

## Article

# Platform Unions

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*How should we regulate social media platforms to prevent harmful treatment of users? Regulators, advocates, and scholars have grappled with this problem for years. Many proposed solutions, ranging from improving privacy disclosures, to promoting competition between platforms, to requiring platforms to pay users for their data, are at best incomplete.*

*This Article begins from the premise that platform problems are collective problems and proposes a collective solution: empowering users to organize platform unions. Much like labor unions give employees a say in their working conditions even when they lack individual bargaining power, platform unions would facilitate collective bargaining over platform policies. They would turn social media “users” into collective participants who have a say in determining platform policies. After making the case for platform unions, the Article turns to implementation, discussing how labor law informs key questions about the design of platform unions.*

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## INTRODUCTION

From extracting and exploiting user data to failing to come to grips with hate speech and misinformation, social media platforms<sup>1</sup> fail their users with distressing regularity. Yet regulating these companies' conduct is difficult; even when regulators can agree that social media platforms should be reined in, enforcement can prove challenging. A wide range of regulators, advocates, and scholars seem to agree with this diagnosis, but disagree about the cure. Their proposed solutions range from improving privacy disclosures, to promoting competition between platforms, to requiring platforms to pay users for their data.<sup>2</sup>

Importantly, platform problems are often collective problems.<sup>3</sup> Data collected by social media platforms is especially valuable because it is embedded in a network of other users' data; content moderation and curation are in part a function of users' evolving norms and behaviors. The collective nature of platform problems mean that solutions focused on individual users' choices are at best incomplete.

As others have observed, collective problems call for a collective solution.<sup>4</sup> But what form should that solution take? In this Article, I consider one model for collective empowerment—platform unions—and begin to grapple with the policy and implementation questions that follow.

The initial premise is straightforward: much like labor unions empower workers to have a say in their wages and other working conditions, platform unions could turn platform “users” into “participants” who have a meaningful collective say in whether or how their data is collected and used by platforms, and in the development of norms and practices governing

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1. This Article generally uses the word “platforms” to refer to social media companies. While most of the examples it discusses are drawn from a few large platforms, including Meta/Facebook, X/Twitter, and YouTube, platform unions could be used to empower the users of any social media platform.

2. See *infra* Part II.B–C (discussing current approaches to regulating social media platforms and proposals for reform).

3. See *infra* Part III (discussing collective bargaining in the social media context).

4. E.g., Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 579 (2021) (“Properly representing the population-level interests that result from data production in the digital economy will require far more collective modes of ordering this productive activity.”).

content moderation and curation. Starting from this premise, I argue that platform unions make sense for four reasons.<sup>5</sup> First, just as many individual workers cannot exert enough pressure on their employers to win improvements in wages or working conditions, most platform users have no influence over how their data or content is treated. But—to continue the analogy—the value of both labor and platform usage taken on an aggregated basis is enormous. Second, platform unions could be well-positioned to address a key source of platforms’ power over their users: that users are often unaware of what platforms are doing. Platform unions could develop substantive expertise in how platforms operate, while also educating their members, aggregating their preferences in bargaining, and monitoring for compliance. And because platform unions would exist mainly or exclusively to perform these functions, they would likely do so in a more single-minded and user-centric fashion than would regulators, who usually must consider the interests of diverse stakeholders, including platforms themselves. Third, users already engage in collective action to try to influence their treatment by platforms; platform unions could make these efforts more focused, successful, and democratic. And fourth, platform unions—like labor unions—have potential to strengthen political democracy, both on platforms and beyond.

Finally, I move from this relatively simple premise to a complex set of practical considerations and design questions.<sup>6</sup> Here, I do not argue for the wholesale importation of U.S. labor law into the platform context for two reasons. First, there are obvious differences between platforms and workplaces that pose new challenges for the regulation of collective action and collective bargaining in the platform context. Second, U.S. labor law has major shortcomings that limit its effectiveness; a law facilitating platform unionization and bargaining should not make the same mistakes. Instead, I argue that labor law is instructive about what questions to ask about how to structure platform unionism and how collective bargaining might work in the platform context. These questions include the basic scope of platform bargaining; the relationship between platform unions, their

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5. See *infra* Part III (arguing in favor of platform unions).

6. See *infra* Part IV (discussing how to design hypothetical platform unions as compared to labor unions).

members, and the government; and problems of information and union power.

My goal in this Article is to explore the idea of unionization and collective bargaining as a response to problems endemic to social media platforms. In order to fully engage with that idea, I do not confront various practical and legal barriers to implementation. Readers may already be wondering: are platform unions politically feasible? Not today. And if the government enacted a platform collective-bargaining law, would First Amendment objections follow? Absolutely. These are important objections (and there are likely others as well), but they come after questions about whether unionization and collective bargaining could usefully be deployed in the platform-user context. To put it another way: a platform unionization and collective-bargaining law that has a viable path through a divided Congress and the current Supreme Court probably does not exist; if it did, it would likely be so watered-down as to be worthless. Putting forward this vision of platform bargaining would be tantamount to giving up before reaching the starting line. Thus, my goal in this Article is to attempt to identify and discuss some key questions about how platform unions could work; if the idea gains traction, it would then become necessary to confront (and perhaps work to change) political and legal conditions.

The balance of the Article proceeds in four parts. Part I contains a brief overview of data-privacy and content-related problems associated with social media platforms, arguing that they are partially collective in nature. Part II covers current approaches to platform regulation and leading proposals to fix platforms. Part III makes the case that a collective problem calls for a collective solution, advancing a practical and normative case for platform bargaining. Part IV begins to address how to do this by identifying and discussing some of the first questions and problems that would arise in adapting a workplace collective bargaining structure to a platform bargaining structure. The Article concludes by observing that collective bargaining might also be adapted to address other kinds of problems that result from intractable power imbalances.

## I. PLATFORM PROBLEMS

This Article focuses on social media platforms whose main business model involves relying on network effects to monetize

users' interactions with content generated by other users.<sup>7</sup> Thus, I draw many of my examples and illustrations from Meta (Facebook), X (formerly known as Twitter), and YouTube, although at times I also mention other platforms such as Reddit, Bluesky, and Mastodon. Although I think unions would probably benefit users of platforms that do other things, such as sell specific services (e.g., Uber or Lyft), or enable economic transactions (e.g., Etsy, eBay, or Amazon), I mostly do not discuss these platforms in this Article. Likewise, I do not discuss apps that mainly enable communication between or among specific people, such as Gmail or WhatsApp.

Scholars, policymakers, advocates, and many platform users themselves agree that major social media platforms often mistreat their users in ways that implicate privacy, speech, and psychological well-being concerns, among others. This Part begins by summarizing two strands of those critiques: (1) that platforms collect and exploit too much information about users and (2) that platforms handle content moderation and curation in ways that can be detrimental to users.<sup>8</sup> Finally, I reframe these problems as collective and/or democratic problems, setting the stage for Part III's argument that law could empower platform users to engage with platforms on a collective basis.

## A. A BRIEF SUMMARY OF PLATFORM PROBLEMS

### 1. Data-Privacy Problems

That platforms collect a large amount of data about users (and even non-users) is a longstanding source of concern.<sup>9</sup>

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7. See Carla Bonina et al., *Digital Platforms for Development: Foundations and Research Agenda*, 31 INFO. SYS. J. 869, 871 (2021) (defining common characteristics of social media platforms, including “enabl[ing] interaction between user groups and allow[ing] those user groups to carry out defined tasks”).

8. This discussion is necessarily incomplete; a full accounting of these problems could fill an entire book. See, e.g., SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019) (discussing “surveillance capitalism” wherein corporations use user data to attempt to predict and control user behavior); JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* (2019) (discussing how our evolving political economy of data relates to changing legal institutions).

9. For example, scholars and commentators began analyzing Facebook users' privacy shortly after the platform began operations. E.g., Harvey Jones & José Hiram Soltren, Facebook: Threats to Privacy (Dec. 14, 2005) (class paper,

Recently, lawmakers have focused on TikTok—not because that platform collects an unusual amount of data (research suggests this is probably not the case), but because of concerns that TikTok’s parent company might one day give that data to the Chinese government.<sup>10</sup> To be clear, to say that TikTok collects the same amount of data as other social networking companies is to say that it collects vast quantities of data. Illustratively, Mark Zuckerberg told a group of developers more than a decade ago that he envisioned that his platform would eventually know about “[y]our runs, your bike rides, your cooking and eating, your sleeping, your happiness, your fashion—anything you want.”<sup>11</sup> Today, Facebook and other platforms have blown past those (already capacious) categories.

Some of this user data is provided knowingly—for example, birthdates and occupations that users enter into their profiles. Other information is provided unknowingly—for example, when a user uploads a photo, Facebook may collect metadata revealing where and when it was taken.<sup>12</sup> Users also don’t know where their data ends up; platforms sell user data to advertisers and data-collection firms and can authorize third-party applications that collect even more data from users and their networks.<sup>13</sup> Moreover, many websites that might not appear to have a relationship to Facebook nonetheless use tools like “Facebook Pixel”

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Massachusetts Technical Institute), <https://groups.csail.mit.edu/mac/classes/6.805/student-papers/fall05-papers/facebook.pdf> [<https://perma.cc/SU23-3GB4>] (analyzing user privacy concerns on Facebook as early as 2005); Usha Munukutla-Parker, Note, *Unsolicited Commercial E-Mail, Privacy Concerns Related to Social Network Services, Online Protection of Children, and Cyberbullying*, 2 I/S: J.L. & POL’Y 627 (2006) (discussing privacy and safety concerns surrounding social media platforms as they reached widespread use).

10. See Geoffrey A. Fowler, *TikTok and You: Should You Delete the App Now?*, WASH. POST (Mar. 23, 2023), <https://www.washingtonpost.com/technology/2023/02/03/tiktok-delete-advice> [<https://perma.cc/4932-JVJ7>] (“I’ve been hearing from Washington Post readers concerned that the Chinese-owned app is handing our data to the Chinese Communist Party.”).

11. Julianne Pepitone, *Facebook Settles FTC Charges Over 2009 Privacy Breaches*, CNN: MONEY (Nov. 29, 2011), [https://money.cnn.com/2011/11/29/technology/facebook\\_settlement/index.htm](https://money.cnn.com/2011/11/29/technology/facebook_settlement/index.htm) [<https://perma.cc/8TKQ-YWF6>].

12. *Data Policy*, FACEBOOK (last updated Jan. 4, 2022), <https://www.facebook.com/about/privacy/update/printable> [<https://perma.cc/QUY9-TNHG>] (stating that Facebook may track information about content a user provides, including “the location of a photo or the date a file was created”).

13. *E.g., id.* (explaining that Facebook provides information to analytics services and advertisers, among a list of other partners).

(now “Meta Pixel”),<sup>14</sup> which allows both the site’s owners and Facebook to track visitors’ interactions.<sup>15</sup>

That one person’s privacy sometimes depends on the privacy settings of others in their network drove a particularly pernicious aspect of the Cambridge Analytica scandal, in which the company collected vast quantities of information about U.S. Facebook users, using that information to place micro-targeted political ads.<sup>16</sup> The whistleblower who revealed the scandal put it evocatively: “We exploited Facebook to harvest millions of people’s profiles. And built models to exploit what we knew about them and target their inner demons.”<sup>17</sup> Of course, political ads that prey on people’s fears and prejudices have been part of our political landscape since long before social media was invented. But the “promise” of micro-targeting is to limit the possibility of an effective counter-message; campaigns and other critics can’t respond to advertisements that they don’t see.

Much data collected from social media is used for comparatively mundane purposes, like targeted product advertising—which has become so eerily accurate that people sometimes wonder if their phones are eavesdropping on them. And while this information does not come only from social media platforms, social media is an especially salient and powerful source of data.<sup>18</sup>

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14. For ease of reference, this Article refers to both the platform (Facebook) and the company that owns it (Meta) as “Facebook.”

15. *Meta Pixel*, META, <https://www.facebook.com/business/tools/meta-pixel> [<https://perma.cc/CU87-MQFS>] (“The Meta Pixel is a piece of code on your website that can help you better understand the effectiveness of your advertising and the actions people take on your site, like visiting a page or adding an item to their cart.”); see also Natasha Singer, *What You Don’t Know About How Facebook Uses Your Data*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/technology/facebook-privacy-hearings.html> [<https://perma.cc/BP4N-ZQTC>] (explaining how Facebook tracks users and provides data tracking tools to allow other platforms to do so as well).

16. See Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, GUARDIAN (Mar. 17, 2018), <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> [<https://perma.cc/2M4W-D949>] (outlining the history and details of the Cambridge Analytica scandal).

17. *Id.* (quoting Christopher Wylie).

18. Data brokers can combine social media information with data from other sources, such as the GPS locators on our phones, grocery store loyalty programs, and our interactions with other websites. See Thorin Klosowski, *Big Companies Harvest Our Data. This Is Who They Think I Am.*, N.Y. TIMES:



So while high-profile scandals like Cambridge Analytica capture the public's attention for obvious reasons, the day-to-day use of user data for targeted advertising is core to social media platforms' business models. That reality drives other problematic practices. For example, Kyle Langvardt has described how "free content online is monetized by a huge behavioral advertising ecosystem" that works only if users "spend enormous amounts of time on their devices."<sup>19</sup> But—as the next Subsection discusses—user engagement can be quite different from user happiness or well-being.

## 2. Content Moderation and Curation Problems

This Subsection turns to problems with platforms' content moderation and curation.<sup>20</sup> Moderation refers to platforms' decisions about whether or when to delete or limit the reach of specific content or users; curation refers to decisions about how to promote or display content, such as whether users' feeds will be chronological or whether the platform will display unrequested content to users.

Platforms ban specific content for a range of reasons, including that decisionmakers think it could make the platform unusable or annoying, or that it could harm individual users or society as a whole.<sup>21</sup> To varying degrees, then, platforms are on the lookout for spam, depictions of abuse, calls for violence towards

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WIRECUTTER (May 28, 2020), <https://www.nytimes.com/wirecutter/blog/data-harvesting-by-companies> [<https://perma.cc/7MMU-XC75>] (discussing how data brokers collect and sell user data, even for those users with minimal online footprints). The result can be an extremely detailed picture of where someone has been, what they've done, and whom they've seen. *Id.*

19. Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 *FORDHAM L. REV.* 129, 133 (2019).

20. For detailed accounts of the nuts and bolts of content moderation, as well as useful critiques of content moderation practices, see, for example, Evelyn Douek, *Content Moderation as Systems Thinking*, 136 *HARV. L. REV.* 526, 528 (2022) (analyzing content moderation as a "project of mass speech administration" as opposed to a "post-by-post evaluation of platform decisionmaking"); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 *HARV. L. REV.* 1598, 1599 (2018) (analyzing platform content moderation "under a regulatory and First Amendment framework").

21. See Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 *COLUM. L. REV.* 759, 763 (2021) (arguing that platform content moderation has evolved to "to encompass multiple interests, not just individual speech rights, and with awareness of the error rates inherent in enforcing any rule at the truly staggering scale of major platforms").

specific individuals or groups, advocacy of self-harm, unwelcome pornography, privacy violations like doxxing, and the systematic dissemination of dis- or misinformation.<sup>22</sup>

Platforms are free to set their own content-moderation standards within broad parameters.<sup>23</sup> (Section II.B discusses why this is, as well as a new wave of state laws that seek to limit platforms' discretion over content moderation.) As Elon Musk's time helming X/Twitter have powerfully illustrated,<sup>24</sup> platforms may or may not seek (or heed) input from employees or users, and they may change their content policies without notice. Musk's decision-making has been called "impulsive" and "ad hoc."<sup>25</sup> Reporting from the first several months of Musk's tenure suggested that he was driven by a mix of prior public commitments, concerns about user engagement, corporate, media or user pressure, internal research, advocacy by individual X/Twitter employees, and his personal political views.<sup>26</sup> Increasingly, though, Musk seems inclined to promote the expression of extremist and conspiratorial right-wing views on X, even if doing so drives advertisers away.<sup>27</sup>

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22. *Id.* at 815 ("[T]here will always need to be a balance struck between the free speech rights (and business interests) of platforms to decide what content they want to host and the free speech interests of users to say whatever they want."); Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1360–62 (2018) (explaining how platforms such as Facebook moderate content).

23. See Klonick, *supra* note 20, at 1631–35 (discussing evolution of content-moderation standards at YouTube and Facebook); Jeff Horwitz & Justin Scheck, *Facebook Increasingly Suppresses Political Movements It Deems Dangerous*, WALL ST. J. (Oct. 22, 2021), <https://www.wsj.com/articles/facebook-suppresses-political-movements-patriot-party-11634937358> [<https://perma.cc/ZDM5-ZJVP>] (discussing the role of different constituencies in setting content-moderation policies related to far-right U.S. political groups).

24. See Cat Zakrzewski et al., *Musk's 'Free Speech' Agenda Dismantles Safety Work at Twitter, Insiders Say*, WASH. POST (Nov. 22, 2022), <https://www.washingtonpost.com/technology/2022/11/22/elon-musk-twitter-content-moderations> [<https://perma.cc/JR2S-4KA4>] (describing Musk's goal of purging "liberal overreach" from the platform when he took control of Twitter).

25. *Id.*

26. *Id.*

27. Kate Conger & Tiffany Hsu, *More Advertisers Halt Spending on X in Growing Backlash Against Musk*, N.Y. TIMES (Nov. 18, 2023), <https://www.nytimes.com/2023/11/18/technology/elon-musk-twitter-x-advertisers.html> [<https://perma.cc/8VFB-3EXS>] (describing how major companies such as Sony and IBM paused spending on X advertisements due to Musk's endorsement of

The costs of some of social media's most egregious content-moderation failures have been borne by users outside the U.S.<sup>28</sup> But this Article is focused mainly on U.S. users, for whom content moderation can be intertwined with electoral politics. For example, platform policies to combat election interference were slow to develop, and platforms have had to play catch-up to deal with bots and troll farms.<sup>29</sup> And the idea that platforms silence some political viewpoints has become a standard (though often incorrect) talking point, with the predictable result that platforms sometimes bend their own rules to avoid criticism from prominent politicians and news outlets.<sup>30</sup>

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far-right conspiracy theories); Clare Duffy, *Elon Musk's X Is Encouraging Users to Follow Conspiracy Theorist Alex Jones After Reinstating His Account*, CNN: BUS. (Dec. 11, 2023), <https://www.cnn.com/2023/12/11/tech/elon-musk-x-promoting-alex-jones-after-reinstating-his-account/index.html> [<https://perma.cc/T8MR-CKW3>] (highlighting Musk's statements and actions that have led to an "advertiser exodus over concerns about brand safety and hate speech").

28. For example, Meta/Facebook has acknowledged that its failures to develop language or cultural competency allowed proliferation of genocidal speech against Myanmar's Rohingya people. See Alex Warofka, *An Independent Assessment of the Human Rights Impact of Facebook in Myanmar*, META (Aug. 26, 2020), <https://about.fb.com/news/2018/11/myanmar-hria> [<https://perma.cc/E8D4-5VCD>] ("[P]rior to this year, we weren't doing enough to help prevent our platform from being used to foment division and incite offline violence."); see also Steve Stecklow, *Why Facebook Is Losing the War on Hate Speech in Myanmar*, REUTERS (Aug. 15, 2018), <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate> [<https://perma.cc/YY2B-J8HV>] (showing how hate speech surrounding Myanmar's Rohingya people proliferated on Facebook despite content moderation policies). Despite this acknowledgment, similar dynamics have unfolded in other countries, and the *Wall Street Journal* has reported that Facebook has also been slow to respond to drug cartels and human traffickers on the platform. Justin Scheck et al., *Facebook Employees Flag Drug Cartels and Human Traffickers. The Company's Response Is Weak, Documents Show.*, WALL ST. J. (Sept. 16, 2021), <https://www.wsj.com/articles/facebook-drug-cartels-human-traffickers-response-is-weak-documents-11631812953> [<https://perma.cc/UDV6-7GHJ>].

29. See Karen Hao, *Troll Farms Reached 140 Million Americans a Month on Facebook Before 2020 Election, Internal Report Shows*, MIT TECH. REV. (Sept. 16, 2021), <https://www.technologyreview.com/2021/09/16/1035851/facebook-troll-farms-report-us-2020-election> [<https://perma.cc/BLG3-N8QG>] (discussing how Facebook enables troll farms).

30. E.g., Benjamin Wallace-Wells, *What the Twitter Files Reveal About Free Speech and Social Media*, NEW YORKER (Jan. 11, 2023), <https://www.newyorker.com/news/the-political-scene/what-the-twitter-files-reveal-about-free-speech-and-social-media> [<https://perma.cc/4YNS-3XVV>] ("Twitter . . . had chosen to largely exempt public figures from the scrutiny it directed at most accounts.");

There is undoubtedly much to be said about platforms' decision-making in high-profile cases, such as Facebook's and Twitter's decisions barring President Trump in the wake of the January 6th insurrection.<sup>31</sup> But these cases are not representative.<sup>32</sup> Far more often, content moderation decisions are made in relative anonymity, and with little process. The sheer volume of user-generated content has led platforms to rely on automated tools as their first line of defense, often augmented by human reviewers who are pushed to make decisions as quickly as possible.<sup>33</sup> Unsurprisingly, this process can be uneven, especially in situations that call for nuance. First, automated content filters have limited ability to discern context; thus, Lilly Irani explains, Twitter's algorithms could not initially distinguish "binders full of women"—Mitt Romney's political gaffe—from actual binders for sale at Office Depot.<sup>34</sup> Shortcomings like these mean humans are necessary to augment automated processes, but both the work and the working conditions are often terrible, and so

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Keach Hagey & Jeff Horwitz, *Facebook's Internal Chat Boards Show Politics Often at Center of Decision Making*, WALL ST. J. (Oct. 24, 2021), <https://www.wsj.com/articles/facebook-politics-decision-making-documents-11635100195> [<https://perma.cc/E9DK-CYQY>] ("Facebook's management team has been so intently focused on avoiding charges of bias that it regularly places political considerations at the center of its decision making.").

31. See Melina Delkic, *Trump's Banishment from Facebook and Twitter: A Timeline*, N.Y. TIMES (May 10, 2022), <https://www.nytimes.com/2022/05/10/technology/trump-social-media-ban-timeline.html> [<https://perma.cc/KF2K-662C>] (discussing how Facebook and Twitter responded to President Trump's handling of the January 6th insurrection).

32. E.g., Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt.*, WALL ST. J. (Sept. 13, 2021), <https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353> [<https://perma.cc/G5Q7-GWFJ>] (reporting on Facebook policy exempting certain high-profile users from standard content-moderation rules or processes).

33. E.g., Casey Newton, *The Trauma Floor: The Secret Lives of Facebook Moderators in America*, VERGE (Feb. 25, 2019), <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona> [<https://perma.cc/MPZ8-UH87>] (highlighting the stories of Facebook content moderators and how they operate day-to-day).

