel Microsoft to produce the data in the United States.³⁰⁷ Microsoft appealed, and the case was pending before the Supreme Court when Congress passed the CLOUD Act, which clarified extraterritorial aspects of the Stored Communications Act, making the pending case moot.³⁰⁸ In this limited example, legislative action was spurred by court decisions. For fans of legislative approaches to technology reform, the second-best reform was the stepping stone to first-best reforms. It seems reasonable to think that something similar might occur as a result of judicial review of platform contracts.³⁰⁹

It may seem awkward to ask private law to play this role, policing public rights. Indeed, as Bagchi warns, “The costs of private law regulation are especially problematic with respect to diffuse externalities.”³¹⁰ But in at least one way, having courts review these contracts *ex post* for societal effect is preferable to *ex ante* legislation because it allows the court to focus narrowly on specific harms produced in the enforcement of a particular contract, rather than striking entire clauses from contracts *ex ante*. If this is right, the much-maligned public policy doctrine gives courts a tool to identify precisely the fact pattern where platform contracts impose too high a cost on society.³¹¹

At a minimum, the specter of courts second guessing the substance of platform contracts raises a series of questions about institutional competence. The status quo is one in which market actors largely set the rules. But is the alternative—a world of rules set by legislators, or courts, or both—better? This is a complicated question, but its answer will likely turn on the kinds of variables that inform other comparative institutional analyses. For example, the costs of organizing, the costs of information, and the costs of access will inform

306. See Andrew Keane Woods, *Litigating Data Sovereignty*, 128 YALE L.J. 328, 345–47 (2018) (describing how a court case challenging the extraterritoriality of the Stored Communications Act led to Congress’s passage of the CLOUD Act).

307. *Id.* at 345.

308. *Id.* at 345–46.

309. Neil Komesar convincingly shows that institutions often “fail together” or “succeed together,” so it is not impossible to imagine judicial reforms sparking legislative reforms. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994). The question, in Komesarian terms, is whether and under what conditions this dynamic will lead to a virtuous, rather than a vicious, cycle. See *id.* The alternative is to leave things as they stand, in the hands of the market, which has its own strengths and weaknesses. See *id.*

310. Bagchi, *supra* note 16, at 231.

311. As Bagchi notes: “We rely too much on the blunt instrument of outlawing terms without attending to the effects of *enforceable* agreements.” *Id.* at 212.

the incentives for potential participants, many of whom may decide that the costs of participating outweigh any benefits.³¹² These variables will inform which interested parties ultimately participate in a given institutional process, which in turn will determine the risk of minoritarian or majoritarian bias.³¹³ *These* are the variables that will inform whether rules are better left to the platforms, or legislatures, or the courts. Accordingly, these are the variables that ought to inform current debates about technology policy. At the moment, they do not.

V. JUDICIAL LIMITS ON SOCIAL CONTRACTS

In the absence of legislation, we are left with the courts. As long as the model of internet governance in the United States remains contractarian—as long as the public norms of our digital world are dictated by contract—there will be growing pressure on courts to review platform contracts for their public consequences. Not because lawsuits are the best way to solve the internet governance problem, but because they may be inevitable. If contracts play such a significant role in determining the rules of society, and if legislatures do not curtail those contracts, then it is left to courts to assess the social impact of these deals. This raises a number of obvious questions: Who would sue? If they sue, what will they claim? This Part addresses each question in turn.

A. State Suits

One tempting explanation for contract law’s silence on so many important internet governance issues is the fact that it is not clear who would have standing to sue. There is an inherent mismatch between the kinds of contract claims a platform user might bring—like breach of contract or misrepresentation—and the kinds of harms described here. The harms are social harms that arise in the aggregate, and yet civil actions in contract are typically brought, apart from class actions, on behalf of a single consumer. No user will likely have the incentive, let alone the standing, to sue for these wider social harms. Even a class action would make little sense because it would be a class of nearly all of society. Another possible explanation for contract law’s silence is the rise of arbitration. Some big internet platforms, like Instagram, require

312. These are all taken from KOMESAR, *supra* note 320, at 8. For a nice summary of how these variables work in the administrative context with a special concern for science and technology policy, see Wendy Wagner, *The Participation-Centered Model Meets Administrative Process*, 2013 WIS. L. REV. 672, 681–90.

313. See KOMESAR, *supra* note 309, at 73–74.

users to agree to arbitrate their claims in private arbitration and not to join class actions.³¹⁴ But even without these arbitration and anti-aggregation clauses, there is a bigger problem: the matter of fit between the harm and the cause of action. The major societal questions about today's platforms are issues that cannot be easily squared with a simple contractual claim. So long as the cause of action is societal harm, it is difficult to imagine a user or even a group of users having standing to sue on behalf of third parties affected by the platform's use.