34. Lilly Irani, *Justice for "Data Janitors,"* PUB. BOOKS (Jan. 15, 2015), <https://www.publicbooks.org/justice-for-data-janitors> [<https://perma.cc/P4CR-LGD6>]; see also Daphne Keller, *Facebook Filters, Fundamental Rights, and the CJEU's Glawischnig-Pieszcsek Ruling*, 69 GRUR INT'L 616, 619 (2020) (describing limitations of automated content-filtering tools).

turnover is high.<sup>35</sup> Further, the rules that content reviewers are charged with applying can be unclear and especially challenging to apply when reviewers do not have the same cultural context as the relevant users; on top of that, content reviewers are pushed to make judgments in seconds.<sup>36</sup> And finally, because platforms contract out much of their content-review work, they usually do not learn from reviewers about their on-the-ground experiences trying to apply platforms' policies in the way they would if they employed content reviewers directly and then managed them through a chain of command that eventually reached the level of policy setters.<sup>37</sup>

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35. For in-depth discussion of these working conditions, see, for example, Newton, *supra* note 33 (describing working conditions of Facebook content moderators); Adrian Chen, *The Laborers Who Keep Dick Pics and Beheadings Out of Your Facebook Feed*, WIRED (Oct. 23, 2014), <https://www.wired.com/2014/10/content-moderation> [<https://perma.cc/2W8Y-7C2H>] (discussing how platforms often outsource content-moderation to countries such as the Philippines, and describing the working conditions in such countries); MARY L. GRAY & SIDDHARTH SURI, *GHOST WORK: HOW TO STOP SILICON VALLEY FROM BUILDING A NEW GLOBAL UNDERCLASS*, at ix (2019) (discussing independent contractors performing content reviews). Recently, a group of 200 employees who worked as content reviewers for a Facebook contractor based in Kenya sued both their employer and Facebook, alleging that their work was both poorly paid and psychologically traumatic. Evelyne Musambi & Cara Anna, *Facebook Content Moderators in Kenya Call the Work 'Torture.' Their Lawsuit May Ripple Worldwide*, AP NEWS (June 29, 2023), <https://apnews.com/article/kenya-facebook-content-moderation-lawsuit-8215445b191fce9df4ebe35183d8b322> [<https://perma.cc/AE57-MU73>].

36. See *supra* note 35 (describing the working conditions of content moderators); SARAH T. ROBERTS, *BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA* 173, 179 (2019) (reflecting Filipino content moderators' descriptions of being pushed to make decisions in ten seconds).

37. Content reviewers are rarely employed by the platforms for which they work; instead, they work for another company, or they are independent contractors who get work from a platform such as Mechanical Turk. See Cristina Cridle, *Social Media Content Moderators Lead Charge for Better Rights*, FIN. TIMES (Mar. 18, 2023), <https://www.ft.com/content/63a0ba72-e052-4279-922a-402105eacd4d> [<https://perma.cc/XH7B-F587>] (“Social networks including Meta, TikTok and YouTube hire external contractors to conduct [content moderation] work.”). Independent contractors are not covered by minimum employment standards such as the minimum wage. See *supra* note 35 (discussing independent contractors working as content moderators); see also Ethan Zuckerman, *How Social Media Could Teach Us to Be Better Citizens*, 18 J. E-LEARNING & KNOWLEDGE SOC'Y 36, 39 (2022) (“Seeking cost reductions, platforms outsourced content moderation to overburdened workers in low-wage nations, who make hundreds of content decisions a minute, following complex rules dictated from corporate headquarters.”).

The scale and difficulty of content moderation means errors are inevitable: every platform will both leave up content that violates the platform's standards and remove content that does not.<sup>38</sup> Platforms can systematically err on one side more than the other—though they may not choose the side most users prefer. For example, although most U.S. users are concerned about hate speech and disinformation, platforms often seem to be more concerned about political blowback or public mockery that comes with taking down (what is at least claimed to be) benign content.<sup>39</sup>

To be clear, either type of error can cause harm. Hateful content that is left up might lead to the proliferation of similar content and ultimately to real-life physical violence. Even short of that, its uninterrupted presence might make some users' experiences intolerable, driving away users who are at risk of being targeted because they have one or more marginalized identities. On the other hand, wrongly or arbitrarily taking down or demonetizing content can cause psychic harms to individual posters<sup>40</sup> or harms to the overall discourse—such as when a platform takes down a post criticizing racist speech, asserting that the post itself is racist. There can also be economic harms, as occurred when YouTube—attempting to stop monetization of videos containing hateful content or misinformation—adopted a new, “strict regime of content moderation . . . resulting in arbitrary sanctions, automated channel shutdowns and therefore

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38. See *supra* note 20 (providing sources which describe the realities of content moderation); TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 12 (2018) (“Moderation policies are, at best, reasonable compromises . . .”).

39. See Deepa Seetharaman et al., *Facebook Says AI Will Clean Up the Platform. Its Own Engineers Have Doubts.*, WALL ST. J. (Oct. 17, 2021), <https://www.wsj.com/articles/facebook-ai-enforce-rules-engineers-doubtful-artificial-intelligence-11634338184> [<https://perma.cc/XH7S-FMBU>] (reporting that Facebook “executives are particularly sensitive to what it calls ‘over-enforcement,’” but users were more concerned about “seeing violating content like hate speech”); see also *Media and Democracy: Unpacking America’s Complex Views on the Digital Public Square*, KNIGHT FOUND. (Mar. 9, 2022), <https://knightfoundation.org/wp-content/uploads/2022/03/KMAD-2022-1.pdf> [<https://perma.cc/EZ7D-DYSM>] (detailing how Democrats and Republicans respond to both content itself and content moderation, and how this impacts platform and government behavior).

40. See GILLESPIE, *supra* note 38, at 148 (describing that mothers who had breastfeeding photos taken down “spoke of feeling ashamed and humiliated”).

sudden income loss for creators.”<sup>41</sup> Less directly, a social media presence can have professional benefits for politicians, journalists, academics, and so on; this means that content-moderation decisions help shape professions and institutions that themselves play important roles in maintaining democratic practices<sup>42</sup> by influencing who gets hired, elected, promoted, or given a larger platform.<sup>43</sup>

In addition to taking down (or trying to take down) user-generated content that violates their rules or standards, platforms also influence how and when users see and interact with others’ content. These decisions can involve what kinds of content to promote, as when platforms place content more likely to generate engagement at the top of a user’s feed.<sup>44</sup> Additionally, platforms might algorithmically recommend content based on a user’s individual history of engagement or change how users can engage with content—for example, making it easier or harder to re-share content generated by others or making a user’s “likes” more or less prominent.<sup>45</sup> Platforms also generate their own content, such as by adding labels to misinformation or endorsing a

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41. Valentin Niebler, *YouTubers Unite: Collective Action by YouTube Content Creators*, 26 TRANSFER 223, 224 (2020). As discussed below, creators responded to these events through collective action. See *infra* Part II.B (describing current approaches to content moderation).

42. See generally Vicki C. Jackson, *Knowledge Institutions and Resisting Truth Decay*, in DISINFORMATION, MISINFORMATION, AND DEMOCRACY: LEGAL APPROACHES IN COMPARATIVE CONTEXT (Ronald J. Krotoszynski, Jr., Andras Koltay & Charlotte Garden eds., forthcoming 2024) (on file with author) (discussing how the vast dissemination of misinformation has shaped democratic institutions, and arguing for intermediary “knowledge institutions” to preserve and produce accurate information).

43. See Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 381–82 (2009) (describing professional consequences of online harassment).

44. See Filippo Menczer, Facebook Whistleblower Frances Haugen Testified That the Company’s Algorithms Are Dangerous – Here’s How They Can Manipulate You, CONVERSATION (Oct. 7, 2021), <https://theconversation.com/facebook-whistleblower-frances-haugen-testified-that-the-companys-algorithms-are-dangerous-heres-how-they-can-manipulate-you-169420> [<https://perma.cc/9RE6-XH43>] (discussing how major social media platforms rank and recommend content based on user inputs to maximize engagement).

45. See, e.g., Casey Newton, *What Instagram Really Learned from Hiding Like Counts*, VERGE (May 27, 2021), <https://www.theverge.com/2021/5/27/22456206/instagram-hiding-likes-experiment-results-platformer> [<https://perma.cc/W2L5-F3DP>] (discussing the impact of Instagram’s decision to allow users to hide “like” counters on social media posts).

news source or story as trusted.<sup>46</sup> Finally, platforms display advertising, which might be tailored to individual users.<sup>47</sup>

Like content moderation, these choices can affect the emotional and economic well-being of both content producers and content viewers.<sup>48</sup> Consider YouTube from the perspective of a content creator. Achieving a significant audience and making money on the platform takes a considerable amount of skill, work, and investment.<sup>49</sup> But it also requires favorable treatment by YouTube, which sets and applies eligibility criteria determining which videos will be monetized, and algorithmically promotes content to viewers.<sup>50</sup> Because algorithmic promotion is so important to a creator's success, scholars have characterized it as "a disciplinary management tool."<sup>51</sup>

YouTube viewers experience the platform's algorithm in the form of recommended content, optimized for the metrics chosen by the platform: clicks, time spent viewing, or user approval.<sup>52</sup> Much research discusses the effects of algorithmically

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46. See, e.g., Elizabeth Culliford, *Facebook to Label All Posts About Covid-19 Vaccines*, REUTERS (Mar. 15, 2021), <https://www.reuters.com/article/idUSKBN2B70NJ> [<https://perma.cc/56AU-S5Q8>] (discussing Facebook and Instagram's practice of labeling posts discussing the safety of COVID-19 with "text saying the vaccines go through safety and effectiveness tests before approval").

47. See, e.g., Nik Froehlich, *The Truth in User Privacy and Targeted Ads*, FORBES (Feb. 24, 2022), <https://www.forbes.com/sites/forbestechcouncil/2022/02/24/the-truth-in-user-privacy-and-targeted-ads/?sh=31dc6795355e> [<https://perma.cc/LC58-LH4W>] ("Targeted ads collect and analyze users' online activity and use this data to inform the type of ads a user is shown.").

48. For example, there is a significant debate about the extent to which social media harms the mental health of children, especially teens. See, e.g., Albertina Antognini & Andrew Keane Woods, *Shallow Fakes*, 128 PENN ST. L. REV. 69, 75–76 (canvassing social media harms and associated mental health concerns and research).

49. See *Monetization for Creators*, YOUTUBE, <https://www.youtube.com/howyoutubeworks/product-features/monetization/#advertising> [<https://perma.cc/T5EX-BPEJ>] (outlining YouTube's monetization policy); see also Valentin Niebler & Annemarie Kern, *Organising YouTube: A Novel Case of Platform Worker Organising* 3 (Sept. 2020), <http://library.fes.de/pdf-files/iez/16535-20210225.pdf> [<https://perma.cc/3HDG-EAGP>] (describing how YouTubers make money).

50. Niebler & Kern, *supra* note 49, at 3 ("[T]he main precondition for a creator's success is their visibility on the platform . . . . Visibility on YouTube is tied to the platform's recommendation engine . . . .").

51. *Id.*

52. See generally Hao, *supra* note 29 (discussing how platform algorithms push content on users' newsfeeds).



recommended content on users, including whether it can have an ideological effect.<sup>53</sup> In addition, platforms can make choices about the user interface, such as making autoplay the default, to increase the amount of time users spend on the platform.<sup>54</sup>

Platforms might adjust content curation to boost engagement, placate advertisers, or try to mitigate certain kinds of harms. Where these values are in tension, platforms make their own judgments about how to balance them, and their own predictions about how different changes might play out. For example, after Facebook made changes intended to drive greater engagement by promoting “meaningful social interactions,” company employees raised concerns that the platform was becoming an outrage machine.<sup>55</sup> But it turns out that outrage drives user engagement; while the platform made subsequent changes intended to limit mis- and disinformation, it did not revert to its previous incarnation.<sup>56</sup>

Finally, platforms’ data collection can facilitate discriminatory content curation, leading to economic and psychological harms. Platform-enabled targeted advertising is a key example. As Professor Ryan Calo put it, data analysis allows companies to “discover and exploit the limits of each individual consumer’s ability to pursue his or her own self-interest.”<sup>57</sup> Data from social media helps advertisers target subsets of consumers, determining who will see an ad and what terms they will be offered.<sup>58</sup>

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53. See, e.g., Muhammad Haroon et al., *YouTube, The Great Radicalizer? Auditing and Mitigating Ideological Biases in YouTube Recommendations*, ARXIV (Mar. 25, 2022), <https://arxiv.org/pdf/2203.10666.pdf> [<https://perma.cc/JH2Z-XQPZ>] (providing a systematic audit of YouTube’s recommendation system to determine the presence of ideological bias, its magnitude, and radicalization).

54. *Id.* at 3 (describing the functionality and impact of YouTube’s autoplay function).

55. Keach Hagey & Jeff Horwitz, *Facebook Tried to Make Its Platform a Healthier Place. It Got Angrier Instead.*, WALL ST. J. (Sept. 15, 2021), <https://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215> [<https://perma.cc/5CK5-J5FT>] (describing efforts to “curb the tendency of the overhauled [Facebook] algorithm to reward outrage and lies”).

56. *Id.*

57. Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 999 (2014).

58. *Id.* (stating platforms are increasingly able to utilize data to trigger irrationality and vulnerability in consumers); see also Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May*

Professor Nathan Newman makes a similar argument with respect to employment standards, writing that data inflicts “collective harm in the form of weaker collective organization and lower wages,”<sup>59</sup> such as by giving employers access to the information they need to avoid hiring union supporters or set wages at the lowest acceptable level. Along similar lines, Facebook settled a lawsuit arising from its practice of allowing companies to tailor the audiences for job advertisements based on users’ protected characteristics—but researchers and journalists subsequently found that Facebook’s algorithm still yielded skewed results for some types of job postings.<sup>60</sup>

### 3. Platform Problems Are Collective Problems

There are at least three different ways to frame data-privacy and content-moderation problems. The first is through the lens of individual choice and autonomy: people want to use platforms without having their data harvested and used for marketing, and without being ideologically or emotionally manipulated to increase the time they spend looking at content. Second, Professor Aziz Huq has written that these “concerns about autonomy are probably best glossed as worries about the ability of platform economies and data brokers to seize a disproportionate share of the material surplus created by personal data economies.”<sup>61</sup> Third, we could look at platform information problems as reflections of our embeddedness in networks or communities that are

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*Undermine Housing Justice*, 52 COLUM. HUM. RTS. L. REV. 251, 289 (2020) (describing lawsuits arising out of targeted advertising that excludes members of protected classes).

59. Nathan Newman, *Reengineering Workplace Bargaining: How Big Data Drives Lower Wages and How Reframing Labor Law Can Restore Information Equality in the Workplace*, 85 U. CIN. L. REV. 693, 699 (2017).

60. See Ava Kofman & Ariana Tobin, *Facebook Ads Can Still Discriminate Against Women and Older Workers, Despite a Civil Rights Settlement*, PROPUBLICA (Dec. 13, 2019), <https://www.propublica.org/article/facebook-ads-can-still-discriminate-against-women-and-older-workers-despite-a-civil-rights-settlement> [https://perma.cc/E7JF-33YS] (“ProPublica spotted multiple real-world employment advertisements that favored men or excluded older potential applicants.”). Facebook settled a similar lawsuit brought by the DOJ under the Fair Housing Act. See Naomi Nix & Elizabeth Dwoskin, *Justice Department and Meta Settle Landmark Housing Discrimination Case*, WASH. POST (June 21, 2022), <https://www.washingtonpost.com/technology/2022/06/21/facebook-doj-discriminatory-housing-ads> [https://perma.cc/Q9N8-WGGD] (describing the DOJ case against Facebook).

61. Aziz Z. Huq, *The Public Trust in Data*, 110 GEO. L.J. 333, 354 (2021).

controlled by platforms—in other words, as collective information problems.<sup>62</sup>

The collective account of data privacy is straightforward: social media platforms are valuable sources of data because they yield a mosaic of information about how we are connected to each other, which is much more valuable than a list of atomized information about individuals.<sup>63</sup> This means we depend on platforms for data privacy, but we also depend on each other. Professor Salomé Viljoen observes that when one person reveals information about themselves, it can also have consequences for others who share a relevant trait or identity; she calls this a “horizontal data relation.”<sup>64</sup> And Professor Sari Mazzurco notes that privacy preferences are socially constructed norms; our ideas about privacy boundaries are shaped in part by what we see others share.<sup>65</sup>

There is also a multifaceted account of the collectiveness of content moderation. In part, it concerns collective articulation and evolution of norms. Users’ engagement reflects their understanding of the purpose of a platform (or platform sub-community), and the acceptable bounds of discourse more generally. These norms may be reinforced through repetition, or they may evolve through interactions with others, such as if one user criticizes another’s posts as racist, uncivil, or irrelevant. Platforms’ content-moderation decisions also shape norms—sometimes explicitly, as when Twitter began nudging users to edit harsh language out of their tweets, and sometimes implicitly, as when

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62. See, e.g., Viljoen, *supra* note 4, at 573 (advancing “a theoretical account of data as social relations, constituted by both legal and technical systems”); Eli Freedman, Note, *Data Unions: The Need for Informational Democracy*, 111 CALIF. L. REV. 657, 662 (2023) (arguing that “data’s value and harms are driven by horizontal relationships between data subjects”).

63. For discussions of the networked nature of data, see, for example, *id.* at 611–12 (describing how data becomes more valuable when it is aggregated and combined with other kinds of data); Huq, *supra* note 61, at 338 (“[W]e should view [] data . . . as a shared asset—one realized through the entangled social interactions of the many . . .”); James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1164 (2009) (describing “six common patterns of privacy violations on social network sites” united by a common theme: their “peer-to-peer” nature).

64. Viljoen, *supra* note 4, at 607–08.

65. See Sari Mazzurco, *Democratizing Platform Privacy*, 31 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 792, 812–13 (2021) (discussing general privacy and information privacy norms); see also Ari Ezra Waldman, *Privacy, Practice, and Performance*, 110 CALIF. L. REV. 1221, 1221 (2022) (“[P]rivacy law’s practices . . . have socially constructed what we think privacy law is and should be.”).

users see less of a certain kind of content and then stop seeing that content as normal.<sup>66</sup>

There is also a more literal collective aspect of content moderation and promotion. As discussed above, platforms rely on a combination of algorithmic and human decisions to moderate or curate content.<sup>67</sup> These methods overlap with and reinforce each other; for example, both user reports and moderators' decisions inform automated takedown processes,<sup>68</sup> making it more likely that platforms' automated content moderation processes will catch similar future posts. This system means that while users do not set content-moderation or curation standards, they have a degree of collective influence over the results; for example, users can work together to encourage a platform to take down specific posts, with knock-on effects for other similar posts.<sup>69</sup> But platforms shape the terms on which users can exercise this influence; for example, a platform that wants to create the impression that its automated content-moderation processes catch most

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66. See *How Twitter Is Nudging Users to Have Healthier Conversations*, X (formerly TWITTER): COMMON THREAD (June 1, 2022), <https://blog.twitter.com/common-thread/en/topics/stories/2022/how-twitter-is-nudging-users-healthier-conversations> [<https://perma.cc/MFP5-7839>] (discussing how Twitter utilizes tools on its platform, such as “nudges,” to “explore encouraging better behavior”).

67. See, e.g., Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2431–33 (2020) (describing how Facebook relies in part on user reports to augment its content moderation, which is also accomplished by automated processes, Facebook employees, and independent contractors); Ben Bradford et al., *Report of the Facebook Data Transparency Advisory Group*, YALE L. SCH.: THE JUST. COLLABORATORY 11 (Apr. 2019), [https://law.yale.edu/sites/default/files/area/center/justice/document/dtag\\_report\\_5.22.2019.pdf](https://law.yale.edu/sites/default/files/area/center/justice/document/dtag_report_5.22.2019.pdf) [<https://perma.cc/PGW6-9WZP>] (discussing Facebook's “process for identifying and evaluating potential violations of the Community Standards”).

68. Klonick, *supra* note 67, at 2431 (discussing the cooperation between human and automatic moderation).

69. This process can be weaponized by users who report content in bad faith, hoping to get another user's account locked, or who engage with misinformation or disinformation so that it will be promoted by content algorithms. These practices are sometimes called “brigading.” See Phoenix C.S. Andrews, *Social Media Futures: What Is Brigading?*, TONY BLAIR INST. FOR GLOB. CHANGE (Mar. 10, 2021), <https://institute.global/insights/tech-and-digitalisation/social-media-futures-what-brigading> [<https://perma.cc/3KHS-9NKT>] (discussing “mass reporting,” “sock puppeting,” and “astroturfing” techniques of brigading).

prohibited content can reduce the number of user reports it receives by making them more difficult to submit.

Finally, content moderation shapes who uses a platform, and how. For example, a platform that is either indifferent to threats of violence against women users or incapable of effectively finding and responding to them will likely find that over time its user base includes fewer women (and also fewer users of any gender who object to this content). Women who remain may use the platform differently than they would in a different content-moderation universe, perhaps limiting the size of their networks or remaining anonymous.<sup>70</sup>

This last observation should prompt us to pull back our lens further. Platforms are privately controlled sites that have become central to democratic deliberation, which means that platform decisions shaping who participates are also decisions about which voices are heard more generally. Professor Kate Klonick sounds a similar note: “[T]he biggest threat this private system of governance poses to democratic culture is the loss of a fair opportunity to participate, which is compounded by the system’s lack of direct accountability to its users.”<sup>71</sup>

As to the democratic consequences of data privacy, Professor Julie Cohen argues that “freedom from surveillance, whether public or private, is foundational to the practice of informed and reflective citizenship,”<sup>72</sup> but also that “citizenship requires access to information and to the various communities in which citizens claim membership”<sup>73</sup>—both of which are increasingly moderated by platforms. As Cohen and others observe, there are two sides to this problem: platforms collect and then use or sell too much of some kinds of information, while refusing to release data that could bear on various kinds of governance problems.<sup>74</sup>

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70. See Citron, *supra* note 43, at 387–88 (discussing how women who are harassed online may hide their identity or try to interact with others in a stereotypically “male” way).

71. Klonick, *supra* note 20, at 1603.

72. Julie E. Cohen, *What Privacy Is for*, 126 HARV. L. REV. 1904, 1905 (2013).

73. *Id.* at 1913.

74. See, e.g., *id.* at 1931 (“Effective privacy protection requires regulatory scrutiny of information processing activity on both sides of the public-private divide, and must include strategies for exposing networked processes of modulation to adequate public scrutiny.”); *supra* note 71 and accompanying text (quoting Klonick on platforms’ private systems of governance).

Somewhat differently, Delacroix and Lawrence analogize users' relationship with platforms to feudalism, describing the widespread loss of personal privacy as striking at "the very *raison-d'être* of liberal democracies."<sup>75</sup> They note that individual platform users—unable to bargain on an individual basis with platforms<sup>76</sup>—can be placed at risk by the widespread availability of their personal information.<sup>77</sup> Liberal democracies, they conclude, owe their citizens and residents protections from "social cruelty" that is enabled when individuals lose control over how they portray themselves to the rest of the world.<sup>78</sup>

This Part has described platforms' extensive control over user data and the content they see, casting the problems that result as collective in nature. The next Part considers how law does and does not constrain platforms' decisions before turning to regulatory proposals.

## II. CURRENT REGULATORY APPROACHES AND PROPOSALS FOR CHANGE

This Part summarizes the main U.S. approaches to regulating social media platforms,<sup>79</sup> highlighting their various advantages and drawbacks.<sup>80</sup> It begins with existing approaches before turning to proposed alternatives.

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75. See Sylvie Delacroix & Neil D. Lawrence, *Bottom-Up Data Trusts: Disturbing the 'One Size Fits All' Approach to Data Governance*, 9 INT'L DATA PRIV. L. 236, 239 (2019).

76. See *id.* ("[I]ndividual data subjects are rarely in a position to bargain.").

77. See *id.* at 237–38 ("[T]he data we leak daily has become something by reference to which we may be continuously judged. The systematic collection of data allows our lives to be dissected to an unprecedented degree. Although any individual fact learned about us may be inconsequential, taken together, over time, a detailed picture of who we are and what motivates us emerges." (footnotes omitted)).

78. *Id.* at 239. The authors quote Andrea Sangiovanni, defining "social cruelty" as "the unauthorized, harmful, and wrongful use of another's vulnerability to attack or obliterate their capacity to develop and maintain an integral sense of self." *Id.* at 239 n.25 (quoting ANDREA SANGIOVANNI, HUMANITY WITHOUT DIGNITY: MORAL EQUALITY, RESPECT, AND HUMAN RIGHTS 76 (2017) (footnotes omitted)).

79. For a useful taxonomy of approaches to platform regulation, see generally Elettra Bietti, *A Genealogy of Digital Platform Regulation*, 7 GEO. L. TECH. REV. 1 (2023).

80. This Part does not discuss the European Union's General Data Protection Regulation (GDPR), although that law has influenced platforms' behavior

## A. CURRENT APPROACHES TO DATA PRIVACY

U.S. privacy law has been described as a “hodgepodge of various constitutional protections, federal and state statutes, torts, regulatory rules, and treaties.”<sup>81</sup> Illustratively, the multi-district litigation brought by Facebook users against the company in the wake of the Cambridge Analytica scandal involves claims brought under two federal statutes (the Stored Communications Act and the Video Privacy Protection Act); California’s Unfair Competition Law and state constitutional right to privacy; and an array of state common-law doctrines, including privacy torts, breach of contract, and negligence.<sup>82</sup>

At the federal level, the FTC is the main federal agency that deals with companies’ privacy practices, which it reaches “through its authority to police unfair and deceptive trade practices.”<sup>83</sup> In a study of the FTC’s privacy-related enforcement actions, Daniel Solove and Woodrow Hartzog describe “three broad areas” of FTC enforcement actions: “(1) deception, (2) unfairness, and (3) statutory and Safe Harbor enforcement.”<sup>84</sup>

Solove and Hartzog also show that the agency nearly always settles with the companies against which it files privacy-related complaints in exchange for a mix of remedial measures,<sup>85</sup> such as forward-looking changes to privacy practices, reporting and monitoring, and fines and other backward-looking remedies.<sup>86</sup> These settlements then become a form of precedent, so a settlement prohibiting one company from engaging in a particular privacy practice will also take hold at other companies.<sup>87</sup>

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and the development of privacy law in the U.S. See Mary D. Fan, *The Hidden Harms of Privacy Penalties*, 56 UC DAVIS L. REV. 71, 89–90 (2022) (discussing similarities and differences between the GDPR and the California Consumer Privacy Act).

81. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 587 (2014).

82. *In re Facebook, Inc.*, 402 F. Supp. 3d 767, 781–82 (N.D. Cal. 2019) (outlining the claims brought).

83. Solove & Hartzog, *supra* note 81, at 585.

84. *Id.* at 627.

85. *Id.* at 610–11 (describing FTC consent order process).

86. See *id.* at 614–19 (listing common features of FTC consent orders).

87. *Id.* at 621–23 (describing why FTC consent orders are treated as precedential, including because “FTC settlements are viewed by the community of privacy practitioners as having precedential weight”).

The FTC has reached privacy-related settlements with multiple platforms, including Facebook, Twitter, and Uber.<sup>88</sup> For example, in 2012, the agency settled a complaint against Facebook based on allegations that the platform's user privacy settings and other privacy-related communications were misleading, especially with respect to how much user information the company made available to third parties.<sup>89</sup> The settlement agreement required Facebook to improve its privacy notice and consent practices and establish a "comprehensive privacy program," among other requirements.<sup>90</sup> Then, in 2019, Facebook paid the largest fine in FTC history to settle allegations that its actions in the Cambridge Analytica scandal violated the 2012 agreement.<sup>91</sup> Still, the \$5 billion fine was less than one-quarter of the company's profits in the previous year, and Facebook's stock went up following the fine's announcement.<sup>92</sup> There are many lessons to draw from this, but one is that agency enforcement alone has not fixed platforms' privacy practices—a reality that the agency

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88. The settlements with Twitter and Uber are both related to security breaches. In 2022, the FTC alleged that Twitter had breached its 2011 settlement agreement by giving advertisers access to information users provided for security purposes. See Press Release, Fed. Trade Comm'n, FTC Charges Twitter with Deceptively Using Account Security Data to Sell Targeted Ads (May 25, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-charges-twitter-deceptively-using-account-security-data-sell-targeted-ads> [<https://perma.cc/JXX2-8P9Y>] (describing the claim against Twitter); see also Press Release, Fed. Trade Comm'n, Federal Trade Commission Gives Final Approval to Settlement with Uber (Oct. 26, 2018), <https://www.ftc.gov/news-events/news/press-releases/2018/10/federal-trade-commission-gives-final-approval-settlement-uber> [<https://perma.cc/M8AW-Y6M2>] (announcing FTC settlement conditions with Uber, with the underlying claim being based on a data breach).

89. See Complaint at 4–19, Facebook, Inc., 154 F.T.C. 1 (2012) (establishing the claims made against Facebook).

90. See Decision and Order at 3–9, Facebook, Inc., 154 F.T.C. 1 (2012) (setting forth the terms of the consent order).

91. See Press Release, Fed. Trade Comm'n, FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (July 24, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook> [<https://perma.cc/5RXQ-95JP>] (announcing Facebook's "record-breaking \$5 billion penalty").

92. See Nilay Patel, *Facebook's \$5 Billion FTC Fine Is an Embarrassing Joke*, VERGE (July 12, 2019), <https://www.theverge.com/2019/7/12/20692524/facebook-five-billion-ftc-fine-embarrassing-joke> [<https://perma.cc/3QWK-ETY2>] (noting that Facebook had \$22 billion in profits in 2018, as compared to the \$5 billion fine).



itself stated in an August 2022 advance notice of proposed rule-making related to privacy.<sup>93</sup>

States also regulate how companies handle user information. For example, California's Consumer Privacy Act (CCPA), which took effect in 2020,<sup>94</sup> creates a set of disclosure obligations and associated opt-out rights.<sup>95</sup> More recently, the California Privacy Rights Act (CPRA) passed by ballot initiative; it strengthens the CCPA by creating a new state Privacy Protection Agency, increasing penalties for privacy violations, and expanding the scope of certain substantive protections.<sup>96</sup> Several other states have also enacted online privacy regulations; these often resemble California's law in at least some respects.<sup>97</sup>

Privacy regulations that turn on consumer consent or opt-outs raise an important question about whether companies should be allowed to offer incentives to secure a user's acquiescence to the sale of their data. The CCPA allows companies to pay users who opt in to having their data collected and sold, or to offer users a choice between a free service that collects data and a paid service that does not.<sup>98</sup> But the idea of allowing

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93. See Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51280 (Aug. 22, 2022) (explaining that rulemaking is necessary because "experience suggests that enforcement alone without rule-making may be insufficient to protect consumers").

94. *CCPA Regulations*, STATE OF CAL. DEP'T OF JUST.: OFF. OF THE ATT'Y GEN., <https://oag.ca.gov/privacy/ccpa/regs> [<https://perma.cc/G3DD-3SJK>] (noting the CCPA's effective date of August 14, 2020).

95. See, e.g., CAL. CIV. CODE §§ 1798.100(c)–(e), 1798.120(a) (West 2023) (providing for some of such obligations and associated rights).

96. The CPRA was enacted as a ballot initiative to strengthen the CCPA. See *Text of Proposed Laws: Proposition 24*, CAL. SEC'Y OF STATE 43 (Nov. 3, 2020), <https://vig.cdn.sos.ca.gov/2020/general/pdf/top1-prop24.pdf> [<https://perma.cc/R44V-2BEJ>] (providing the text of the CPRA as it appeared on the ballot initiative and urging that "[u]nless California voters take action, the hard-fought rights consumers have won [with the CCPA] could be undermined by future legislation").

97. For a more comprehensive list of state digital privacy laws, see *State Laws Related to Digital Privacy*, NAT'L CONF. OF STATE LEGISLATURES (June 7, 2022), <https://www.ncsl.org/technology-and-communication/state-laws-related-to-digital-privacy> [<https://perma.cc/UH7S-TUHH>]. See also Anupam Chander et al., *Catalyzing Privacy Law*, 105 MINN. L. REV. 1733, 1769–77 (2021) (summarizing enacted and proposed state laws and their similarities to the CCPA); Fan, *supra* note 80, at 93–95 (same).

98. CAL. CIV. CODE § 1798.125(a)(2), (b)(1) (West 2023); see also Joanna Kessler, Note, *Data Protection in the Wake of the GDPR: California's Solution*

companies to pay a relatively low amount of money in exchange for access to more consumer data is controversial, as discussed in greater detail below.<sup>99</sup>

## B. CURRENT APPROACHES TO CONTENT MODERATION

### 1. Federal Law: Section 230 and the “Leave-It-to-the-Platforms” Approach

Federal law takes a hands-off approach to regulating platforms’ content moderation curation. The main sources of law that create this hands-off regulatory environment are Section 230 of the Communications Decency Act (Section 230) and the First Amendment.<sup>100</sup>

Section 230 of the Communications Decency Act states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>101</sup> This language guarantees that platforms can make content-moderation decisions without risking most forms of legal liability if they leave up user speech that is, for example, defamatory or threatening.<sup>102</sup>

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for *Protecting “The World’s Most Valuable Resource,”* 93 S. CAL. L. REV. 99, 114 (2019) (describing “a loophole . . . allowing companies to offer financial incentives to California residents for the collection and sale of their data . . .”).

99. See *infra* Part II.C.2 (discussing data commodification approaches to platform regulation).

100. 47 U.S.C. § 230; U.S. CONST. amend. I.

101. 47 U.S.C. § 230(c)(1). As Jeff Kosseff describes:

Section 230 was a direct and swift response to a . . . state court judge’s 1995 ruling against Prodigy, then the largest online service in the United States. . . . [T]he judge ruled that because Prodigy moderated some content and established online community policies, and it failed to delete posts that allegedly defamed the plaintiff, Prodigy could be sued for those posts regardless of whether it knew of them.

JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 2 (2019).

102. Section 230 does not immunize platforms against liability under criminal law or intellectual property law. 47 U.S.C. § 230(e)(1)–(2). While the Supreme Court was recently expected to decide whether Section 230 covers platforms’ algorithmic decisions to promote or monetize conduct, the Court did not reach the issue in light of the *Taamneh* opinion. See *Gonzalez v. Google LLC*, 598 U.S. 617, 622 (2023) (per curiam) (“We . . . decline to address the application of § 230 to a complaint that appears to state little, if any, plausible claim for relief.”); see also *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), *rev’g* *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021) (reversing on grounds unrelated to Section 230).

Professor Jeff Kosseff calls Section 230 the statute that “created the modern Internet.”<sup>103</sup> By eliminating the risk that imperfect content moderation would leave platforms liable for their users’ speech, the statute removed a strong disincentive for platforms to moderate content. Without Section 230, platforms might today have to choose from among three options, all of which they dislike: (1) perform no content moderation, rendering them unusable; (2) moderate some content, but risk some degree of legal liability; or (3) perform very thorough content moderation, the practicalities of which would require significant limits on who could post and what they could say.

The Section 230 approach is, for obvious reasons, the favored approach of the platforms themselves. It has always had its critics,<sup>104</sup> though some commentators who are critical of platforms have nonetheless concluded that some commonly proposed alternatives pose even bigger risks. For example, Professor Mary Anne Franks has argued against attempts to treat platforms as state actors that are subject to the First Amendment, reasoning that current First Amendment doctrine does a poor job of promoting substantive values of “democracy, autonomy, and truth.”<sup>105</sup> Franks then concludes that “[t]he rulers of the internet

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103. KOSSEFF, *supra* note 101, at 2.

104. For a rundown of proposed legislative changes, see Meghan Anand et al., *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021), <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html> [<https://perma.cc/G6QE-GZSV>] (compiling a comprehensive list of lawmakers’ proposed Section 230 reforms since 2020). For academic and expert proposals, see Danielle Keats Citron, *How to Fix Section 230*, 103 B.U. L. REV. 713, 713–14 (2023) (“While the over-filtering provision, § 230(c)(2), should be preserved, the under-filtering provision, § 230(c)(1), should be revised. Sites that deliberately encourage, solicit, or maintain intimate privacy violations, cyber stalking, or cyber harassment should not enjoy immunity from liability.”); Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 307 (2021) (describing the “goal of Democratic section 230 reform” as being “to encourage platforms to more closely police the content of their sites, removing false information and hate speech”); Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 YALE L.J.F. 475, 476–77 (2021) (urging statutory reform of Section 230).

105. Mary Anne Franks, *The Free Speech Black Hole: Can the Internet Escape the Gravitational Pull of the First Amendment?*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Aug. 21, 2019), <https://knightcolumbia.org/content/the-free-speech-black-hole-can-the-internet-escape-the-gravitational-pull-of-the-first-amendment> [<https://perma.cc/8DB9-GA9S>].

... may be the actors best suited to resist the black hole of the First Amendment.”<sup>106</sup>

Opponents of Section 230 reform often are not naive about the extent to which platforms’ and users’ incentives overlap. But they note that platforms are sometimes susceptible to public pressure, especially if legislators or regulators threaten to act on that public dissatisfaction.<sup>107</sup> For example, widespread complaints about Facebook’s practices have prompted the company to adopt various policy changes over the years; prominent examples include the company’s three-year experiment with allowing users to vote proposed site-governance proposals and its creation of the Facebook Oversight Board.<sup>108</sup>

These examples illustrate an important dynamic of platforms’ self-governance. While platforms are sometimes moved by collective pressure—perhaps depending on its source—the changes they then make are often limited and may wane further over time. Consider Facebook’s 2009 announcement that it would “Open[] Governance of Service and Policy Process to Users” by allowing users to provide input on some kinds of proposed policy changes and then potentially vote on their adoption.<sup>109</sup> It turned out that the devil was in the procedural details: a vote would be available only if enough users first commented on the proposal, and then would be binding only if at least thirty percent of users voted.<sup>110</sup> Three years later, only two policy changes had generated the user response required to trigger a vote, and neither vote reached the turnout threshold to bind the

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106. *Id.*

107. *Cf.* Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Feb. 27, 2018), <https://knightcolumbia.org/content/search-engines-social-media-and-editorial-analogy> [<https://perma.cc/24H3-MKAV>] (aggregating statements by lawmakers threatening greater regulation of platforms’ content moderation).

108. *See generally* Klonick, *supra* note 67 (describing the evolution of Facebook’s content-moderation practices). To summarize her detailed account, the company went from very malleable norms that were enforced by a small team, to development and application of a detailed set of standards that were published online, to adaptation of those standards for global contexts, to the addition of the Facebook Oversight Board. *Id.*

109. Press Release, Meta, Facebook Opens Governance of Service and Policy Process to Users (Feb. 26, 2009), <https://about.fb.com/news/2009/02/facebook-opens-governance-of-service-and-policy-process-to-users> [<https://perma.cc/BZ3E-9XKE>].

110. *Id.*

company.<sup>111</sup> Facebook’s next public proposal was to scrap the comment-and-voting process altogether; that proposal went to a vote, which was overwhelmingly negative—but it did not meet the turnout threshold, and so Facebook implemented its proposal anyway.<sup>112</sup>

The Oversight Board seems less likely to fizzle out, but it has its own limitations. It came into existence in 2020, “constructed as an independent entity to legitimize the company’s self-regulatory system.”<sup>113</sup> It is charged with reviewing selected content-moderation decisions to assess their consistency with Facebook’s own “content policies and values,”<sup>114</sup> and the company has promised to treat these decisions as binding.<sup>115</sup> In addition, the Board may make non-binding policy recommendations.<sup>116</sup> As others have pointed out, this structure and remit mean that Facebook retains the sole authority to set (and to change) content policies, to decide whose input counts in setting those policies, and to decide what information to supply the Board.<sup>117</sup>

Ultimately, the argument for the “leave-it-to-the-platforms” approach fails if there are better ways to regulate platforms. Or, as Julie Cohen put it, “[i]f the only alternative to private ordering

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111. See Will Oremus, *Facebook Would Like to End Its Experiment in Democracy, If That’s OK with You*, SLATE (Nov. 21, 2012), <https://slate.com/technology/2012/11/proposed-updates-to-governing-documents-facebook-to-end-its-experiment-in-democracy.html> [<https://perma.cc/68UW-NNJH>] (“[T]wo sets of proposed changes have drawn enough comments to be put to a vote. But neither came anywhere close to getting enough votes to decide the issue either way, and the proposals sailed through.”).

112. See Wilson Rothman, *Facebook Ignores ‘Minimal’ User Vote, Adopts New Privacy Policy*, NBC NEWS (Dec. 11, 2012), <https://www.nbcnews.com/tech/tech-news/facebook-ignores-minimal-user-vote-adopts-new-privacy-policy-flna1c7559683> [<https://perma.cc/L9V4-JTL8>] (reporting that Facebook adopted its proposal despite the negative responses it received and the proposal’s failure to reach the minimum turnout required).

113. Chinmayi Arun, *Facebook’s Faces*, 135 HARV. L. REV. F. 236, 243 (2022).

114. *Oversight Board Charter*, OVERSIGHT BD. 7 (Feb. 2023), <https://oversightboard.com/attachment/494475942886876> [<https://perma.cc/558G-NARR>].

115. As Chinmayi Arun writes, “[l]egal sanctions for noncompliance would not apply to Facebook if it chose to ignore the Board’s decisions.” Arun, *supra* note 113, at 244.

116. *Id.*

117. See, e.g., *id.* at 260 (describing Facebook’s partial response to a set of questions about the decision to ban Trump from the platform).

is authoritarianism, private ordering doesn't seem so bad. That proposition, however, tends to be assumed rather than proved, and it has become a favorite tech industry talking point."<sup>118</sup> The remainder of this Section discusses various alternatives to leaving platforms to self-regulate. It begins with a recent spate of state laws governing platform content moderation, and then turns to academic proposals to regulate platforms' treatment of their users.

## 2. State Regulation of Content Moderation: Testing First Amendment Boundaries

At least two states—Texas and Florida—have enacted statutes limiting social media platforms' abilities to make content-moderation decisions with respect to users in those states;<sup>119</sup> both statutes proceed from the premise that platforms like Twitter and Facebook unfairly censor conservative viewpoints.<sup>120</sup> In addition, New York and California have passed laws requiring platforms to publicize aspects of their content-moderation policies and practices.<sup>121</sup> Litigation about whether each of these statutes violates the First Amendment is ongoing; this Subsection briefly describes the challenges to the Texas and Florida laws to illustrate the First Amendment arguments that tend to follow attempts to regulate platforms.

Texas's statute, known as HB 20,<sup>122</sup> applies to large platforms, prohibiting them from engaging in nearly all viewpoint

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118. Julie E. Cohen, *From Lex Informatica to the Control Revolution*, 36 BERKELEY TECH. L.J. 1017, 1042 (2021).

119. H.B. 20, 87th Leg., 1st Spec. Sess. (Tex. 2021); S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021) (codified as amended at FLA. STAT. § 501.2041 (2023)).

120. See *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1099 (W.D. Tex. 2021) (collecting statements from Texas officials to this effect); *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022) (same with respect to Florida's law), *cert. granted in part*, 144 S. Ct. 478 (2023).

121. New York's law requires social media networks to have a way for users of covered platforms to report hate speech and a public policy about handling those reports. See *Assemb. 7865-A*, 2021–2022 Leg., Reg. Sess. (N.Y. 2022). California's law requires platforms to post their content-moderation policies. See *Assemb. B. 587*, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (requiring semiannual reports on terms of service). California also requires platforms to post policies specifically relating to distribution of controlled substances and threats of violence. See *Assemb. B. 1628*, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (controlled substances); S.B. 1056, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (violent posts).

122. H.B. 20, 87th Leg., 1st Spec. Sess. (Tex. 2021).

discrimination when they moderate content,<sup>123</sup> and requiring certain procedural steps such as allowing users to appeal content moderation decisions.<sup>124</sup> Florida’s statute, SB 7072,<sup>125</sup> requires platforms to disclose content moderation rules (which it terms “censorship, deplatforming, and shadow banning”) and apply them “in a consistent manner among its users.”<sup>126</sup> It also requires platforms to give a “thorough rationale” for individual moderation decisions to affected users<sup>127</sup> and to allow users to see posts chronologically.<sup>128</sup> Finally, it bans platforms from “deplatform[ing],” limiting the reach of posts, or adding statements to posts by either political candidates for Florida offices or “journalistic enterprise[s].”<sup>129</sup>

Unsurprisingly, a platform trade association has sued to invalidate both laws, including on First Amendment grounds.<sup>130</sup> These lawsuits involve difficult questions. Platforms are covered by the First Amendment when they engage in an activity that counts as speech or expression.<sup>131</sup> But what counts as speech or expression? The platforms, backed by some courts and commentators, sometimes argue that nearly everything they do that relates to managing, ranking, and displaying content is covered by

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123. *Id.* § 143A.002(a) (“A social media platform may not censor a user, a user’s expression, or a user’s ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user’s expression or another person’s expression; or (3) the user’s geographic location in [Texas].”).

124. *Id.* § 120.103(a)(2) (requiring social media platforms to “allow the user to appeal the decision to remove the content to the platform”).

125. S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021) (codified as amended at FLA. STAT. § 501.2041 (2023)).

126. FLA. STAT. § 501.2041(2)(b) (2023).

127. *Id.* § 501.2041(3)©.

128. *Id.* § 501.2041(2)(f)(2).

129. *Id.* § 501.2041(2)(h), (j); *see also id.* § 106.072(2) (“A social media platform may not willfully deplatform a candidate for office . . . beginning on the date of qualification [to be a candidate] and ending on the date of the election or the date the candidate ceases to be a candidate.”). The law defines “deplatform” as “the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days.” *Id.* § 501.2041(1)(c).

130. *See supra* note 120 and accompanying text (referencing cases).