This makes the claims well suited for a *parens patriae* action—an action brought by the state in its quasi-sovereign role.³¹⁵ As the Supreme Court noted in *Hawaii v. Standard Oil Co.*, while it is derived from English law, the “nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England.”³¹⁶ *Parens patriae* suits are typically brought by the state on behalf of its citizens.³¹⁷ For example, the Supreme Court found that the state of Georgia had standing to sue a private party in federal court where the state alleged a price-fixing conspiracy, and “the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy.”³¹⁸ One could similarly imagine a state attorney general bringing a *parens patriae* suit to challenge platform contracts where they “harm the welfare of the citizens.”³¹⁹ This would be novel, to be sure, but as I explain above, we are choosing among imperfect alternatives, a series of second-best solutions to a fairly novel problem.³²⁰

314. See Terms of Use, INSTAGRAM, <https://help.instagram.com/581066165581870> (last visited Nov. 22, 2024) [<https://perma.cc/PT9L-VHFW>] (“ARBITRATION NOTICE: 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. WE EXPLAIN SOME EXCEPTIONS AND HOW YOU CAN OPT OUT OF ARBITRATION BELOW.”).

315. See Margaret S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 SMU L. REV. 759, 769–79 (2016) (exploring the origins of the *parens patriae* power under the English Crown and American reception of the concept).

316. 405 U.S. 251, 257 (1972).

317. See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 493 n.20 (2012) (“Some attorneys general have authority to exercise all the powers typically vested in the office under the common law, which includes the power to sue as *parens patriae* whenever necessary to promote the public interest—and without any subject matter-specific statutory authorization.” (citing 7 AM. JUR. 2D *Attorney General* §§ 6-7 (2004))).

318. *Georgia v. Pa. R.R.*, 324 U.S. 439, 450 (1945).

319. *Id. But see Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 263–64 (1972) (finding that Section 4 of the Clayton Act does not authorize a state to sue in *parens patriae* for “injury to its general economy”).

320. See *infra* Section IV.C. The phrase “imperfect alternatives” is meant as a nod to Komesar's work. KOMESAR, *supra* note 309.

States could also sue directly, asserting standing to pursue their own sovereign interests.³²¹ This is in some ways the most natural fit with the kinds of harms described here; the injured party is the public at large, which can be thought of as a direct harm to the sovereign. As a practical matter, if the concern is platform contracts creating systemic harms, states are well situated to litigate those claims, especially where the harms relate to core state concerns, like the operation of the democratic system. If a commercial entity struck a contract with a majority of a state's citizens, and that contract created democratic harms, it is hard to imagine the state not having standing to sue, especially in state court. As Seth Davis notes, "A state has standing to vindicate its 'sovereign power . . . to create and enforce a legal code' and to protect public health and welfare."³²² Then again, a court's ruling on standing will likely depend on the specificity of those democratic harms. The specificity of the harm is also relevant to the more difficult task of convincing a court to invalidate a contract for policy reasons.

B. Contracts Against Public Policy

While contract law is largely inattentive to broader societal interests, it is not entirely so. As Mark Pettit showed two decades ago, there is in fact a long history of courts limiting so-called freedom of contract in the name of the broader public interest.³²³ While courts are less willing to entertain broad policy challenges to contracts than they were a century ago, the doctrine is not dead.³²⁴ If courts are to interrogate the broader social impacts of a contract, the public policy doctrine is historically the vehicle in contract law for doing so.³²⁵

There are at least two kinds of important policy problems raised by today's massive platform contracts: (1) general systemic harms (for

321. See *Massachusetts v. EPA*, 549 U.S. 497, 516–20 (2007) (noting that states have standing to sue to protect their own interests).

322. Seth Davis, *Standing Doctrine's State Action Problem*, 91 NOTRE DAME L. REV. 585, 595 (2015) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601, 607 (1982)).

323. See Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall,"* 79 B.U. L. REV. 263, 317–49 (1999) (reviewing cases from the 1880s where courts invalidated contracts in order to protect third parties and the broader public); see also Kaiponanea T. Matsumura, *Unifying Status and Contract*, 56 U.C. DAVIS L. REV. 1571, 1598 (2024) (characterizing the findings of Pettit's study).

324. See Shell, *supra* note 15, at 452 (noting that, while public policy defenses are broadly disfavored, instances where specific laws rebut the priority of contract enforcement for public policy reasons may be upheld).

325. Bagchi, *supra* note 16, at 242 ("The doctrine that agreements against public policy are void . . . substantiates the essential principle that contract rights are bounded by the interests of others.").

example, harms that threaten the democratic process but without violating a particular statute or clear public policy); and (2) non-systemic specific harms (for example, harms that frustrate specific statutes or regulations). One could imagine a state attorney general bringing a suit to block enforcement of today's platform contracts on both grounds. In the first category we might put misinformation, political polarization, and mental health problems from social media use, to name just a few. In the second category we might put bans on research, campaign advertisements that violate election laws, and more.