131. *See, e.g.,* NetChoice, LLC v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022) (applying the First Amendment to social media company but stating “we reject the idea that corporations have a freewheeling First Amendment right to censor what people say”), *cert. granted in part*, 144 S. Ct. 477 (2023).

the First Amendment, analogizing to newspapers' or magazines' decisions about which authors to publish.<sup>132</sup> If this analogy is right,<sup>133</sup> then any content-moderation regulation would likely have to pass heightened constitutional scrutiny when challenged in court.<sup>134</sup>

In a case challenging the Florida law, the Eleventh Circuit largely agreed with this view, upholding an injunction against key provisions of the statute.<sup>135</sup> The court described platforms' content moderation as "curati[on]" that reflected editorial judgment, which was in turn protected by the First Amendment.<sup>136</sup> In reaching that conclusion, the court rejected an argument that platforms could be compelled to "host" others' speech,<sup>137</sup> reasoning that Florida's law affected platforms' own speech—their "editorial judgment to convey some messages but not others and thereby cultivate different types of communities that appeal to different groups."<sup>138</sup>

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132. See Whitney, *supra* note 107 (discussing court decisions endorsing the analogy between editorial decisions and content placement, and critiquing that analogy).

133. There exist persuasive arguments that the analogy between platforms' content moderation and newspapers' editorial judgment is flawed, at least as to some kinds of content moderation decisions. See, e.g., *id.* (dismantling the editorial analogy and evaluating competing analogies); Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629, 1629 (2014) (arguing against the idea that a search engine is a "speaker" when it ranks search results).

134. E.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247, 258 (1974) (holding that state statute guaranteeing a "right of reply" to press criticism violated newspapers' First Amendment rights); see also Genevieve Lakier & Nelson Tebbe, *After the "Great Deplatforming": Reconsidering the Shape of the First Amendment*, LAW & POL. ECON. PROJECT (Mar. 1, 2021), <https://lpeproject.org/blog/after-the-great-deplatforming-reconsidering-the-shape-of-the-first-amendment> [<https://perma.cc/GA24-6AWN>] (discussing the First Amendment's relationship to platforms' rights and duties).

135. *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1231 (11th Cir. 2022), *cert. granted in part*, 144 S. Ct. 478 (2023).

136. *Id.* at 1204–05, 1210.

137. See *id.* at 1215–16 (evaluating the Supreme Court's "hosting" cases (first citing *PruneYard Shopping Ctr. V. Robins*, 447 U.S. 74 (1980); and then citing *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47 (2006))).

138. *Id.* at 1213; see also *id.* at 1217 ("Unlike the law schools in [*Forum for Academic and Institutional Rights, Inc.*], social-media platforms' content-moderation decisions communicate messages when they remove or 'shadow-ban' users or content.").



Litigation regarding the Texas statute has been a different story. In a decision reversing a preliminary injunction issued by the district court, the Fifth Circuit framed platforms' content-moderation decisions as "censorship" rather than "speech," and rejected the idea that the First Amendment protects those decisions at all.<sup>139</sup> In addition, the court held that platforms should be regarded as common carriers,<sup>140</sup> a determination that is significant because court decisions allow common carriers to be regulated in order to ensure that the public has equal access to these communication channels.<sup>141</sup>

Putting aside whether it is even possible for platforms to comply with the requirements imposed by these statutes, the resulting court decisions illustrate the difficulty of applying this sort of content-moderation regulation. As the district court in the Texas case pointed out, a rule that platforms can engage in content-but-not-viewpoint discrimination would be exceedingly

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139. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 452, 459 (5th Cir. 2022) (“[A] speech host must make one of two showings to mount a First Amendment challenge. It must show that the challenged law either (a) compels the host to speak or (b) restricts the host’s own speech. The Platforms cannot make either showing. And (c) the Platforms’ counterarguments are unpersuasive.”), *cert. granted in part*, 144 S. Ct. 477 (2023).

140. *Id.* at 473 (“Texas permissibly determined that the Platforms are common carriers subject to nondiscrimination regulation.”). Arguments that social media platforms are common carriers predate this decision. *See, e.g.*, Adam Candeb, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 *YALE J.L. & TECH.* 391, 398–429 (2020) (applying common carrier analysis to broadband and social media companies); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 *J. FREE SPEECH L.* 377, 379–80 (2021) (describing the idea of a “common carrier” and distinguishing common carriers from publishers). Justice Thomas has also endorsed this view. *See Biden v. Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (mem.) (Thomas, J., concurring) (stating social media platforms share many similarities with common carriers). Imposing common carrier obligations on platforms has also had some support from progressives, though in different forms. For example, Lina Khan has proposed a “platform neutrality regime [that] could require a platform to treat all commerce flowing through its infrastructure equally, preventing a platform from using the threat of discrimination to extract and extort.” Lina M. Khan, *Sources of Tech Platform Power*, 2 *GEO. L. TECH. REV.* 325, 332 (2018).

141. *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 *HARV. L. REV.* 2299, 2316–24 (discussing the evolution of common carrier regulation and its reception in the courts).

slippery.<sup>142</sup> For example, a platform that bans the category of racist speech but allows postings about the Black Lives Matter movement will undoubtedly be alleged to have engaged in viewpoint discrimination by those who maintain that BLM is “racist.” Likewise, as the Eleventh Circuit described, Florida’s rule regarding “consistent” treatment of content means that platforms could face liability if they consider context, for example, handling differently two posts containing the same image based on the accompanying message of endorsement or repudiation.<sup>143</sup>

### C. PROPOSALS FOR PLATFORM REFORM

This Section turns to proposed approaches to regulating platforms. In turn, it briefly discusses increasing disclosure and opt-out rights; facilitating users’ sale of their data, including with “data unions”; increasing competition between platforms; and, finally, protecting user data by making platforms into information fiduciaries, or placing data rights in trusts.

#### 1. Notice and Disclosure Approaches

One common response to data privacy scandals is to emphasize that users should have more meaningful opportunities to consent to the use of their data, and a range of proposals urge stronger individual consent mechanisms.<sup>144</sup> In a slightly different vein, Kyle Langvardt has suggested requiring platforms to adopt product labels, similar to those required on cigarette packages, that “encourage consumers to make good choices.”<sup>145</sup> These warnings could be individualized, perhaps informing users how much time they have spent on a platform, or suggesting that they take breaks.<sup>146</sup>

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142. See *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1109–10 (W.D. Tex. 2021) (“[I]f a platform appends its own speech to label a post as misinformation, the platform may be discriminating against that user’s viewpoint by adding its own disclaimer.”).

143. *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1217 (11th Cir. 2022) (discussing how context differentiates activity that is sufficiently expressive from similar activity that is not), *cert. granted in part*, 144 S. Ct. 478 (2023).

144. See, e.g., Julie E. Cohen, *How (Not) to Write a Privacy Law*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Mar. 23, 2021), <https://knightcolumbia.org/content/how-not-to-write-a-privacy-law> [<https://perma.cc/QB9A-8CLM>] (canvassing and criticizing various proposals).

145. Langvardt, *supra* note 19, at 154.

146. *Id.* at 154–55 (elaborating on two different types of warning mechanisms: labeling requirements and devices for responsible use advocacy).

But privacy policies are already nearly ubiquitous, and many apps allow users to opt out of at least some forms of data collection.<sup>147</sup> Privacy scholars have convincingly shown that users mostly ignore or misunderstand both privacy notices and privacy settings.<sup>148</sup> Thus, as Professor Katharina Pistor has described, the GDPR's requirement that companies obtain consent before collecting data "has been translated into an 'agree' button for internet users to click whenever they enter a site that uses cookies"; most users agree "without hesitation."<sup>149</sup> In theory, this could be because users are indifferent to information privacy—but survey data and recent experience suggests that is not the case.<sup>150</sup> Thus, while disclosure and opt-out rules can be achievable political lifts, they are unlikely to lead to meaningful privacy protections for most users.

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147. *E.g.*, Solove & Hartzog, *supra* note 81, at 594 (discussing companies' voluntary adoption of "notice-and-choice" privacy policies to avoid being regulated).

148. *See, e.g.*, Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1884 (2013) (stating that most users seem to ignore or fail to understand privacy settings); Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 WASH. U. L. REV. 1461, 1486 (2019) (discussing conditions that render consent to privacy practices involuntary or unknowing).

149. Katharina Pistor, *Rule by Data: The End of Markets?*, 83 L. & CONTEMP. PROBS. 101, 109 (2020).

150. *See* Solove, *supra* note 148, at 1886 (discussing surveys where respondents across all age groups regularly asserted how important privacy was to them); *8 in 10 Americans Say They Value Online Privacy—But Would They Pay to Protect It?*, PANDA SEC. (Sept. 11, 2021), <https://www.pandasecurity.com/en/mediacenter/security/how-much-is-my-data-worth> [<https://perma.cc/Y3S3-9BHM>] ("80% of respondents reported the privacy of their data is more important to them . . . [than] keeping social media platforms free . . ."); Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control over Their Personal Information*, PEW RSCH. CTR. (Nov. 15, 2019), <https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information> [<https://perma.cc/K2BH-AJXX>] ("[A]bout one-in-five adults overall say they always (9%) or often (13%) read a company's privacy policy before agreeing to it. Some 38% of all adults maintain they sometimes read such policies, but 36% say they never read a company's privacy policy before agreeing to it."); Samuel Axon, *96% of US Users Opt Out of App Tracking in iOS 14.5, Analytics Find*, ARS TECHNICA (May 7, 2021), <https://arstechnica.com/gadgets/2021/05/96-of-us-users-opt-out-of-app-tracking-in-ios-14-5-analytics-find> [<https://perma.cc/8YBF-KSMD>] (reporting that when Apple adopted a policy requiring apps to obtain affirmative permission before tracking users on iOS devices, the vast majority of users refused permission).

## 2. Data-Commodification Approaches

Some envision a future in which social media companies continue to harvest and monetize user data—or perhaps take even more data, in more systematic ways—but begin to pay users for the privilege.<sup>151</sup> This could involve giving users a protected property interest in data that they generate, creating rules to structure how that interest can be transferred; it could also involve restricting how and when companies handle data, while allowing users to waive those restrictions in exchange for payment or other benefits.<sup>152</sup> Recent proposals include both Governor Gavin Newsom’s proposed “data dividend,”<sup>153</sup> and Republican Senator John Kennedy’s Own Your Own Data Act,<sup>154</sup> which would have required that social media companies license each user’s data at the time they create their account.

More ambitiously, Eric Posner and Glen Weyl urge platforms to pay users for high-quality data.<sup>155</sup> They see this as a win-win: platforms could reduce their content-moderation and data-extraction costs, and users could be compensated for the

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151. See, e.g., Steven A. Bibas, *A Contractual Approach to Data Privacy*, 17 HARV. J.L. & PUB. POL’Y 591, 610 (1994) (providing a hypothetical situation where people are paid for opting into no privacy); Zachary Mack, *Jaron Lanier’s Ideas for the Future of Profiting from Your Own Data*, VERGE (Apr. 9, 2019), <https://www.theverge.com/2019/4/9/18302076/data-monetization-control-manipulation-economy-jaron-laniers-virtual-reality-vr-vergecast> [<https://perma.cc/82WL-2SBA>] (describing a future where people can “bargain for the value of their data”); Eric A. Posner & E. Glen Weyl, *Want Our Personal Data? Pay for It*, WALL ST. J. (Apr. 20, 2018), <https://www.wsj.com/articles/want-our-personal-data-pay-for-it-1524237577> [<https://perma.cc/P7Y7-KJ7S>] (“In a real market, consumers would have far more power over the exchange: Here’s my data. What are you willing to pay for it?”); Kenneth C. Laudon, *Markets and Privacy*, COMM’NS ASS’N FOR COMPUTING MACH., Sept. 1996, at 92, 93 (conjecturing a National Information Market where people are compensated for use of their personal information).

152. See Delacroix & Lawrence, *supra* note 75, at 238 (“Today data ownership is sometimes hailed as a precondition in order to return ‘control’ to the individual . . .”).

153. See Jill Cowan, *How Much Is Your Data Worth?*, N.Y. TIMES (Mar. 25, 2019), <https://www.nytimes.com/2019/03/25/us/newsom-hertzberg-data-dividend.html> [<https://perma.cc/GM8N-LQ25>] (discussing Governor Gavin Newsom’s stated intent to develop a proposal for “a new Data Dividend for Californians”).

154. Own Your Own Data Act, S. 806, 116th Cong. (2019).

155. ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 210, 220–21 (2018) (imploping social media platforms to pay users in exchange for their personal data).

value of their data.<sup>156</sup> But they also see a need for an intermediating institution to make this system work fairly: enter what they call “data labor unions.”<sup>157</sup> To be clear, Posner and Weyl’s vision for data labor unions is considerably different from the platform unionism I envision in this Article: their focus is how to create a fairer market for data monetization,<sup>158</sup> rather than how to create a democratic structure to empower platform users to collectively decide on and pursue their own interests.

Specifically, Posner and Weyl’s data labor unions would act something like guilds, bargaining collectively on behalf of platform users who become data workers, but also training and disciplining them: “[D]ata workers will need some organization to vet them, ensure they provide quality data, and help them navigate the complexities of digital systems without overburdening their time.”<sup>159</sup> They would also negotiate pay with platforms, calling strikes if necessary. Alternatively, they write, “[a] more complicated approach could involve routing data labor through platforms set up by the union, so that the union could disrupt the supply of data if and when the Internet companies on the other side refused to pay reasonable wages.”<sup>160</sup>

The case for commodifying user data can have an intuitive appeal. Users produce data through their social interactions with others, and then platforms harvest and sell that data, often to companies that use it to better sell goods to consumers. As Pistor pithily describes, “[w]hen consumers and data producers overlap, they lose twice: first, they lose the value of their data; second, they lose their ability to choose transactions without manipulation.”<sup>161</sup> So why shouldn’t users recoup some of the wealth they generate for platforms and advertisers?

But pay-for-data policies are rightly controversial. Some academics critique the premise that it is possible to value data on an individual basis, given that it becomes much more valuable

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156. *Id.* at 220–21 (arguing that “there is a mismatch between Facebook’s needs and the reasons that users post photos” and that “what Facebook really needs is the capacity to ask users simple questions about the photos and receive answers from them”).

157. *Id.* at 243–46 (discussing data labor unions).

158. *See generally id.* at 205–49 (discussing user data as monetizable labor in the digital economy).

159. *Id.* at 241.

160. *Id.* at 242.

161. Pistor, *supra* note 149, at 112–13.

once aggregated; the greater the aggregation, the more valuable the data.<sup>162</sup> Others argue that data commodification is tantamount to commodification of ourselves.<sup>163</sup>

On a practical level, critics of the pay-for-data approach also point out that the predictable result will be that companies adopt one-sided adhesion contracts that offer users a pittance for their data.<sup>164</sup> Then, once that transaction is complete, platforms will face even fewer legal or moral restrictions regarding data use. Bearing out these critics' predictions, both research and experience suggest the value of an individual user's data is low. Facebook previously paid users aged thirteen to thirty-five "up to \$20 in gift cards per month" for installing an app that collected information about all of the user's phone use; the platform discontinued the app following reporting on its implications for privacy and competition.<sup>165</sup> Many pieces of information about a single

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162. *E.g.*, Diane Coyle, *Socializing Data*, 151 DÆDALUS 348, 352–54 (2022) (arguing data is better characterized as a means for exerting control than as a tradable good); Pistor, *supra* note 149, at 112 ("The value of data is not revealed by the price others are willing to pay for data points or even the sum of all these data points, but by the processing and analytical capacity of the data controller."); Huq, *supra* note 61, at 392 (companies with access to many users' data can "extract data that firms value in ways users cannot").

163. *See, e.g.*, Stacy-Ann Elvy, *Commodifying Consumer Data in the Era of the Internet of Things*, 59 B.C. L. REV. 423, 463–66 (2018) (describing the state of the debate and observing that "consumers frequently consent to the use of their information by IoT companies," which allows IoT companies to aggregate and sell user data in ways the consumer may not have foreseen); *cf.* Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1288 (2000) (critiquing a property rights approach to data as more likely to "encourage the market in personal data rather than constraining it").

164. *See, e.g.*, Will Rinehart, *How Do You Value Data? A Reply to Jaron Lanier's Op-Ed in the NYT*, TECH. LIBERATION FRONT (Sept. 23, 2019), <https://techliberation.com/2019/09/23/how-do-you-value-data-a-reply-to-jaron-laniers-op-ed-in-the-nyt> [<https://perma.cc/TS3Z-A529>] (listing several ways to estimate the value of data and showing estimates are much lower than proffered); Sam Harnett, *Why Privacy Advocates Are Worried About Newsom's Call for a 'Digital Dividend'*, KQED (Feb. 26, 2019), <https://www.kqed.org/news/11729086/why-privacy-advocates-are-worried-about-newsoms-call-for-a-digital-dividend> [<https://perma.cc/BHS6-VDEL>] (arguing that a digital dividend will regularize the idea that our personal information should be bought and sold).

165. Josh Constine, *Facebook Will Shut Down Its Spyware VPN App Onavo*, TECHCRUNCH (Feb. 21, 2019), <https://techcrunch.com/2019/02/21/facebook-removes-onavo> [<https://perma.cc/86VL-F252>]; *see also* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1002–03 (2019) (discussing Facebook's use of Onavo to identify competitors and then either buy them out or copy their functions).

individual can be bought and sold for much less—often just a few cents,<sup>166</sup> though some other estimates suggest Facebook user data might be worth more.<sup>167</sup> For example, the company Datacoup, a platform created to allow members to sell various types of data, initially set the maximum total amount a user could receive at \$10/month.<sup>168</sup> A study suggests this value is aligned with users' own sense of how much their data was worth: when asked how much money they would demand in exchange for specific pieces of information, U.S. respondents indicated that, on average, they would need under \$5 per month to allow companies to read their texts, send them ads, see their banking information, hear their voiceprints, and gather information about their network.<sup>169</sup> The same respondents would expect just over \$5 per month to share their contacts or fingerprints.<sup>170</sup> Further, when told that the buyer would be Facebook, respondents'

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166. See Emily Steel et al., *How Much Is Your Personal Data Worth?*, FIN. TIMES (June 12, 2013), <https://ig.ft.com/how-much-is-your-personal-data-worth> [<https://perma.cc/5W74-XU37>] (“[T]he average person’s data often retails for less than a dollar.”).

167. See Diane Coyle et al., *The Value of Data: Policy Implications*, BENNETT INST. FOR PUB. POL’Y 17–20 (2020), [https://www.bennettinstitute.cam.ac.uk/wp-content/uploads/2020/12/Value\\_of\\_data\\_Policy\\_Implications\\_Report\\_26\\_Feb\\_ok4noWn.pdf](https://www.bennettinstitute.cam.ac.uk/wp-content/uploads/2020/12/Value_of_data_Policy_Implications_Report_26_Feb_ok4noWn.pdf) [<https://perma.cc/C7QE-XAZW>] (establishing a market-based method of data valuation).

168. Tom Brewster, *Meet Datacoup - The Company That Wants to Help You Sell Your Data*, GUARDIAN (Sept. 5, 2014), <https://www.theguardian.com/technology/2014/sep/05/datacoup-consumer-sell-data-control-privacy-advertising> [<https://perma.cc/W58X-E8VG>] (“\$10 is the most anyone can earn for now . . .”). Ironically, Datacoup’s own website requires visitors to enter an email address to access either the “About Us” or the “FAQ” page. See *The Personal Data Revolution*, DATACOU, <https://datacoup.com> [<https://perma.cc/SM69-ZH2V>] (requiring an email address to access any portion of the site).

169. See Jeffrey Prince & Scott Wallsten, *How Much Is Privacy Worth Around the World and Across Platforms?*, TECH. POL’Y INST. 38 (Jan. 2020), [https://techpolicyinstitute.org/wp-content/uploads/2020/02/Prince\\_Wallsten\\_How-Much-is-Privacy-Worth-Around-the-World-and-Across-Platforms.pdf](https://techpolicyinstitute.org/wp-content/uploads/2020/02/Prince_Wallsten_How-Much-is-Privacy-Worth-Around-the-World-and-Across-Platforms.pdf) [<https://perma.cc/7KG6-69UQ>] (surveying users from around the world for how much they would need to be paid in exchange for their personal information). But cf. A.G. Winegar & C.R. Sunstein, *How Much Is Data Privacy Worth? A Preliminary Investigation*, 42 J. CONSUMER POL’Y 425, 426 (2019) (finding that Americans are willing to pay \$5 a month for data privacy but would need \$80 to give up personal data).

170. Prince & Wallsten, *supra* note 169, at 37–38 (reporting a U.S. respondent would expect \$6.66 to share contacts with a phone carrier and \$6.13 to share fingerprints with a smartphone company).

price for access to their contacts fell to under \$5.<sup>171</sup> At a minimum, these figures suggest that data commodification will not have much upside for users.

### 3. Competition and Countervailing Power Approaches

Other proposals seek to empower users by promoting competition between platforms.<sup>172</sup> These proposals often emphasize the social harms that can result when a few huge corporations exercise nearly unchecked power over the collection and distribution of information.<sup>173</sup>

Facebook's merger with Instagram and WhatsApp is a significant focal point for these arguments; Senators Amy Klobuchar and Elizabeth Warren have both proposed reversing this merger in order to promote competition.<sup>174</sup> In late 2020, the Federal Trade Commission and most states' antitrust regulatory bodies filed lawsuits claiming that Facebook's acquisition of competitors—especially Instagram and WhatsApp—was

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171. *Id.* at 38 (reporting a U.S. respondent would expect \$3.55 to share contacts with Facebook).

172. *E.g.*, Robert Post, *Exit, Voice, and the First Amendment Treatment of Social Media*, LAW & POL. ECON. PROJECT (Apr. 6, 2021), <https://lpeproject.org/blog/exit-voice-and-the-first-amendment-treatment-of-social-media> [<https://perma.cc/9TCS-B8JL>] (arguing it would be useful to consider both content moderation and constitutional questions about content regulation by social media companies through the lens of antitrust law); Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009, 1023 (2013) (“The key to competition on the Internet is . . . that the companies that occupy such commanding heights in the Internet ecosystem do not use their dominant positions to exclude and discourage firms operating in adjacent fields . . .”).

173. *E.g.*, Elettra Bietti, *Self-Regulating Platforms and Antitrust Justice*, 101 TEX. L. REV. 165, 194 (2022) (listing potential social harms); K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234, 240–46 (2018) (discussing forms of infrastructural power exercised by large corporations).

174. *See Break Up Big Tech*, ELIZABETH WARREN, <https://2020.elizabethwarren.com/toolkit/break-up-big-tech> [<https://perma.cc/J3QG-V3B7>] (proposing “unwinding up some existing anti-competitive mergers” like Facebook, Instagram, and WhatsApp); Brian Fung et al., *Mark Zuckerberg and Jack Dorsey Face Senate Grilling over Moderation Practices*, CNN: BUS. (Nov. 18, 2020), <https://www.cnn.com/business/live-news/mark-zuckerberg-jack-dorsey-senate-testimony/index.html> [<https://perma.cc/3XLA-BK25>] (summarizing Senator Klobuchar's questioning of Zuckerberg regarding Facebook's alleged anticompetitive tactic to purchase Instagram). Klobuchar is also a lead co-sponsor of the American Innovation and Choice Online Act, which would prohibit platforms from engaging in certain business practices. S. 2992, 117th Cong. (2022).



anticompetitive.<sup>175</sup> The suit, which is ongoing, seeks to force Facebook to divest its former competitors, among other relief. Other decisions by Facebook have also drawn antitrust scrutiny.<sup>176</sup>

To further enhance competition, some suggest creating digital public options to compete with existing private-sector search engines and social media platforms.<sup>177</sup> Professor Diane Coyle argues that platforms will not improve unless they face a competitor “not driven by profit maximisation: a public option whose platform is shaped not by whatever will generate [the] most clicks but by public service aims.”<sup>178</sup> Coyle’s proposal is inspired by and partially modeled on the BBC, which is publicly owned and competes with private broadcast stations.<sup>179</sup>

Others emphasize data portability, which would make it easier for users to move between platforms.<sup>180</sup> Advocates of this approach start from the insight that users might be reluctant to

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175. See Complaint for Injunctive and Other Equitable Relief at 7–9, *FTC v. Facebook, Inc.*, 560 F. Supp. 3d 1 (D.D.C. 2021) (No. 20-3590) (alleging harm to competition and anticompetitive conditioning from Facebook’s acquisition of Instagram and WhatsApp); see also Cecilia Kang & Mike Isaac, *U.S. and States Say Facebook Illegally Crushed Competition*, N.Y. TIMES (July 28, 2021), <https://www.nytimes.com/2020/12/09/technology/facebook-antitrust-monopoly.html> [<https://perma.cc/6KAP-QLSG>] (reporting on regulators’ suits against Facebook for antitrust violations associated with its purchase of Instagram and WhatsApp); Lemley, *supra* note 104, at 304 (listing efforts to regulate Amazon, Apple, Facebook, and Google).

176. See, e.g., *FTC v. Meta Platforms, Inc.*, 654 F. Supp. 3d 892, 941 (N.D. Cal. 2023) (denying FTC’s motion to preliminarily enjoin Meta’s merger with the virtual reality technology company, Within); Khan, *supra* note 165, at 1003 (discussing Facebook’s collection of information about visitors from websites that installed Facebook plugins).

177. See generally Diane Coyle, *The Public Option*, 91 ROYAL INST. PHIL. SUPPLEMENT 39 (2022) (advocating for the creation of a competing digital platform that will aim to serve the public); Rahman, *supra* note 173, at 249 (listing the creation of a public option as a strategy for curbing the power of existing platforms). For a more generalized argument in support of public options, see GANESH SITARAMAN & ANNE L. ALSTOTT, *THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY* (2019).

178. Coyle, *supra* note 177, at 47.

179. *Id.* at 47 (citing the BBC’s structure as inspiration for the proposal).

180. E.g., *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*, DIGIT. COMPETITION EXPERT PANEL 9–11 (Mar. 2019), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf) [<https://perma.cc/V6TQ-DWDG>] (emphasizing that digital markets should use data portability and data openness to promote competition).

“start over” on a new platform, building a user profile, finding contacts, uploading photos, etc., even if that platform has better privacy practices or user features.<sup>181</sup> In response to pressure, Facebook and Twitter have created ways for U.S.-based users to download or move at least some of their information.<sup>182</sup> In Europe, the GDPR empowers individuals who have provided personal data to a range of recipients (including social media platforms) to request a copy of that information for themselves or to have it transferred to another recipient.<sup>183</sup>

These measures would give users more options and make it easier for users to move between platforms. But they would not undo the network effects that make dominant platforms compelling. For example, when Elon Musk began to lay off employees and make (and then sometimes immediately reverse) changes to the platform’s operation, many Twitter users expressed interest in moving to other microblogging platforms.<sup>184</sup> (This surge apparently worried Twitter enough that it briefly prohibited users

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181. *Id.* at 36 (noting that the loss of personal data—meaning photos, search history, tracked activities, etc.—is a limitation on the digital platform market because “consumers moving to a new service will typically be unable to take their history with them”).

182. See Shoshana Wodinsky, *New Data Portability Tools Get Us Closer to Leaving Facebook the Website, but Not Facebook the Borg*, GIZMODO (Aug. 9, 2021), <https://gizmodo.com/new-data-portability-tools-get-us-closer-to-leaving-fac-1847448786> [<https://perma.cc/W4YF-NB8S>] (reporting on Facebook’s announcement that users could now move their data to other platforms); see also Nandita Bose, *Facebook Pushes for Data Portability Legislation Ahead of FTC Hearing*, REUTERS (Aug. 21, 2020), <https://www.reuters.com/article/us-facebook-antitrust/facebook-pushes-for-data-portability-legislation-ahead-of-ftc-hearing-idUSKBN25H0BG> [<https://perma.cc/RA8P-XVRN>] (“Data portability - considered a potential remedy for large technology companies whose control of social media material makes it harder for smaller rivals to get started - has become a key part of the antitrust debate in the United States and Europe.”).

183. See *Right to Data Portability*, INFO. COMM’R’S OFF., <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-data-portability/#ib1> [<https://perma.cc/S6WB-GL56>] (“The right to data portability entitles an individual to: receive a copy of their personal data; and/or have their personal data transmitted from one controller to another controller.”).

184. See Amanda Hoover, *Twitter Users Flock to Other Platforms as the Elon Era Begins*, WIRED (Oct. 28, 2022), <https://www.wired.com/story/twitter-users-flock-to-other-platforms-as-the-elon-musk-era-begins> [<https://perma.cc/9EGL-W7DL>] (discussing user sentiment following Musk’s acquisition of Twitter).

from posting handles they had created on other platforms.)<sup>185</sup> In response, some frustrated Twitter users set up profiles on alternative platforms like Mastodon or Post, and then waited to see if one of these competitors would gain a critical mass of users.<sup>186</sup> But when a new frontrunner was slow to emerge, many simply stayed put.<sup>187</sup> The lesson here is that increased competition is not enough: dominant platforms will almost never face serious choices between improving their practices and losing their user bases.

Two other interventions fall broadly under the mantle of countervailing power or competition, though they are not proposals to regulate existing platforms as such. First, some urge the development of “middleware” services that layer on top of platforms to give users access to more customized content moderation,<sup>188</sup> or “federated” platforms like Mastodon, which allow users to choose from different communities (“instances”) that set their own rules.<sup>189</sup> Middleware and federation both allow savvy users to choose a set of policies from available options, even if others in their network make different choices—though neither requires participatory or democratic decisions about what option will be available.

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185. See Ivan Mehta & Amanda Silberling, *Twitter Bans Posting of Handles and Links to Facebook, Instagram, Mastodon and More*, TECHCRUNCH (Dec. 18, 2022), <https://techcrunch.com/2022/12/18/twitter-wont-let-you-post-your-facebook-instagram-and-mastodon-handles> [<https://perma.cc/4Z75-8XAJ>] (reporting on Twitter’s temporary ban on posting handles for other social media platforms).

186. *Id.*

187. See Chris Stokel-Walker, *Twitter Quitters Haven’t Left Yet*, NEW SCIENTIST, Dec. 10, 2022, at 11, 11 (finding that most Twitter users did not move to other social media platforms); cf. Jonathan Schulman et al., *Report #97: Twitter, Social Media, and Elon Musk*, COVID STATES PROJECT 3–4 (Jan. 30, 2023), <https://www.covidstates.org/reports/twitter-social-media-and-elon-musk> [<https://perma.cc/JE8N-6HB3>] (finding that, between October 2022 and December 2022-January 2023, “the percentage of Americans who reported using Twitter dropped from 32.4% to 29.5%”).

188. E.g., Daphne Keller, *The Future of Platform Power: Making Middleware Work*, 32 J. DEMOCRACY 168, 168 (2021) (“The hope is that this more expansive set of options might break the chokehold that a very small number of platforms have on today’s information ecosystem . . .”).

189. See Alan Z. Rozenshtein, *Moderating the Fediverse: Content Moderation on Distributed Social Media*, 3 J. FREE SPEECH L. 217, 218 (2023) (analyzing the “Fediverse” and prominent federated platforms).

Second, constituencies including a company's employees, dissenting shareholders, or advertisers, could pressure platforms to make socially beneficial decisions.<sup>190</sup> After all, platform employees as a group are probably the single best source of knowledge about platforms' operations and effects, meaning they are well-positioned to advocate for improvements, if they are so inclined. This is true even if these workers do not formally unionize, as evidenced by examples such as the "digital walkout" by a group of Facebook employees that followed the platform's refusal to take down a post by President Trump calling for violence against people protesting the murder of George Floyd.<sup>191</sup> But while there are successful examples of this phenomenon, collective action by employees, shareholders, or advertisers has not yet emerged as an ongoing solution to platform problems. Moreover, it is unlikely that these groups' interests will always align with users' interests; for example, while users may be able to align with advertisers on certain high-profile content-moderation decisions (such as about whether to ban far-right users or content), it is exceedingly unlikely that advertisers would ever take up the mantle of user privacy, given that many benefit from information about users.

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190. *E.g.*, Sam Sutton, *The AFL-CIO Goes to War with Meta*, POLITICO (Dec. 16, 2022), <https://www.politico.com/newsletters/morning-money/2022/12/16/the-afl-cio-goes-to-war-with-meta-00074263> [<https://perma.cc/X252-5W9T>] (reporting on "a shareholder push for an independent review of Meta's audit and risk oversight committee"); Jacob Silverman, *Workers of the Facebook, Unite!*, NEW REPUBLIC (Dec. 29, 2020), <https://newrepublic.com/article/160687/facebook-workers-union-labor-organizing> [<https://perma.cc/8QTL-TCSZ>] (urging Facebook's workers to "organize and make demands as one"); Jennifer S. Fan, *Employees as Regulators: The New Private Ordering in High Technology Companies*, 2019 UTAH L. REV. 973, 985–86 (arguing that tech workers have an unmatched ability to make demands from their companies because they play an integral role in ensuring company functionality); Kelley Changfong-Hagen, Note, *"Don't Be Evil": Collective Action and Employee Prosocial Activism*, 5 COLUM. HUM. RTS. L. REV. ONLINE 188, 190 (2021) ("Recent strikes, petitions, walkouts, and unionization at major technology companies such as Google illustrate the growing demands from employees for heightened recognition of ethical standards in business practices by employers." (footnotes omitted)).

191. *E.g.*, Ryan Mac & Craig Silverman, *"Hurting People at Scale": Facebook's Employees Reckon with the Social Network They've Built*, BUZZFEED NEWS (July 23, 2020), <https://www.buzzfeednews.com/article/ryanmac/facebook-employee-leaks-show-they-feel-betrayed> [<https://perma.cc/Q8YW-35CX>] (describing Facebook employees' internal critiques of the platform's decisions, particularly as they related to inflammatory posts by President Trump, and their eventual walkout).

#### 4. Data Fiduciary and Trust Approaches

This Subsection groups two privacy-related proposals: treating platforms as information fiduciaries and putting user data in a trust. These proposals are quite different from each other, but I discuss them together because both start from the premise that specific decisions about user data should be made by people acting in users' interests.

Professor Jack Balkin is a leading proponent of a data-fiduciary approach, which would entail imposing on platforms duties of care and of loyalty.<sup>192</sup> These duties would limit how companies could use data—they could not sell or disclose it to others for their own benefit, and they could not act on conflicts of interest, such as by trying to influence users to act in ways that benefit third parties or the platforms themselves.<sup>193</sup>

This idea attracted the support of a group of Democratic senators who, in 2018, proposed legislation that would have imposed duties of “care, loyalty, and confidentiality” on online service providers with respect to certain categories of information.<sup>194</sup> Among other obligations, the legislation would have prohibited OSPs from disclosing or selling “individual identifying data” to

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192. See Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 UC DAVIS L. REV. 1183, 1207–08 (2016) [hereinafter Balkin, *Information Fiduciaries*] (arguing that online service providers should be seen as fiduciaries who owe duties of loyalty and care to service users); see also Jack M. Balkin & Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, ATLANTIC (Oct. 3, 2016), <https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346> [<https://perma.cc/2VHX-4LC2>] (arguing that online platforms should owe certain duties to their customers); Jack M. Balkin, *Information Fiduciaries in the Digital Age*, BALKINIZATION (Mar. 5, 2014), <https://balkin.blogspot.com/2014/03/information-fiduciaries-in-digital-age.html> [<https://perma.cc/8JJ4-HC5L>] (asserting that online service providers are fiduciaries and should owe fiduciary duties to their users); Laudon, *supra* note 151, at 101 (proposing the creation of a national marketplace for personal data, with information fiduciaries acting as brokers).

193. See Balkin, *Information Fiduciaries*, *supra* note 192, at 1207 (“The fiduciary must take care to act in the interests of the other person, who is sometimes called the principal, the beneficiary, or the client.”); see also Neil Richards & Woodrow Hartzog, *A Duty of Loyalty for Privacy Law*, 99 WASH. U. L. REV. 961, 964 (2021) (arguing that companies should owe a duty of loyalty to users); Claudia E. Haupt, *Platforms as Trustees: Information Fiduciaries and the Value of Analogy*, 134 HARV. L. REV. F. 34, 37 (2020) (analogizing the online service provider and user relationship to a trustee-beneficiary relationship and arguing that providers have “a fiduciary duty to act in the best interests of both current and future beneficiaries of the trust”).

194. Data Care Act of 2018, S. 3744, 115th Cong. § 3(a) (2018).

others without first requiring recipients to agree to abide by the same duties to users.<sup>195</sup>

However, now-FTC Chair Lina Khan and Professor David Pozen have criticized Balkin's proposal as inadequate for solving the problems that they agree plague platforms. They question how companies will square their duties as information fiduciaries with their state-law duties to shareholders<sup>196</sup> and how the duty would be enforced.<sup>197</sup> And Professor Huq argues that the proposal would not cover information that is gathered and transmitted outside the constraints of the relationship between a specific user and a platform, unless it became "a more free-floating, miasmatic duty of trustworthiness and constraint."<sup>198</sup>

Others propose controlling data use through trusts charged with preventing socially harmful uses, and promoting socially beneficial ones.<sup>199</sup> For example, Huq argues for control of data to

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195. *Id.* § 3(b).

196. See Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 503 (2019) ("Under Delaware law, the officers and directors of a for-profit corporation already owe fiduciary duties — to the corporation and its stockholders."). *But cf.* Woodrow Hartzog & Neil Richards, *The Surprising Virtues of Data Loyalty*, 71 EMORY L.J. 985, 985 (2022) (arguing that while the adoption of the duty of loyalty might have some flaws, it should still be considered a key tool to protect privacy).

197. Khan & Pozen, *supra* note 196, at 524–25. Khan and Pozen suggest that if the duty is to be enforced in court, then "Balkin's proposal has the potential to swallow judicial dockets even with the aid of class actions . . ." *Id.* at 524. This might actually be a best-case scenario; it seems more likely that companies would insert individual arbitration clauses into user agreements. Unless significant damages remedies were available, these clauses would render the duty unenforceable as a practical matter.

198. Huq, *supra* note 61, at 376. The Data Care Act would have partially addressed Huq's objections by requiring platforms that sell data to require buyers to agree to abide by the same constraints that are imposed by the Act on the platforms themselves. S. 3744 § 3(b)(3)(B). However, the Data Care Act does not account for data gathered from third parties.

199. Huq, *supra* note 61, at 336 (discussing various aspects of a public trust for data); Pistor, *supra* note 149, at 120 (suggesting that "a trust fund that owns the data" could be created in order to allow users to "control both the harvesting and use of the data"); Delacroix & Lawrence, *supra* note 75, at 236 (arguing for creating a data trust in which trustees can "exercise the data rights conferred by the GDPR . . . on behalf of the Trust's beneficiaries" and "negotiate data use in conformity with the Trust's terms"). Others propose "personal data platform cooperatives" as a way of democratizing control over personal data. *E.g.*, Michele Loi et al., *Towards Rawlsian 'Property-Owning Democracy' Through Personal Data Platform Cooperatives*, 26 CRITICAL REV. INT'L SOC. & POL. PHIL. 769, 769

be vested in “public trusts,” where data would remain in private hands, but be subject to restrictions and mandates imposed in the public interest:

The ensuing trust could permit commercial use on the payment of a user fee, which would then be used for the benefit of the population creating the data. The trust could forbid certain uses of the data—such as the use of photographic images to train facial recognition instruments. Or the trust could impose obligations to create epistemic public goods with the data.<sup>200</sup>

Huq argues that this arrangement offers the best of both worlds in that it allows for control over data that is both flexible and democratically accountable, while also avoiding the surveillance risks that would arise if government had direct access to raw data.<sup>201</sup> In fact, some cities have begun to experiment with versions of trusts to protect data collected by for-profit entities like Uber, and use it for public purposes, such as understanding and minimizing traffic congestion.<sup>202</sup>

Of the various approaches discussed in this Section, the trust approach is most similar to the platform-union approach discussed below. Delacroix and Lawrence, who also urge the creation of private data trusts, conceive of them as “bottom-up governance structure[s]” that could facilitate “collective setting of terms,” including through robust consultation between trustees and settlors/beneficiaries.<sup>203</sup> They suggest that in the social media context, data trusts might also bargain on behalf of their beneficiaries over other user terms and conditions—though this

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(2020) (“We advocate the personal data platform cooperative (PDPC) as a means to bring about Rawls’s favoured institutional realisation of justice, the property-owning democracy . . .”).

200. Huq, *supra* note 61, at 336.

201. *Id.* at 381 (discussing how public trusts can “mitigate some of the power asymmetries and regressive effects of present data economies” while simultaneously “employ safeguards to foreclose governmental misuses of information”); *see also* Viljoen, *supra* note 4, at 645 (discussing how data could be introduced into the public domain and managed by a public trust for use in service of the public good).

202. Huq, *supra* note 61, at 395–96 (mentioning several examples of cities partnering with non-profit services akin to trusts to serve the public interest).

203. Delacroix & Lawrence, *supra* note 75, at 237, 242 (writing that data trusts’ settlors and beneficiaries would generally be the same groups of people—users would establish data trusts to enforce acceptable data practices for the benefit of those same users). Unlike Huq, they envision a proliferation of private data trusts that could be in competition with each other for beneficiaries, though they also suggest creating default public trusts. *Id.* at 251.

negotiating power would be “merely a side effect of the power that would accrue to the Trust through the pooling of data rights.”<sup>204</sup>

On the other hand, while this approach is aimed at preserving data rights for the good of user-beneficiaries or the public in general, it does not necessarily facilitate users’ democratic participation in the choices the trust makes about data use.<sup>205</sup> Further, while the trust mechanism is well-suited to preventing the exploitation of user data, it may not address content-moderation problems. Therefore, even if a jurisdiction pursues a data trust approach, there would still be benefits to platform unions. Moreover, the two approaches could work hand-in-hand; a platform union might itself decide to seek the creation of a data trust.

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This Part has discussed various approaches to regulating platforms and some of their benefits and drawbacks. But, with the exception of data trusts, these approaches are not designed to respond to the collectiveness of platform problems.<sup>206</sup> The next Part turns to the affirmative case for adding collective bargaining to the platform-regulation toolbox.

### III. COLLECTIVE PROBLEMS CALL FOR COLLECTIVE SOLUTIONS

There are at least four related reasons to think that collective bargaining could be a useful response to platform problems, either on its own or together with other regulation.<sup>207</sup> Section A discusses the first two reasons: unionization brings strength in numbers and collective bargaining is an iterative process that

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204. *Id.* at 249.

205. *See* Mazzurco, *supra* note 65, at 826 (“[C]onsumers face concrete costs from abstaining from participation on certain platforms and may be unable to find adequate substitutes.”).

206. *See* Viljoen, *supra* note 4, at 617 (criticizing current approaches to data privacy for failing to account for data’s collectiveness and calling for democratically legitimate data regulation).

207. In the workplace context, collective bargaining goes hand-in-hand with statutory minimum employment standards. *See, e.g.*, Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 625 (2019) (discussing how New Deal era legislators envisioned a mutually reinforcing relationship between the NLRA and the FLSA); Luke Norris, *The Workers’ Constitution*, 87 FORDHAM L. REV. 1459, 1462 (2019) (arguing that the NLRA, FLSA, and SSA were part of a “conjoined effort to provide workers with economic security rights”).



effectively addresses open-ended and complex problems. In the platform context, unions would have incentives to develop expertise about platforms' operations and their members' preferences, educate members about platforms' operations, and advance ways of addressing platform problems consistent with members' goals and desires. Section B turns to platform users' current collective action aimed at influencing their treatment, which suggests users want a say in their treatment by platforms. Finally, Section C discusses how platform unions could strengthen democracy.

#### A. COLLECTIVE VOICE AND INFORMATION ASYMMETRY

The case for a strength-in-numbers approach is straightforward: platform users are individually powerless to influence their treatment by platforms—but collectively powerful.<sup>208</sup> One might analogize to the circumstances that led Congress to enact the NLRA in the midst of the Great Depression: individual workers could not negotiate decent wages and good treatment from employers, leading many to seek better conditions through the power of collective action.<sup>209</sup> Aiming to facilitate unionization and collective bargaining, the NLRA's stated purpose was to disrupt "inequality of bargaining power between employees . . . and employers."<sup>210</sup>

While the consequences are different in the platform context, the dynamics are similar.<sup>211</sup> Very few individual users are

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208. For example, individual consumers are powerless to negotiate with platforms over new settings to protect their privacy. *See Mazzurco, supra* note 65, at 827 ("Individual consumers are at the mercy of platforms with respect to their information privacy . . .").

209. *See Norris, supra* note 207, at 1466 ("In the Progressive Era and through the Great Depression, economic life was coming to be seen by many workers, movements, and political leaders as a sphere of vast insecurity, where citizens were powerless in bargaining with employers over their wages, hours, and working conditions . . .").

210. National Labor Relations Act of 1935, Pub. L. No. 74-198, § 1, 49 Stat. 449, 449 (codified as amended at 29 U.S.C. § 151).

211. I am not the first to draw this comparison. *E.g., Mazzurco, supra* note 65, at 827 ("The platform political economy's more pronounced bargaining-power disparity yields a dynamic much the same as for employers and workers."); Kaitlyn Tiffany, *Can YouTubers Really Unionize?*, VOX (July 30, 2019), <https://www.vox.com/the-goods/2019/7/30/20747122/youtube-union-fairtube-ig-metall-instagram> [<https://perma.cc/HP5B-4TFU>] (quoting YouTubers Union founder, Jörg Sprave, drawing an analogy between factory workers during the

so significant to a platform's performance that they could influence their own treatment. Moreover, the information asymmetry between user and platform is usually enormously large—most users don't know much at all about what platforms are doing, while platforms have a lot of information about their users.<sup>212</sup>

Empowering platform unions to bargain collectively responds to both aspects of this power imbalance. First, the platform union would gather information about represented users' preferences.<sup>213</sup> Second, it would build expertise about how the platform operates, in part through its own efforts, and in part because a collective bargaining law could compel platforms to provide platform unions with notice of and information about their operations, including prospective changes to data privacy or content moderation policies.<sup>214</sup> Moreover, these two functions would inform each other; platform unions could educate members about what platforms do (and why they do it), which would in turn influence members' goals.<sup>215</sup>

To extend the workplace analogy, consider an employer contemplating making a change to some aspect of a health insurance plan. Assuming there is no legal impediment to the change, the non-union employer could simply go ahead, announcing the change only after it is a done deal; few workers would have either the leverage or the knowledge to even attempt to bargain. But in a unionized workplace, the employer would be legally obligated to bargain over the change; the union would discern and pursue workers' interests, bringing to bear the expertise of lawyers and actuaries, and its own knowledge of the employer's past conduct

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Industrial Revolution and content creators) ("If someone complained, they'd say, 'There's three people who want your job, so if you no longer want it, there's the door.'").