We should expect claims in the second category to be more successful than those in the first. It has been shown that courts tend to be more favorable to public policy claims where the contract contravenes narrow, specific statutes rather than broader (and vaguer) policies.³²⁶ For example, if a statute says that commercial vendors must provide a one-year warranty for their consumer products, and a vendor writes a three-month warranty into their sales contract, the court might invalidate (blue pencil) that part of the agreement as inconsistent with stated public policy as indicated by the statute. But a court would be less likely to similarly strike a contract for contravening something as vague as constitutional values. As Shell notes:

[T]he modern Court has expressly rejected the notion that public policy defenses may be based on judicial preferences of any kind, moral or otherwise. Instead, public policy defenses are limited to instances when "existing laws and legal precedents . . . demonstrate . . . a 'well defined and dominant' policy" against contract enforcement.³²⁷

This does not mean claims in the first category must be doomed; it just means a return to an earlier era. In the Progressive Era, courts were much more broad minded about public policy claims.³²⁸ For example, in *Marshall*, the U.S. Supreme Court struck down a private contract as void for public policy because it sought to undermine the performance of the democratic process.³²⁹ The Court warned that lobbyists, "a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union and of every state, till corruption shall become the normal condition of the body politic."³³⁰ The

326. See Friedman, *supra* note 32, at 612 ("Judges exercise the 'weakest' discretion in cases that might be defined as 'ruly' or 'easy'—where the rules and authorities clearly point in one direction.").

327. Shell, *supra* note 15, at 452 (quoting *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29, 44 (1987)).

328. *Id.* at 448 ("[T]he *Lochner* Court was surprisingly willing to introduce regulatory elements into the common law of contracts.").

329. *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. 314 (1853).

330. *Id.* at 335.

Court cited a string of cases to prove that contracts for lobbying—contracts to secure legislation—were void as against public policy.³³¹ These cases all found lobbying inconsistent with public policy but not in some specific sense; rather, they were inconsistent with implicit policy goals. More recently, in *Jenni Rivera Enterprises, LLC v. Latin World Entertainment Holdings, Inc.*, a California court held that the First Amendment protected a broadcaster’s use of material that was disclosed in violation of a nondisclosure agreement.³³² Quoting the U.S. Supreme Court in *Snyder v. Phelps*, the California court noted that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”³³³ And Shell’s study of public policy found that despite the U.S. Supreme Court’s general retreat “from the *Lochner* Court’s broad view of the legitimate sources of public policy in contract cases,” the Court “did, however, maintain a role for judicially determined ‘obvious ethical and moral standards’ in the public policy doctrine.”³³⁴

Still, the empirical data are clear: The weakest public policy claims are those where the litigants “appeal broadly to public policy without reference to statute, regulation, or even precedent.”³³⁵ Public policy doctrine—at least as it has evolved over the past decades—is perversely less likely to have teeth the more significant the policy goals implicated by the contract. For example, there is no narrow and specific statutory rule to point to for the idea that citizens in a democratic republic ought to have accurate information and ought to make their political choices free from manipulation and prejudice, yet these are deeply held policy values implicit in so many aspects of the constitutional regime.³³⁶ These kinds of values are harder to articulate as public policies because they are latent. They are not stated as “the

331. *Id.* at 336:

Without examining them particularly, we would refer to the cases of *Fuller v. Dame*, 18 Pick. 470; *Hatzfield v. Gulden*, 7 Watts, 152; *Clippinger v. Hepbaugh*, 5 Watts & Sergt. 315; *Wood v. McCan*, 6 Dana, 366; and *Hunt v. Test*, 8 Alabama, 719. *The Commonwealth v. Callaghan*, 2 Virginia Cases, 460.

332. 249 Cal. Rptr. 3d 122, 151–52 (Cal. Ct. App. 2019).

333. *Id.* (quoting *Snyder*, 562 U.S. 443, 452 (2011)).

334. Shell, *supra* note 15, at 450.

335. Friedman, *supra* note 32, at 612.

336. The Court has indicated as much, often in the First Amendment context. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969):

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

Still, one would not walk into court confident that this is a stricture of the law contravened by some contract.

state has a policy of *X*,” but they are rather embedded in the very bones of the state’s structure. Many of our most-cherished values like free speech, privacy, and separation of powers are akin to this kind of public policy. Oddly, then, our most important social values are the hardest to invoke as grounds for invalidating a contract. Contract law is poorly suited to address this problem.

CONCLUSION

The digital world needs rules. Should those rules come from the state or the private market? Unlike many other countries, the United States has long left internet governance to private actors in the market. That puts enormous pressure on private law, and contract law in particular, to police any harms produced by our digital world. Where those harms are public harms, we have two options: Ask contract law to do the uncomfortable work of enforcing public policy—which puts judges in the position of determining technology policy through private law rules—or pull back from our contractarian internet policy. Under both scenarios, it is hard to imagine a future where the internet has rules and the state does not play a significant role in those rules, either implicitly or explicitly. The state either sets the rules directly, or it delegates rulemaking authority to private actors through contract. The latter scenario is not a first-best solution, but in a world where Congress will not or cannot set public limits on the private internet, contract law steps into the breach.