212. See Mazzurco, *supra* note 65, at 825 (noting that consumers "lack knowledge of how platforms collect and use personal information" and observing that platforms can use the information they have about users to manipulate them).

213. On some platforms, user preferences could be quite diverse. See, e.g., Tiffany, *supra* note 211 (highlighting the "disparate" concerns among YouTube users).

214. This point is discussed further *infra* Part IV.C.

215. For example, in the information privacy context, "[a] consumer collective bargaining organization can, through its educative function, nurture consumers' ability to form information privacy norms and help translate them into actionable demands on platforms." Mazzurco, *supra* note 65, at 858.

and priorities.<sup>216</sup> And the results could go beyond the employer adopting the change or not; for example, the union and employer might together arrive at an entirely different approach to resolving the concerns that led the employer to propose the change.

#### B. COLLECTIVE ACTION ON PLATFORMS TODAY

The phrase “collective action” is often used in the context of workplace protest,<sup>217</sup> and some examples of platform users’ collective action are exactly that: workers protesting for better treatment by the companies that control their wages and working conditions.<sup>218</sup> But other examples involve users who do not make money on platforms coming together to try to influence how platforms treat them.<sup>219</sup>

The phrase “platform workers” often connotes drivers who are dispatched to do particular jobs through an app like DoorDash or Instacart.<sup>220</sup> But it can also apply to, for example, content creators on YouTube or Instagram, workers who accept assignments on Amazon’s Mechanical Turk platform, or people who make jewelry or grow plant starts to sell on Etsy.<sup>221</sup> Some of these workers are relatively self-directed in the sense that

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216. See generally *Collective Bargaining Rights*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/collective-bargaining-rights> [<https://perma.cc/D97L-28XQ>] (“Your union and employer must bargain in good faith about wages, hours, and other terms and conditions of employment until they agree on a labor contract or reach a stand-off or ‘im-passe.’”).

217. See Norris, *supra* note 207, at 1501 (noting that workers could gain the security of better working conditions from collective action).

218. For example, two DoorDash drivers launched a campaign on Facebook to protest DoorDash’s practice of offering a driver higher pay if another driver has already declined the job. See Li Jin et al., *A Labor Movement for the Platform Economy*, HARV. BUS. REV. (Sept. 24, 2021), <https://hbr.org/2021/09/a-labor-movement-for-the-platform-economy> [<https://perma.cc/4EG7-TFT9>] (“In October 2019, two DoorDash drivers . . . launched the #DeclineNow Facebook group. . . . In the Facebook group, which now numbers more than 30,000 members, they urged peers to reject any delivery that doesn’t pay at least \$7—more than double the base rate of \$3.”).

219. See, e.g., Niebler & Kern, *supra* note 49, at 4 (documenting how the Youtubers Union is comprised partly of viewers protesting advertising practices).

220. See generally Jin et al., *supra* note 218 (using DoorDash drivers as an example of “platform workers”).

221. See *id.* (noting the benefits of platform labor, such as allowing someone to sell their creations through Etsy).

they decide what kinds of content they will produce, albeit within the constraints imposed by the platforms on which they operate. Others have their tasks set by customers, whose orders are mediated by platforms. But all of these workers try to make money under conditions that are controlled to varying degrees by their respective platforms.<sup>222</sup> They also tend to bear more risk than do traditional employees, and often work without labor and employment law protections.<sup>223</sup>

Platform workers, including influencers or content creators, may turn to collective action to try to improve their working conditions, with or without the help of traditional labor unions. For example, in 2019, a group of YouTube creators began organizing, eventually teaming up with the German labor union IG Metall, to press the platform to meet a set of demands related to content moderation.<sup>224</sup> This was in response to a 2017 change aimed at preventing hateful or misleading videos from being monetized,<sup>225</sup> but that also led to a large number of incorrect and arbitrary demonetizations.<sup>226</sup>

The organizing effort began when a popular German content creator “published a campaign video in which he called ‘all YouTubers to arms’ and created a Facebook group, which 15,000 individuals joined within six weeks”—both creators and viewers.<sup>227</sup> This group allowed creators to share information, generate a discussion about what was happening, and organize

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222. See, e.g., Tiffany, *supra* note 211 (highlighting how IG Meme Union Local 69-420 is interested in transparency from the platform their “livelihoods . . . depend on”).

223. Numerous scholars have documented the precarious working conditions facing platform workers, especially Uber and Lyft drivers. *E.g.*, Veena Dubal, *On Algorithmic Wage Discrimination*, 123 COLUM. L. REV. 1929, 1961–76 (2023) (analyzing the wage-setting practices of Uber and Lyft through ethnographic research).

224. See Niebler, *supra* note 41, at 225 (“In July 2019, the YouTubers Union and IG Metall launched *FairTube*, a joint campaign that issued six demands to YouTube and called on creators across the platform to join the cause . . .”).

225. See Niebler & Kern, *supra* note 49, at 4 (“To counter this development and regain trust among advertisers, YouTube enforced a strict regime of (mostly) automated content moderation on the platform.”).

226. *Id.* (highlighting that creators’ videos were demonetized regardless of violations). As a previous Part described, YouTube’s various content moderation decisions and algorithmic tweaks can be tremendously consequential for creators. See *supra* Part I.A.2.

227. Niebler & Kern, *supra* note 49, at 4 (citation omitted).

collective action.<sup>228</sup> YouTube engaged with the group in a very limited way, meeting with the creator who organized the group on a few occasions but refusing to make lasting changes.<sup>229</sup>

This non-response led the group to collaborate with IG Metall, and then to launch a campaign dubbed “FairTube.”<sup>230</sup> The group used Facebook polls to settle on a set of demands: transparency about monetization policies; clear explanations about content-moderation decisions and the opportunity to discuss them with a human; a process for contesting those decisions through an independent dispute resolution “mediation board”; and a process for including creators in “important decisions.”<sup>231</sup> The group put pressure on YouTube to agree to the demands through a media campaign, by making regulatory complaints under the GDPR and by filing lawsuits alleging that creators were employees entitled to coverage under employment law.<sup>232</sup> The YouTubers union seems to have successfully influenced YouTube’s policies, though there is no formalized relationship or collective bargaining agreement.<sup>233</sup>

Another example involves SAG-AFTRA, the union best known for representing actors.<sup>234</sup> It approved an “influencer

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228. *See id.* (“[T]he YTU served three main purposes for members: to gather and exchange data, to organise or support campaigns and to discuss ongoing changes on the platform.”).

229. *Id.* at 5 (“While YouTube proved open to talking with some large creators individually, the company refused to communicate with the group and rejected any institutionalised form of review and feedback.”).

230. *Id.* (“After talks with YouTube proved unable to produce lasting agreements, the YTU entered into a cooperative venture with the German trade union IG Metall.”).

231. *Id.* at 6.

232. *Id.* The group is convinced that YouTube’s practice of sorting and tagging YouTubers’ videos in ways the creators cannot see or understand violates “the GDPR’s directive not to generate data about users without telling them.” *See Tiffany, supra* note 211.

233. *See Niebler & Kern, supra* note 49, at 6 (highlighting YouTube’s refusal to invite discussion with YouTube Union); *see also Organizing YouTube - IG Metall Negotiates Better Rights*, INDUSTRIALL GLOB. UNION (Oct. 5, 2020), <https://www.industriall-union.org/organizing-youtube-ig-metall-negotiates-better-rights> [<https://perma.cc/8GVP-R5J5>] (“Following a popular campaign, the union managed to negotiate more rights and better conditions for content creators.”).

234. *See Taylor Lorenz, TikTok Stars and Social Media Creators Can Now Join Hollywood’s Top Union*, N.Y. TIMES (Oct. 4, 2021), <https://www.nytimes.com/2021/02/12/style/influencer-union-hollywood-sag-aftra.html> [<https://>

agreement” that covers social media influencers who create videos or do voice-over work, creating a way for existing SAG members to do influencer work, and for influencers who are not already union members to join.<sup>235</sup> So far, the union mostly leverages economies of scale to provide member benefits that might otherwise be too expensive for individual influencers to pursue.<sup>236</sup> In addition to pension and health benefits offered through the union, members also get help dealing with pay disputes and intellectual property issues, such as image rights.<sup>237</sup> But this could be a precursor to more; as more influencers join the union, it would have power to push for better pay and other working conditions.

Content creators have collectively advocated for better treatment in other ways as well. For example, Adesuwa Ajayi started an Instagram account called “Influencer Pay Gap” to help influencers of color organize for equal pay.<sup>238</sup> The account mainly publishes influencers’ descriptions of their pay for various jobs.<sup>239</sup> A UK-based group, The Creator Union, focuses on

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[perma.cc/EA4A-6Q4G](https://perma.cc/EA4A-6Q4G)] (noting that SAG-AFTRA is “Hollywood’s biggest union”).

235. See Jacqui Germain, *Influencers Are Unionizing with SAG-AFTRA to Gain Protection, Community at Work*, TEEN VOGUE (Mar. 16, 2021), <https://www.teenvogue.com/story/influencers-union-sag-aftra> [<https://perma.cc/MYV8-DVST>] (“[I]ndependent creators who produce sponsored videos or voiceover work . . . can join SAG-AFTRA’s 160,000-member organization.”); see Lorenz, *supra* note 234 (“SAG-AFTRA’s new agreement opens membership up to more YouTubers, TikTokers, Snapchat stars and anyone else creating sponsored videos or voice overs.”). For more on the agreement, see *Influencer Agreement Fact Sheet*, SAG-AFTRA, <https://www.sagaftra.org/influencer-agreement-fact-sheet> [<https://perma.cc/6GQG-744G>] (select the “How are Influencers covered now?” tab).

236. See Germain, *supra* note 235 (“[T]he organization also ensures collective bargaining power and union assistance if labor, payment, or contract disputes arise with a company.”).

237. See *generally Influencer Agreement Fact Sheet*, *supra* note 235 (describing the benefits the agreement provides).

238. See Ashley Carman, *Black Influencers Are Underpaid, and a New Instagram Account Is Proving It*, VERGE (July 14, 2020), <https://www.theverge.com/21324116/instagram-influencer-pay-gap-account-expose> [<https://perma.cc/TNG3-PWS2>] (“Influencer Pay Gap was created by Adesuwa Ajayi, a Black woman who works at the talent agency AGM and manages influencers.”).

239. See #INFLUENCERPAYGAP (@influencerpaygap), INSTAGRAM, [https://www.instagram.com/influencerpaygap/?utm\\_source=ig\\_embed&ig\\_rid=f90cc5a2-debc-4417-9839-5139436eff85](https://www.instagram.com/influencerpaygap/?utm_source=ig_embed&ig_rid=f90cc5a2-debc-4417-9839-5139436eff85) [<https://perma.cc/Z6ZC-EUKW>]

organizing around fair pay and discrimination.<sup>240</sup> And a memers union—“IG Meme Union Local 69-420”<sup>241</sup>—focuses on publicizing content-moderation issues.<sup>242</sup> Likewise, content creators sometimes come together to deal with particular problems. For example, when an influencer management company stopped making promised payments, some of the company’s clients used Facebook to share their experiences, warn others, and pressure the company to live up to its obligations.<sup>243</sup>

Creators’ collective action is easily recognizable as workplace collective action: creators are workers and platform algorithms are their working conditions.<sup>244</sup> In fact, one commentator has described how relatively minor changes to the National Labor Relations Act could bring U.S. content-creators under labor

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(posting direct messages from influencers describing the work they did and the amount they were paid).

240. See generally The Creator Union (@thecreatorunionuk), INSTAGRAM, <https://www.instagram.com/thecreatorunionuk> [<https://perma.cc/7A22-ZHX2>].

241. See IG Meme Union Local 69-420 (@unionizedmemes), INSTAGRAM, <https://www.instagram.com/unionizedmemes/?hl=en> [<https://perma.cc/N9BK-UJ8X>].

242. *Id.* (posting memes based around supporting unions and content-moderation issues); see also Rebecca Jennings, *Leftist Memes Are Everywhere on Instagram. Now Their Creators Are Unionizing.*, VOX (Apr. 22, 2019), <https://www.vox.com/the-goods/2019/4/22/18507941/instagram-meme-union> [<https://perma.cc/35JF-H58E>] (“[T]he union is focused on holding Instagram accountable to its ever-changing algorithms and practices that it deems shady: limiting the audience of individual accounts, censoring posts without reason or disabling accounts entirely, and the rampant practice of large accounts stealing content from smaller accounts and then monetizing it.”).

243. See Taylor Lorenz, *When a Sponsored Facebook Post Doesn’t Pay Off*, ATLANTIC (Dec. 26, 2018), <https://www.theatlantic.com/technology/archive/2018/12/massive-influencer-management-platform-has-been-stiffing-people-payments/578767> [<https://perma.cc/N36Y-7X9H>] (describing influencer’s reactions to the platform Speakr’s failure to pay them).

244. See, e.g., Niebler & Kern, *supra* note 49, at 4 (noting that YouTube Union is comprised of viewers and creators). Some commentators argue that generating data by interacting on social media should be thought of as work because it generates value for the platforms. *E.g.*, Francesca Procaccini, *Social Net Work* (forthcoming) (manuscript at 1) (on file with author) (“Users, on the other hand, show up each day to contribute to building a profitable product, at the direction of the platform, and for compensation of value to the user. Their data is their labor.”); Imanol Arrieta Ibarra et al., *Should We Treat Data as Labor? Let’s Open Up the Discussion*, BROOKINGS (Feb. 21, 2018), <https://www.brookings.edu/articles/should-we-treat-data-as-labor-lets-open-up-the-discussion> [<https://perma.cc/J67R-98A5>]. This Article’s argument does not turn on the “data as labor” analogy.

law's ambit.<sup>245</sup> But collective action aimed at changing users' treatment by platforms is not limited to users who make money through platforms; other users also work together to educate each other about platform problems and seek change.<sup>246</sup>

Users' collective action sometimes looks like petitions addressed to platform owners or managers, such as when Twitter users start a hashtag or tag the company's owner to call for functionality changes or object to how the platform handles content moderation. For example, user advocacy pushed Facebook and other platforms to change their treatment of photos of breastfeeding.<sup>247</sup> In other instances, users have explicitly framed their collective actions as strikes or boycotts. Examples include a group of Bluesky users who began a "posting strike" to pressure the platform to bar users from incorporating racial slurs in their usernames;<sup>248</sup> and Reddit moderators who struck over plans to begin charging third-party developers who sought access to Reddit's application programming interface.<sup>249</sup>

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245. See Eugene K. Kim, *Data as Labor: Retrofitting Labor Law for the Platform Economy*, 23 MINN. J.L., SCI. & TECH. 131, 155–58 (2022) (explaining how the use of a "services performed" model instead of a "compensation received" model could expand NLRA application to more workers).

246. See *supra* note 244 and accompanying text (discussing users as workers).

247. See GILLESPIE, *supra* note 38, at 146–48 (highlighting how advocacy by breastfeeding mothers got Facebook and MySpace to change their policies regarding such pictures).

248. See Morgan Sung, *Bluesky Is Under Fire for Allowing Usernames with Racial Slurs*, TECHCRUNCH (July 17, 2023), <https://techcrunch.com/2023/07/17/bluesky-racial-slurs-banned-list-usernames> [<https://perma.cc/XS9W-ZZ3A>] ("[U]sers threaten to leave the site in protest of its failure to flag slurs in account usernames.").

249. See Wyatte Grantham-Philips, *Reddit CEO Defiant as Moderator Strike Shuttters Thousands of Forums: 'We Made a Business Decision that We're Not Negotiating On,'* FORTUNE (June 17, 2023), <https://fortune.com/2023/06/17/why-is-reddit-dark-subreddit-moderators-ceo-huffman-not-negotiating> [<https://perma.cc/2AN4-Q3V6>] ("[T]housands of subreddits chose to go dark in an ongoing protest over the company's plan to start charging certain third-party developers to access the site's data."). Another example can be seen on Stack Overflow, a Q&A forum for programmers, data scientists, and IT professionals. See Tom McKay, *Stack Overflow Moderators Strike After Being Told to Let the ChatGPT Flow*, IT BREW (June 21, 2023), <https://www.itbrew.com/stories/2023/06/21/stack-overflow-moderators-strike-after-being-told-to-let-the-chatgpt-flow> [<https://perma.cc/CQ53-NXRW>] ("Volunteer moderators of Q&A site Stack Overflow . . . have declared they are going on strike in response to mandates they say prohibit them from restricting AI-generated content.").



Users also sometimes work together to try to defeat algorithms and other content-moderation methods. These attempts range from relatively sophisticated<sup>250</sup> to totally uninformed<sup>251</sup>—but the key thing to notice is that they all suggest that users want to exercise voice vis-à-vis platforms. Consider users’ responses to Facebook’s decision to structure users’ feeds by prioritizing posts deemed more “interesting and relevant” over more recent (but less interesting and relevant) content.<sup>252</sup> After learning of the change, platform users started teaching each other how to game the algorithm, such as by adding “congratulations!” to posts about the Affordable Care Act’s open enrollment period.<sup>253</sup>

Another category of users’ collective action might be filed under “not based in reality,” as when users warn each other that “[e]verything you’ve ever posted becomes public tomorrow,” unless you invoke “UCC 1-308-1 1-308-103 and the Rome Statute” and “give notice to Facebook” that you do not consent to the change.<sup>254</sup> Another viral post claims that a Facebook algorithm limits each user’s feed to content from about twenty-five friends, but that the algorithm can be defeated if their friends comment

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250. See Andrews, *supra* note 69 (describing the often-coordinated efforts by users to “brigade” posts and trick algorithms).

251. See *infra* note 254 and accompanying text (providing examples of uninformed users’ collective action).

252. See Steven Levy, *Inside the Science that Delivers Your Scary-Smart Facebook and Twitter Feeds*, WIRED (Apr. 22, 2014), <https://www.wired.com/2014/04/perfect-facebook-feed> [<https://perma.cc/S4E6-RN2C>] (detailing Facebook and Twitter’s algorithms and how they value popularity). The change purportedly came “after a day when the highest-ranking story on [Facebook CEO Mark] Zuckerberg’s feed was a coworker’s birthday—and not the post that would have informed the CEO of the birth of his niece.” *Id.*

253. *E.g.*, Charlene Fernandez, FACEBOOK (Oct. 8, 2017), <https://www.facebook.com/charleneforarizona/posts/congratulations-snope-verified-that-the-aca-enrollment-period-was-shortened-and-/615329918591297> [<https://perma.cc/728U-VSU9>] (posting about the ACA’s open enrollment period and stating that the post was “[c]opied and pasted with extra CONGRATULATIONS in an attempt to outsmart the Facebook algorithms”).

254. See David Mikkelson, *Will Posting This Notice Stop Facebook or Instagram from Making Your Posts Public?*, SNOPE (June 4, 2012), <https://www.snope.com/fact-check/facebook-posts-made-public> [<https://perma.cc/2XCY-8X55>]. Unsurprisingly, Facebook did not publicize the posts of users who failed to post the notice. *Id.*

on the post.<sup>255</sup> Again, the premise was false—but, as the *Washington Post* noted, the idea may have taken off because “Facebook really did make changes to what shows up in your News Feed . . . just not in the way this viral message claims.”<sup>256</sup>

Even when it occurs in response to imaginary problems, users’ collective action is noteworthy. First, it shows that users are concerned about platforms’ algorithmic content curation and data privacy practices. Second, users sometimes work together to try to change their platforms’ practices—but even when their efforts are well-informed, platforms can easily make further unilateral changes to undermine users. That platform users already see the value of collective action does not mean that their attempts are effective—as these examples show, often they are not. But the fact that collective action happens at all suggests that platform users want to influence their treatment and know they have a better chance of success if they work together. This is where law can play a role by creating a mechanism to channel this energy and give it a real chance of success.

### C. UNIONS AND DEMOCRACY

Social media platforms are often accused of contributing to social isolation and democratic decline,<sup>257</sup> but platform unions

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255. See Abby Ohlheiser, *Facebook Isn’t Restricting Your News Feed to 26 Friends, No Matter What a Viral Hoax Claims*, WASH. POST (Feb. 7, 2018), <https://www.washingtonpost.com/news/the-intersect/wp/2018/02/07/facebook-isnt-restricting-your-news-feed-to-26-friends-no-matter-what-a-viral-hoax-claims> [<https://perma.cc/3NDA-HCTF>] (detailing the viral post).

256. *Id.*

257. See, e.g., Brooke Auxier, *64% of Americans Say Social Media Have a Mostly Negative Effect on the Way Things Are Going in the U.S. Today*, PEW RSCH. CTR. (Oct. 15, 2020), <https://www.pewresearch.org/fact-tank/2020/10/15/64-of-americans-say-social-media-have-a-mostly-negative-effect-on-the-way-things-are-going-in-the-u-s-today> [<https://perma.cc/K9HV-HXG8>] (documenting that most Americans believe that social media platforms have a negative impact on society). However, the empirical research attempting to verify these beliefs is mixed. See, e.g., Bolane Olaniran & Indi Williams, *Social Media Effects: Hijacking Democracy and Civility in Civic Engagement*, in PLATFORMS, PROTESTS, AND THE CHALLENGE OF NETWORKED DEMOCRACY 77, 77–94 (John Jones & Michael Trice eds., 2020) (surveying research about social media and its impacts on democracy); Jonathan Haidt & Chris Bail, *Social Media and Political Dysfunction: A Collaborative Review*, N.Y. UNIV. (last updated Aug. 28, 2023) (unpublished manuscript), [https://docs.google.com/document/d/1vVAatMCQnz8WVxtSNQev\\_e1cGmY9rnY96ecYuAj6C548/edit](https://docs.google.com/document/d/1vVAatMCQnz8WVxtSNQev_e1cGmY9rnY96ecYuAj6C548/edit) [<https://perma.cc/>]

could build civil society and strengthen democracy.<sup>258</sup> Large social media platforms mostly operate as autocracies rather than democracies; this reality is reflected in the word “user,” as contrasted to an alternative like “member” or “participant.” In contrast, this Article aims to consider a platform version of industrial democracy, in which users participate in platform governance.<sup>259</sup> Platform democracy could bring platforms closer to becoming “mediating institutions that give expression to the idea of citizenship.”<sup>260</sup>

Scholars including Danielle Keats Citron and Helen Norton have proposed that users should play a meaningful role in constructing and enforcing community norms: “Empowering users to respond to hate speech on their own sites and to report Terms of Service violations can help communicate and enforce community norms and expectations of digital citizenship.”<sup>261</sup> Similarly, Ethan Zuckerman criticizes dominant social media platforms for “teach[ing] us how to be subjects, not civic actors.”<sup>262</sup> He urges that people should build new, democratically operated, online spaces: “We should shift our use of social platforms towards ones that communities own and govern.”<sup>263</sup>

Platform democracy would convert autocratic spaces into democratic ones, turning Zuckerman’s subjects into virtual citizens with a say in how they are governed. As Mazzurco put it,

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4DVL-5H8Y] (assembling research on a variety of questions related to social media and democracy).

258. For example, some studies have shown that social media can increase voter turnout. See Olaniran & Williams, *supra* note 257, at 80 (discussing the impact of social media on elections).

259. “Industrial democracy” refers generally to participatory methods of workplace governance and can encompass governance arrangements ranging from workers’ complete self-management to relatively minimal versions in which companies voluntarily consider worker input. See Walther Müller-Jentsch, *Industrial Democracy: From Representative Codetermination to Direct Participation*, 25 INT’L J. POL. ECON. 50, 51 (1995) (discussing what “industrial democracy” means and its subcategories).

260. Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1445 (2011).

261. *Id.* at 1478; see also Sudhir Venkatesh et al., *In a New Light: Social Media Governance Reconsidered*, 23 YALE J.L. & TECH. 1, 5–6 (2021) (calling for a “legitimacy-based” approach to platform content-moderation that would promote “user identification with their [online] communities”).

262. Zuckerman, *supra* note 37, at 39.

263. *Id.* at 40.

“industrial democracy can frame the democratic legitimation” of platform decisions.<sup>264</sup> Similarly, Eli Freedman argues that “[i]n today’s world of informational capitalism, we need *informational democracy* to be at the center of any data regulatory regime.”<sup>265</sup> For example, collective bargaining could give voice to concerns held by large majorities of Americans that platforms are not doing enough about “misinformation, hate speech, abusive language and bullying online.”<sup>266</sup> The process of negotiating content-moderation standards and practices could prompt changes that better reflect users’/members’ own norms, within the boundaries of technical possibility.

Platform democracy could also strengthen political democracy. The relationship between platform unions and democracy could be quite literal, such as if collective bargaining led to more effective understanding of and responses to election-related misinformation.<sup>267</sup> But there could be other benefits as well, paralleling the established positive relationship between union representation in collective bargaining—the version of industrial democracy most commonly in use in the United States—and well-functioning democratic society.<sup>268</sup> Social scientists attribute that relationship to several mutually reinforcing dynamics, including that labor unions build social bonds between

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264. Mazzurco, *supra* note 65, at 796.

265. Freedman, *supra* note 62, at 672.

266. *Media and Democracy: Unpacking America’s Complex Views on the Digital Public Square*, KNIGHT FOUND. 6 (Mar. 9, 2022), <https://knightfoundation.org/wp-content/uploads/2022/03/KMAD-2022-1.pdf> [<https://perma.cc/XNB9-GQE7>] (noting more than 80% of Americans are concerned about such issues).

267. This is especially important because misinformation, once limited to a smaller number of people, is now accessible to all. See Olaniran & Williams, *supra* note 257, at 87.

268. See Roland Zullo, *Union Membership and Political Inclusion*, 62 INDUS. & LAB. RELS. REV. 22, 22 (2008) (noting that union membership is positively correlated with voter turnout); Benjamin Radcliff, *Organized Labor and Electoral Participation in American National Elections*, 22 J. LAB. RSCH. 405, 407 (2001) (“High membership means a greater number of both voters and activists, as well as the capacity to be more generous with financial contributions which will tend to elevate the influence of unions in party politics.” (citation omitted)); see also Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 81 (2018) (describing how income inequality leads to increased embrace of authoritarian rule).

members,<sup>269</sup> foster civic engagement and political action,<sup>270</sup> provide opportunities to practice democratic skills like coalition building and advocacy,<sup>271</sup> and even reduce toxic racial resentment among white union members.<sup>272</sup> Platform democracy could have similar effects, especially if structured to maximize opportunities for members to participate meaningfully.

Of course, the parallel is inexact. In addition to the dynamics described above, labor unions strengthen democracy because they represent working- and middle-class people; they reduce income inequality, which itself undermines democracy, and they amplify an often-ignored constituency in the political process.<sup>273</sup>

269. See Paul Frymer & Jacob M. Grumbach, *Labor Unions and White Racial Politics*, 65 AM. J. POL. SCI. 225, 229 (2021) (“[I]ntergroup contact among workers in unionized settings is likely to be deeper and more cooperative.”); Bob Edwards & Michael W. Foley, *Civil Society and Social Capital: A Primer*, in BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE 1, 10–11 (Bob Edwards et al. eds., 2000) (describing how membership in organizations can create norms such as reciprocity, cooperation, and tolerance).

270. See Veronica Terriquez, *Schools for Democracy: Labor Union Participation and Latino Immigrant Parents’ School-Based Civic Engagement*, 76 AM. SOCIO. REV. 581, 581 (2011) (“[A]ctive union members tend to become involved in critical forms of engagement that allow them to voice their interests and exercise leadership.”); Aaron J. Sojourner, *Do Unions Promote Members’ Electoral Office Holding? Evidence from Correlates of State Legislatures’ Occupational Shares*, 66 INDUS. & LAB. RELS. REV. 467, 467 (2013) (“In this study, I call attention to a neglected effect of unions—they help members rise to elected public office . . .”).

271. See Barbara J. Fick, *Not Just Collective Bargaining: The Role of Trade Unions in Creating and Maintaining a Democratic Society*, 12 WORKINGUSA: J. LAB. & SOC’Y 249, 254, (2009) (describing how unions generally utilize democratic representation “allowing for the membership to control the organization’s agenda and actions”).

272. See Frymer & Grumbach, *supra* note 269, at 226 (“Cross-sectional analysis consistently shows that union membership is associated with lower levels of racial resentment.”).

273. See, e.g., Michael J. Klarman, Foreword, *The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 148–49 (2019) (“[D]emocracy fares best when the working class enjoys economic prosperity and that deteriorating economic conditions render such voters vulnerable to the appeal of autocratic demagogues.”); John S. Ahlquist, *Labor Unions, Political Representation, and Economic Inequality*, 20 ANN. REV. POL. SCI. 409, 410 (2017) (“Among rich democracies, there is robust evidence that unionization is associated with a more compressed wage distribution as well as reduced top income shares.”); cf. Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOCIO. REV. 513, 513 (2011) (“The decline of organized labor in the United States coincided with a large increase in wage inequality.”).

Platform democracy may or may not develop along similar lines; the extent to which it would have similar pro-democratic effects to labor unions will depend on design and implementation questions. But there is a real chance for platform unions to become meaningful civil-society institutions that foster democratic self-determination among their members.

This Part has made a case for facilitating users' collective participation in platform governance through platform democracy; the next Part turns to some key questions about how that could happen.

#### IV. DESIGNING PLATFORM UNIONS

Platform democracy could take a range of forms. Drawing parallels to workplace-governance structures, we might say that some scholars, including Citron and Norton, are advocating for something like a quality-circle, or perhaps a works council model,<sup>274</sup> whereas Zuckerman is advocating for an analogue to worker-owned co-ops.<sup>275</sup> Other versions could also exist; for

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274. See Citron & Norton, *supra* note 260, at 1457–68 (discussing how to implement a digital citizenship). A quality circle is a participatory method of workplace management that emphasizes problem-solving by coworkers. See Edward E. Lawler III & Susan A. Mohrman, *Quality Circles After the Fad*, 63 HARV. BUS. REV., Jan. 1985, at 65, 66. A works council is an “institutionalized bod[y] for representative communication between a single employer . . . and the employees . . . of a single plant or enterprise . . . .” Joel Rogers & Wolfgang Streeck, *The Study of Works Councils: Concepts and Problems*, in WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 3, 6 (Joel Rogers & Wolfgang Streeck eds., 1995). As Rogers and Streeck describe, a works council can exist alongside a labor union; for example, in Germany, both works councils and unions exist, filling different roles. *Id.* Quality circles and works councils differ from each other in that quality circles are constituted and overseen by management, whereas works councils are worker representative bodies that are independent from management. See *id.* at 8 (noting that works councils are “outside the managerial line of authority”).

275. See Zuckerman, *supra* note 37, at 39 (arguing that the best option for social media sites is for users to “build and govern the spaces [they] use the most”). Worker cooperatives are “firms that workers own and democratically manage.” Ariana R. Levinson, *Founding Worker Cooperatives: Social Movement Theory and the Law*, 14 NEV. L.J. 322, 325 (2014). Some authors have argued workers should create “platform cooperatives” to compete with companies like Uber and Lyft. See generally, e.g., OURS TO HACK AND TO OWN: THE RISE OF PLATFORM COOPERATIVISM, A NEW VISION FOR THE FUTURE OF WORK AND A FAIRER INTERNET (Trebor Scholz & Nathan Schneider eds., 2017) (including works of various authors urging activists to engage in platform cooperativism and illustrating how it is possible).

example, under a codetermination model, users would elect representatives who would serve on platforms' Boards of Directors, participate in day-to-day management, or both.<sup>276</sup>

Of course, another form of industrial democracy involves unionization and collective bargaining, in which workers elect unions to represent them in negotiations with the employer and then enforce the resulting contract.<sup>277</sup> Compared to a quality circle, unionized workers have much more autonomy to set and pursue their own goals.<sup>278</sup> On the other hand, they have less collective ability to set the direction and objectives of the enterprise than workers in co-ops.<sup>279</sup> But worker co-ops are hard to scale;<sup>280</sup> perhaps for this reason, Zuckerman urges users to seek out “very small online platforms” where “community governance” is feasible.<sup>281</sup>

This Part draws from labor law to envision effective platform unions. It identifies aspects of workplace collective bargaining that could also be useful in the platform context, including that unions aggregate and amplify employee voice, that they operate democratically, that the collective bargaining obligation is continuous and comes with a right to demand certain information from one's bargaining partner, and that there exist mechanisms to encourage parties to agree on contracts.

To be clear, I am not proposing that the National Labor Relations Act be extended to cover social media platform users. Instead, I am drawing from the U.S. experience with labor law to

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276. See Simon Jäger et al., *What Does Codetermination Do?* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28921, 2021) (“[U]nder codetermination, a firm's shareholders and workers share control over major strategic decisions, and managers and workers share control over day-to-day decision-making.”). Codetermination often exists alongside other forms of industrial democracy, including collective bargaining. *Id.* at 5.

277. See, e.g., Norris, *supra* note 207, at 1481 (“The NLRA, among other things, provided workers the right to bargain collectively and to engage in collective action for mutual aid and protection, and indeed encouraged these features.”).

278. Management can control the number of people in a quality circle, as well as its purview. Lawler & Mohrman, *supra* note 274, at 66.

279. This is because a (pure) worker cooperative would give every employee “one equal share in the entity and one vote.” Levinson, *supra* note 275, at 325.

280. See *generally id.* 326–37 (discussing five historical examples of worker cooperatives and their strengths and weakness).

281. Ethan Zuckerman, *A Social Network Taxonomy.*, NEW PUB. (Feb. 19, 2023), <https://newpublic.substack.com/p/a-social-network-taxonomy> [<https://perma.cc/HR9E-FBG2>].

consider how to create an analogous but separate legal structure for unionization and collective bargaining by platform users.

To put a finer point on it, some aspects of U.S. labor law would make no sense in the platform bargaining context, given the differences between platforms and workplaces. One important difference is scale: although there are collective bargaining agreements that cover very large workplaces, platforms have exponentially more users. For example, the American Postal Workers Union represents about 200,000 postal workers employed by the federal government.<sup>282</sup> But in 2022, Twitter—among the smaller social media platforms—had 39.6 million “monetizable daily active users” in the United States,<sup>283</sup> while Facebook reported 196 million daily active users in the United States and Canada.<sup>284</sup>

Further, social media users have different relationships to platforms than workers have to their jobs. Most spend less time on social media than at work, and people are probably less likely to think of social media as a source of life’s necessities, as compared to work. Still, social media plays a large role in many of its users’ personal and professional lives,<sup>285</sup> and it is a significant source of social connection for many people, with attendant significant (but sometimes negative) effects on psychological well-being.<sup>286</sup> One source concluded that people across age groups

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282. *Our Union*, AM. POSTAL WORKERS UNION, <https://apwu.org/our-union> [<https://perma.cc/TJ5S-4XPE>].

283. Twitter, Inc., Quarterly Report (Form 10-Q) (May 2, 2022).

284. Meta Platforms, Inc., Quarterly Report (Form 10-Q) (Apr. 28, 2022).

285. Researchers find that social media users can have emotional connections to the platforms themselves, and the platforms can become an aspect of self-identity. See e.g., Zoetanya Sujon et al., *Domesticating Facebook: The Shift from Compulsive Connection to Personal Service Platform*, 4 SOC. MEDIA + SOC’Y 1, 2 (2018) (finding that young people’s relationship to Facebook is changing, with their connection to the platform becoming less emotionally intense and more interconnected with mundane daily tasks).

286. E.g., #*StatusOfMind: Social Media and Young People’s Mental Health and Wellbeing*, ROYAL SOC’Y FOR PUB. HEALTH 8–16 (2017), <https://www.rsph.org.uk/static/uploaded/d125b27c-0b62-41c5-a2c0155a8887cd01.pdf> [<https://perma.cc/2MZ7-WMK8>] (discussing positive and negative effects of social media on teen mental health); James A. Roberts & Meredith E. David, *On the Outside Looking in: Social Media Intensity, Social Connection, and User Well-Being: The Moderating Role of Passive Social Media Use*, 55 CANADIAN J. BEHAV. SCI. 240, 240 (2023) (“[S]ocial media use can have both positive and negative implications for our well-being.”); Georgia Wells et al., *Facebook Knows Instagram Is Toxic*



spent an average of nearly 2.5 hours per day on social media, with young people spending three hours per day—less time than people generally spend at work or school, but more than many other life tasks.<sup>287</sup>

Both of these differences mean it will be harder to generate the solidarity on which labor unions depend to organize workplaces and generate leverage. One important question, then, is which users will choose to engage with the process of forming a platform union. Will most users be passive about unionization, leaving them vulnerable to capture by a small number of malignant actors? Will the users most engaged with a platform union have an idiosyncratic set of preferences, or—worse—will they aim to turn a platform into a vehicle for undermining political democracy? These are real risks—though recent experience shows that our current approach to platform ownership and control also involves these risks.<sup>288</sup> Still, it would be critical to carefully design a legal framework for platform unions with an eye towards minimizing these risks.

This remainder of this Part discusses how collective bargaining might be adapted from the workplace context to the social media context, considering these challenges. Because it would be impossible to discuss every possible policy choice that would go into creating a structure for platform bargaining, it focuses on a few key decisions: a basic structure for platform collective-bargaining and platform unions, and the establishment of a workable bargaining process. It does not discuss other important topics, including the establishment and deterrence of “unfair platform practices.” For example, it would be critical to bar platforms from using information collected from users to manipulate their decisions about platform unionism. Likewise, it does not discuss enforcement issues, including whether a new

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for *Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021), <https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739> [<https://perma.cc/2V6H-T7SJ>] (highlighting the negative effects that Facebook and Instagram can have on teenage girls). See generally Sujon et al., *supra* note 285, at 5–9 (documenting the results of interviews with users of Facebook and their relationship with the platform).

287. See Roberts & David, *supra* note 286, at 240 (“To put this in perspective, the average social media user spends more time on Facebook, Snapchat, Instagram, YouTube, and other social media platforms than they do eating, drinking, socializing, or personal grooming.”).

288. See *supra* note 257 (providing sources that explore whether social media leads to social isolation and democratic decline).

government agency should be charged with administering a platform-bargaining law.

The discussion that follows also sets aside First Amendment objections, even though they are inevitable and have a good chance of success before the current Supreme Court.<sup>289</sup> As discussed above, this is because this Article's main contribution is to make the case that platform unions could usefully respond to platform problems; legal objections (much like objections grounded in political pragmatism) are important, but also a separate conversation.

#### A. THE BASIC STRUCTURE OF PLATFORM DEMOCRACY

**The Representation Default:** A first key choice concerns the “representation default.” Should the rule be—as it is in the workplace context—that a platform will be non-union unless a union wins the support of more than half of the voters in a union election?<sup>290</sup> If the answer is “no,” then there is another decision to make: should users have the option to reject union representation altogether, or should users' key decision be *which* union, and not *whether* union?

In the workplace context, some attempt to defend the non-union default by arguing that it preserves workers' rights to “speak for themselves” in dealing with management.<sup>291</sup> The premise—that workers have meaningful leverage in their individual dealings with employers—is at best questionable for most workers, and it is ludicrous in the platform context, where individual users do not negotiate their treatment by platforms at all. In other words, for most workers and virtually all platform users, the choice is not individual negotiation versus collective

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289. The Associated Press raised facial First Amendment objections to the NLRA shortly after it was enacted. *Associated Press v. NLRB*, 301 U.S. 103, 124 (1937). Rejecting this argument, the Supreme Court wrote that even though the Associated Press was in the speech-distribution business, the NLRA did not facially burden its First Amendment rights. *Id.* at 130–31. Today, many journalists are unionized and work under collective bargaining agreements. *See, e.g., Members, NEWSGUILD*, <https://newsguild.org/members> [<https://perma.cc/65J4-TEU9>].

290. *E.g.*, Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 932 (1994) (“The law's default position in the employment contract is non-union governance.”).

291. *But see id.* at 821 (highlighting how unions helped solve individual grievances).

negotiation—it is autocratic control versus collective negotiation.<sup>292</sup> So if platform users should become platform participants who have a voice in how they are treated, then a platform bargaining law should ensure at least a baseline level of representation—the “no representation” default that persists in U.S. workplaces should be rejected in favor of a representation default or, preferably, a requirement.<sup>293</sup>

**Exclusive or Plural Representation:** The next question is whether all platform users should be represented by the same union, meaning that a union that wins the most support in an election becomes the “exclusive representative” of all users.<sup>294</sup> The exclusive representation system is virtually the only system of collective bargaining that exists under U.S. labor law, in either the public or private sector.<sup>295</sup> In the U.S. workplace

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292. As others have argued, most workers’ alternative to union representation is not individual negotiation, but “authoritarian governance.” Barenberg, *supra* note 290, at 932. For a more recent discussion of the autocratic nature of most U.S. workplaces, see generally ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* (Stephen Macedo ed., 2017) (arguing that the current labor system is a form of dictatorship).

293. Scholars have argued convincingly for a union default or requirement in the workplace context as well. *See, e.g.*, Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1595 (2002) (highlighting the attractiveness of a default union baseline and what it would do for workers); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 256 (2001) (“It is easy to imagine an unusual regime, in which workers are presumed to favor collective organization, but in which they are permitted to vote otherwise. If union representation is thought to have significant advantages, a system of this sort might well be preferred.”); *cf.* Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1624 (2016) (“[T]he state would strongly encourage or even mandate collective bargaining at the occupational or sectoral level (as corporatism has historically required) . . . .”); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 680 (2010) (“[I]t is more difficult for employees to depart from a nonunion default (to choose unionization) than it would be for employees to depart from a union default (to choose nonunion, individual employment contracting).”).

294. This discussion sidesteps the question of whether bargaining should occur on an enterprise basis or a sectoral basis, a question that is discussed below. *See infra* Part IV.C.

295. *See* Rogers, *supra* note 293, at 1627 (“[T]he National Labor Relations Board (NLRB) will certify the union as those workers’ exclusive representative . . . . No other union may then represent workers in that bargaining unit . . . .”). There are minor exceptions, such as Tennessee’s system of “collaborative conferencing” in which multiple employee representatives can engage in

context, becoming the exclusive representative is a source of both power and obligation: a union becoming a certified exclusive representative triggers the employer's legal obligation to bargain, and if a contract results, it will cover all of the workers in the bargaining unit.<sup>296</sup> In return, a union that has exclusive representative status owes every represented worker a "duty of fair representation."<sup>297</sup> And an exclusive representative retains its status indefinitely, unless it is voted out in a "decertification" election.<sup>298</sup>

If given the choice between bargaining with one union or multiple unions, most employers would likely prefer to maintain only one bargaining relationship and one contract. But for unions, exclusive representation also means the employer cannot "divide and conquer," offering worse terms to a disliked union than a preferred one. The system is also democratic in that a U.S. union cannot be certified as an exclusive representative without having first achieved majority support among bargaining unit members.<sup>299</sup>

On the other hand, exclusive representation has its critics, including among commentators who aim to strengthen collective

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talks about working conditions. See TENN. CODE ANN. §§ 49-5-601 to -609 (2023) (codifying the Professional Educators Collaborative Conferencing Act of 2011, which allowed for collaborative conferencing). In addition, employers in the private sector may voluntarily bargain with labor unions on behalf of only their own members, though there is little evidence that this happens. See CHARLES J. MORRIS, *Membership-Based Collective Bargaining, the Norris-LaGuardia Act, and Section 7(a) of the National Industry Recovery Act*, in *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 17, 17–40 (2005) (arguing the NLRA should be read to require "members-only" bargaining when a union lacks a bargaining-unit majority).

296. See 29 U.S.C. § 159(a) ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . .").

297. See *id.* § 158(a)(5), (d) (requiring employers and employee representatives to bargain in good faith). For a more detailed explanation of the bundle of rights and obligations that come with exclusive representative status, see generally Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 196–208 (2015).

298. See *Decertification Election*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/decertification-election> [<https://perma.cc/C877-LBZN>] (discussing the decertification election process).

299. See 29 U.S.C. § 159(c)(3) (requiring run-off elections where multiple unions are on the election ballot, and no union wins majority support in the first vote).

bargaining. First, the combination of the non-union default and the exclusive-representation system means that union elections are “all-or-nothing” referenda on whether there will be workplace democracy or workplace autocracy; this gives employers a strong incentive to fight tooth-and-nail to “win.”<sup>300</sup> Second, exclusive representatives’ obligation to represent even non-members fairly gives workers a financial incentive to free-ride on their coworkers, especially in states that have adopted “right to work” laws,<sup>301</sup> which can lead to a vicious cycle of declining union membership and depleting union effectiveness. Third, union opponents point to the fact that a union can maintain exclusive representative status for decades without workers reaffirming their choice of representative—though their alternative is often more frequent all-or-nothing union elections that increase the likelihood that workers will lose workplace representation altogether.<sup>302</sup>

The alternative to exclusive representation is a system in which workers can choose from among different unions, which then either bargain separate contracts or participate together in bargaining a single contract. For example, Italy uses a pluralist model in which unions participate in collective bargaining to varying degrees depending on their level of worker support.<sup>303</sup> This

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300. See, e.g., Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, CLEAN SLATE FOR WORKER POWER (2020), [https://uploads-ssl.webflow.com/5fa42ded15984eaa002a7ef2/5fa42ded15984eaa6a72a806b\\_CleanSlate\\_SinglePages\\_ForWeb\\_noemptyspace.pdf](https://uploads-ssl.webflow.com/5fa42ded15984eaa002a7ef2/5fa42ded15984eaa6a72a806b_CleanSlate_SinglePages_ForWeb_noemptyspace.pdf) [<https://perma.cc/9EZQ-RRJ6>] (arguing that decentralized bargaining incentivizes employers to fight unionization).

301. “Right to work” laws prohibit unions or employers from requiring represented workers to pay anything towards the cost of union representation. See 29 U.S.C. § 164(b) (authorizing “right to work” laws); see also Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 859 (2014) (arguing that if state law allows workers to decline union membership and decline to pay for union representation, federal law should not require unions to represent non-members).

302. E.g., Samuel Estreicher, *“Easy In, Easy Out”: A Future for U.S. Workplace Representation*, 98 MINN. L. REV. 1615, 1615 (2014) (proposing an automatic representation election system to “make it easier to vote the union out if the employees no longer believe the bargaining agent is accountable to them or worth the dues they pay”).

303. See Vincenzo Pietrogiovanni & Andrea Iossa, *Workers’ Representation and Labour Conflict at Company Level: The Italian Binary Star in the Prism of the Swedish Ternary System*, 8 EUR. LAB. L.J. 45, 50–54 (2017) (detailing the history of Italy’s pluralist union model).

practice is embedded within a labor-relations system that is also quite different than the U.S. system in other important ways: bargaining takes place at the national or sectoral and enterprise levels, with nearly all workers covered by a national collective agreement, and a significant majority of workers at large companies covered by a workplace agreement.<sup>304</sup> The Clean Slate for Worker Power Project proposes a middle-ground approach for the U.S. context: a system of gradual representation rights pegged to the level of worker support a union can show.<sup>305</sup> At a minimum, non-majority unions with relatively low support would be entitled to meet and confer with employers on workplace issues; unions with the support of twenty-five percent of employees would have the right to bargain a “members-only” contract; and unions with support of over fifty percent of employees would become the exclusive representative.<sup>306</sup> In work focused on police collective bargaining, Professors Catherine Fisk and L. Song Richardson have urged a “modified form of minority union bargaining” in which departments would be required to meet and confer with groups other than the exclusive collective bargaining representative; their goal is to empower rank-and-file police to participate in dialogue over policing practices.<sup>307</sup>

Exclusive representation as it exists in the workplace context could be deployed in the platform context—especially if users’ choice is “which union,” so that union elections do not become opportunities for platforms to convince users to choose platform autocracy. In that case, platform union elections could be designed much like political elections, in which voters elect their

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304. See Roberto Pedersini, *Italy: Institutionalisation and Resilience in a Changing Economic and Political Environment*, in 2 COLLECTIVE BARGAINING IN EUROPE: TOWARDS AN ENDGAME 337, 346 (Torsten Müller et al. eds., 2019) (analyzing how many workers are covered by workplace agreements across industries and employers of different sizes); *Industrial Relations in Italy: Background Summary*, EUR. TRADE UNION INST. (Sept. 20, 2016), <https://www.etui.org/covid-social-impact/italy/industrial-relations-in-italy-background-summary> [<https://perma.cc/L9U4-KGYV>] (providing an overview of how unions operate in Italy).

305. See Block & Sachs, *supra* note 300, at 30–31 (proposing a system that allows for a range of representational structures).

306. *Id.* at 33–37 (describing these varying levels and the rights they would confer).

307. See Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 783–89 (2017) (proposing this concept in the context of police unions).

representative on a majority basis every few years, at which point the elected representative would have the opportunity to bargain for a new contract. This approach would avoid lock-in, but also give users a regular say about who would represent them.<sup>308</sup>

Alternatively, a pluralist model might encourage users to designate their preferred platform union as their bargaining agent. Then, platform unions that reached a predetermined level of support could either bargain separate contracts covering their members, or share in consultation and bargaining rights allocated based on their degree of user support. A hybrid system could also be possible; for example, a single national agreement could cover terms that should be uniform for all users because they cannot be disaggregated, while other terms are bargained on a members-only basis by different unions. In contrast to exclusive representation, this system would manage disagreement between users by allowing different points of view to be represented at the bargaining table—a system that could offer greater opportunities for user voice, but at the risk of allowing platforms to divide and conquer. Importantly, however, either system would call on users/members to make regular choices about the identity of their platform representative, promoting democratic engagement and platform-union responsiveness.

#### B. REGULATING PLATFORM UNIONS

If platform unionism is to bring about democratic participation in platform governance, then a platform bargaining law should consider whether and how to regulate platform unions' relationships to both represented users and platforms.

**Platform Union Qualifications:** U.S. labor law is mostly agnostic about which labor unions may represent which workers. For example, workers can vote to be represented by an

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308. As is discussed above, federal law requires that workplace union officers be elected by the union membership. *See supra* note 299 and accompanying text (setting forth this requirement). Union leadership elections would likely be separate from union representation elections, loosely parallel to the relationship between primary elections (which are often limited to members of the relevant political party) and general elections.

established union, or they can also decide to strike out on their own, forming an entirely new union.<sup>309</sup>

A main exception to this agnosticism is that a “dominated” labor organization—better known as a company union—cannot lawfully represent workers. An employer may not “interfere with the formation or administration of any labor organization,” or “contribute financial or other support to it.”<sup>310</sup> Further, labor organizations must comply with a set of rules governing how they treat their members, and how they handle and report their finances.<sup>311</sup> These rules require labor organizations to elect their leaders democratically,<sup>312</sup> and they prohibit discrimination or retaliation against members.<sup>313</sup> And, as mentioned above, unions also owe all bargaining unit members a duty of fair representation.<sup>314</sup> Taken together, these rules are meant to ensure that the union is loyal to the workers it represents, and to protect “dissident” union members.

A platform union law should consider similar guardrails by linking bargaining rights to baseline rules for union conduct. At a minimum, those rules should bind platform unions to operate democratically, prohibit discrimination based on users’ personal characteristics, bar platforms from exerting financial or other control over platform unions, and establish duties of loyalty and fair treatment to users/members. It could also require a degree of financial and operational transparency.

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309. Today, the first model is more common, but the Amazon Labor Union utilizes the latter approach. *See, e.g.*, E. Tammy Kim, *How to Unionize at Amazon*, NEW YORKER (Apr. 7, 2022), <https://www.newyorker.com/news/dispatch/how-to-unionize-at-amazon> [<https://perma.cc/Z5GV-V7S3>] (covering Amazon warehouse workers in Staten Island who voted to form their own union not managed by an outside organization).

310. 29 U.S.C. § 158(a)(2).

311. *See generally* 29 U.S.C. §§ 401–531 (providing rules surrounding reporting requirements, safeguards, and elections).

312. *See* 29 U.S.C. § 481(a)–(b) (providing that elections are determined by “members in good standing” at least every three years).

313. *See* 29 U.S.C. § 411 (protecting members’ rights to free expression and providing due process rights against union discipline).

314. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (describing the duty of fair representation as the duty “to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct”); *see also supra* note 298 and accompanying text (setting forth the fair representation requirement).



Policymakers could also consider additional requirements, such as that a platform union have a degree of substantive expertise concerning platform operations and/or the practice of collective bargaining. As a model, one could look to a Seattle law that was intended to permit ride-hail drivers to unionize; had it taken effect, it would have required unions planning to organize drivers to have non-profit status, a democratic structure, and experience reaching agreements between employers and contractors.<sup>315</sup>

Finally, platform unions should be organized to allow for meaningful user participation. One might analogize to labor union structures: a national or international union will charter various local unions, which should in turn foster individual participation and attachment through union meetings, social events, and so on. Unions often also establish and support various other kinds of mediating structures, such as state-level federations of local unions, and affinity groups and caucuses.<sup>316</sup> Political parties also provide a useful analogy, in that they at least attempt to establish county, city, neighborhood, and/or precinct-level organizations, and to build enduring relationships with other civil-society groups.<sup>317</sup> In both the union and political contexts, these efforts can help mobilize new “grassroots” participants, but also

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315. SEATTLE, WASH., MUN. CODE § 6.310.735(B) (2017) (requiring union registration as a “not-for-profit entity”). The Seattle City Council ultimately withdrew key aspects of this ordinance, and then changed its approach to regulating ride-hail working conditions after the Ninth Circuit held that the law was likely to violate federal antitrust law. See *Legal Challenge to Seattle’s Uber Drivers Collective Bargaining Ordinance Ends*, SEATTLE CITY COUNCIL INSIGHT (Apr. 10, 2020), <https://sccinsight.com/2020/04/10/legal-challenge-to-seattles-uber-drivers-collective-bargaining-ordinance-ends> [<https://perma.cc/XXG6-MPYM>] (describing this history). The court’s decision turned in part on the fact that the city, rather than the state, had enacted this ordinance. *Chamber of Com. v. City of Seattle*, 890 F.3d 769, 790 (9th Cir. 2018) (“Because the distinction between states and municipalities is of crucial importance for purposes of state-action immunity, we reject the City’s invitation to treat the two entities interchangeably.”).

316. See, e.g., *Teamsters Structure*, INT’L BHD. OF TEAMSTERS, <https://teamster.org/about/teamsters-structure> [<https://perma.cc/LB2V-634Q>] (illustrating the organizational structure of Teamster unions).

317. See generally Kenneth T. Andrews et al., *How to Revitalize America’s Local Political Parties*, SCHOLARS STRATEGY NETWORK (Jan. 30, 2019), <https://scholars.org/contribution/how-revitalize-americas-local-political> [<https://perma.cc/7HR7-3RC4>] (discussing the need for a grassroots approach to maintain engagement in political parties); cf. Freedman, *supra* note 62, at 675 (arguing for “geographic locality unions”).

allow for two-way communications between members and organization leadership.

It should be in platform unions' own interests to create a similar participatory structure, even if bargaining ultimately takes place at a statewide or national level; among other reasons, platform unions' power will depend in part on their ability to generate member solidarity, which will be impossible if a platform union is functionally disconnected from its members.<sup>318</sup> But a platform bargaining law should also encourage or even mandate such a structure, and protect local groups' autonomy to a degree. The resulting organizational chart might look like a pyramid, with an umbrella organization at the top, and smaller groups based on a mix of users' geographic locations and affinities at the bottom. This structure should facilitate two-way communication with members so that unions can understand members' needs and goals, and members can understand how the union is trying to achieve those goals.

**Bargaining-Unit Composition:** When a labor union petitions to represent a group of workers, it might aim to include everyone who works for a given employer, everyone who works at one or more of the employer's locations or departments, or everyone who does the same kind of job. The NLRA broadly allows each of these choices.<sup>319</sup> However, it also imposes constraints. For example, employers can object to proposed bargaining units that are drawn on a nonsensical basis, or to the proposed inclusion of some categories of employees, including supervisors.<sup>320</sup> Further, the NLRA prohibits the NLRB from certifying a union that represents both plant "guards" and other employees to avoid the risk of property damage in a strike,<sup>321</sup> and a combination of

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318. See *infra* Part IV.C (discussing the implementation of platform collective bargaining agreements).

319. See 29 U.S.C. § 159(b) ("[T]he unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . .").

320. See *id.* (setting out flexible standard for bargaining unit definition, but excluding certain categories of employees); *Am. Steel Constr., Inc.*, 372 N.L.R.B. No. 23 (2022) (discussing appropriate bargaining units and the exclusion of certain employees); 29 U.S.C. § 152(3) (excluding supervisors from NLRA coverage).

321. See 29 U.S.C. § 159(b) (stating the Board shall not decide that any unit is appropriate if "it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer").

labor law and antitrust law forecloses independent contractors from collective bargaining.<sup>322</sup>

The considerations in the platform context are different, but a platform bargaining law should still consider whether some categories of users should be excluded from platform bargaining altogether, and whether conflicts of interest mean that different categories of users should bargain separately. This Article's primary focus is on people who use platforms in their individual capacities, and a platform bargaining law should center these users.

How to do that presents one easy issue, and one difficult one. To begin with the easy one, law should require platform unions to adopt security measures to exclude bots and fake accounts, whose inclusion would skew bargaining and undermine platform-union democracy. The harder question is how to address possible conflicts of interests, including between users who both create and consume monetized content, and users who only consume that content.<sup>323</sup> One response would be to require separate negotiations leading to separate collective bargaining agreements governing the treatment of these two groups. An alternative would allow for negotiation of a single agreement but require that it be ratified by a majority of each group.<sup>324</sup>

Even more serious conflicts of interest exist between individual users and advertisers or other business users; this conflict is especially acute with respect to advertisers that exploit platform-generated data to target users.<sup>325</sup> At the same time, Lina

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322. See 29 U.S.C. § 152(3) (excluding independent contractors from the definition of "employee"); *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 424 (1990) (holding that a strike by independent contractors violated antitrust law).

323. The distinction I am suggesting here is between users whose content is monetized by the platform on which it is posted, and other users. But it is possible that users who get other kinds of monetary benefits from their use of social media—such as celebrities who use social media to raise their public profiles—could also have conflicting interests as compared to other users. On the other hand, a celebrity presence could raise a platform union's profile, inspiring greater interest and participation by other users. I am grateful to Michael Oswald for suggesting this dynamic.

324. There is a labor law analogy: proposed bargaining units that include both "professional" and "non-professional" employees must win a separate majority vote from the "professional" employees. 29 U.S.C. § 159(b).

325. See *supra* Part I.A.2 (discussing how platforms and advertisers acquire and utilize user data to exert influence over users); see also Pistor, *supra* note 149, at 117 (stating the real threat of big data is not just market dominance, but

Khan has described how business users can also be dominated by Google and Facebook, whose market control “renders businesses highly dependent on the platforms for access to users.”<sup>326</sup> Platforms then exploit this dynamic to “extort and extract better terms from the business users that depend on their infrastructure,” shaping both consumer transactions and our media environment.<sup>327</sup> The conundrum is obvious: on one hand, there is a risk that corporate interests would dominate individual ones within platform unions; on the other, small businesses can also be exploited by platforms. At minimum, this should prompt the creation of separate unions and bargaining units for different kinds of users—but a focus on empowering individual users who are most at risk of arbitrary or abusive treatment by platforms would also justify limiting platform unionism to individual users.

**Funding Platform Unions:** One of the stickiest but most critical questions about how to adapt workplace collective bargaining to the platform context concerns how platform unions will be funded. In the workplace context, unions are funded by member dues or fees; in some states, unions can negotiate contract provisions requiring employers to dismiss workers who are in arrears.<sup>328</sup> Further, unions often negotiate “dues checkoffs,” which allows employees to agree that employers will automatically deduct dues from their paychecks and remit them to the union.<sup>329</sup> But labor unions also typically negotiate pay increases that are significantly more than the cost of union dues, so union dues are more than offset by raises.<sup>330</sup>

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also “the power to transform free contracting and markets into a controlled space that gives a huge advantage to sellers over buyers”).

326. Khan, *supra* note 140, at 326.

327. *Id.* at 327.

328. See *supra* note 301 and accompanying text (discussing right to work laws).

329. See Valley Hosp. Med. Ctr., Inc., 371 N.L.R.B. No. 160, at 1 (2022) (holding dues checkoffs cannot be unilaterally discontinued upon contract expiration).

330. U.S. DEPT OF LAB.: BUREAU OF LAB. STAT., USDL-23-00713, UNION MEMBERS — 2022 (Jan. 19, 2023), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/YZZ4-WF46>] (reporting that, in 2022, “union members had median usual weekly earnings of \$1,216,” compared to \$1,029 for non-union workers); John W. Budd & In-Gang Na, *The Union Membership Wage Premium for Employees Covered by Collective Bargaining Agreements*, 18 J. LAB. ECON.

For most platform users, this system will not be readily translatable. On one hand, platform unions could apply the labor union model when members were paid by platforms—for example, users who monetize their content on YouTube or Instagram could agree to have a small portion of their compensation remitted to their union through a check-off procedure. But when platform unions represent users who are not paid for their content, this issue will be much more difficult. For these users, there are several possibilities, all of which have drawbacks.

First, the union could simply adopt another mechanism for users to pay dues, either through the relevant platforms themselves or another payment system. But any source of friction makes it less likely that members will pay, leaving unions in the awkward position of having to bill their own members. Platform unions might get around this by negotiating with platforms to cut off access to users who are in dues arrears; assuming dues were low, this could be sufficient to secure payment.<sup>331</sup> But this risks resentment towards a platform union, especially because users are accustomed to using platforms without any up-front cost.<sup>332</sup> Additionally, this model could give platform unions an incentive to negotiate for users to be paid for their data, because even a small income stream would make it easier to implement dues check-off. But a previous Part discussed drawbacks to monetizing users' data—and while the presence of a platform union would mitigate some of those drawbacks, a platform bargaining

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783, 785 (2000) (finding an average twelve percent union wage premium, with variation across groups).

331. One relatively small study found users were willing to pay between about \$2 and \$4 per month to use dominant social media platforms. Saima Jiwani, *Studies Show the Price Users Would Pay to Use Popular Social Media Apps*, DIGIT. INFO. WORLD (Aug. 9, 2019), <https://www.digitalinformationworld.com/2019/08/what-consumers-would-pay-for-popular-free-apps.html> [<https://perma.cc/PRR4-XLU4>]. Another study found that the “average Facebook user would require more than \$1000 to deactivate their account for one year.” Jay R. Corrigan et al., *How Much Is Social Media Worth? Estimating the Value of Facebook by Paying Users to Stop Using It*, PLOS ONE (Dec. 19, 2018), <https://doi.org/10.1371/journal.pone.0207101>.

332. L. Richard Ye et al., *Fee-Based Online Services: Exploring Consumers' Willingness to Pay*, 13 J. INT'L TECH. & INFO. MGMT. 133, 138 (2004) (discussing overcoming consumers' “free-lunch’ mentality”).

law should not affirmatively create incentives to monetize user data.<sup>333</sup>

Alternatives have other benefits and drawbacks. First, a platform-bargaining law could simply leave it to platform unions to figure out a solution, at the risk of leaving unions underfunded. Union strategies could include membership incentives, which are also common in the labor context.<sup>334</sup> Or it could adopt a fee-for-service model, charging users for certain “above-and-beyond” services, such as advocating for individual users over the application of content moderation policies. More promisingly, a platform-bargaining law could require platforms to fund platform unions on a per-capita basis—a straightforward approach that ensures platform unions will have the operational resources they need, even though it may risk the appearance of divided loyalties. In a similar vein, government could fund platform unions, either directly or by providing each user with a dues voucher that they could direct either to the exclusive representative or their chosen representative.

### C. NEGOTIATING A PLATFORM COLLECTIVE-BARGAINING AGREEMENT

Once a collective representative is in place, what goals will it pursue, and how will it pursue them? In the workplace context, the election or voluntary recognition of a union triggers a bargaining obligation: the employer must sit down with the union to bargain in good faith to reach an agreement on compensation and other working conditions.<sup>335</sup> Moreover, this obligation is ongoing: whether or not there is already a contract in place, the employer must bargain before making changes to wages or working conditions.<sup>336</sup> This is an important part of the case for

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333. See *supra* Part II.C.2 (discussing the pitfalls of users selling their data, including the fact that individual user data is not sufficiently valuable unless aggregated).

334. See *Bain v. Cal. Tchrs. Ass’n*, 891 F.3d 1206, 1210 (9th Cir. 2018) (explaining union membership incentives and rejecting a First Amendment challenge to their use on mootness grounds).

335. See 29 U.S.C. § 158(d) (setting forth the obligation to bargain collectively); see also *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (holding that the NLRB could not order employer to agree to substantive contract terms as remedy for employer’s failure to bargain in good faith).

336. See *MV Transp., Inc.*, 368 N.L.R.B. No. 66 (2019) (changing standards under which waiver of the right to bargain over a mid-term contract modification would be assessed).

platform collective-bargaining: rather than regulating platforms through reactive interventions, collective bargaining is proactive. It would mean users get advance notice of—and a say in—changes that affect them.

Still, policymakers would need to adapt collective bargaining to the platform context; key questions concern the scope of the bargaining obligation, platforms' obligations to supply information about what they are doing, and the source of platform unions' power to win concessions.

**The Scope of Bargaining:** There are two important topics that relate to the scope of bargaining: first, whether bargaining will take place on a sectoral or an enterprise level (or on another basis); and second, what topics will be bargainable. This Section also discusses a third, related issue: whether the implementation of a negotiated collective bargaining agreement should be contingent on a mandatory approval process.

The NLRA requires only enterprise-based bargaining; while employers and unions are permitted to bargain on a multi-employer basis, there is no legal mechanism to compel them to do so.<sup>337</sup> This presents a dilemma for unionized workers, especially in industries where profit margins are low and competition is fierce—improved wages and benefits could mean raising prices, in turn driving customers away. Multi-employer bargaining or sectoral bargaining is a solution that—to use a common phrase—“takes wages out of competition.”<sup>338</sup> Unsurprisingly, various critics of the U.S. enterprise-based approach have urged the adoption of sectoral bargaining for purposes of negotiating certain minimum standards, which could then be augmented by enterprise-based bargaining over other terms and conditions of employment.<sup>339</sup>

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337. See *Pac. Metals Co.*, 91 N.L.R.B. 696, 697–98 (1950) (holding that a multi-employer bargaining unit was no longer proper when a substantial portion of employers left to pursue individual bargaining agreements).

338. E.g., Stan De Spiegelaere, *The Why and How of Multi-Employer Bargaining*, UNIONS 21 (Aug. 7, 2023), <https://unions21.org/ideas/the-why-and-how-of-multi-employer-bargaining> [<https://perma.cc/93UZ-RW8A>] (“Economically, multi-employer bargaining ‘takes wages out of competition.’”).

339. See, e.g., David Madland, *Lessons from New Zealand’s New Sectoral Bargaining Law*, CTR. FOR AM. PROGRESS (Nov. 29, 2022), <https://www.americanprogress.org/article/lessons-from-new-zealands-new-sectoral-bargaining-law> [<https://perma.cc/VU6K-LRAG>] (summarizing the benefits of sectoral bargaining in New Zealand); *Principles of Sectoral Bargaining: A*

Platforms may not face the same competitive pressures, but sectoral bargaining might solve other problems. For example, many people use multiple social media platforms, and they may have roughly similar preferences as to each—and so it might make sense to encourage a degree of sectoral bargaining in lieu of a series of separate negotiations over similar issues.

Another important function of a platform-bargaining law would be to define platforms' obligations with respect to platform unions. The bare minimum would include only "information and consultation" rights, similar to European Works Councils, which "lack any mechanism to decisively influence or veto corporate decisions."<sup>340</sup> But a more robust approach would require platforms to put certain kinds of decisions that affect users on the bargaining table, barring implementation until the bargaining process is complete. The scope of decisions covered by a bargaining obligation could be relatively broad or narrow, but should give users input over key decisions and standards related to the privacy and content moderation topics discussed above.<sup>341</sup>

Finally, a platform bargaining law could require that a negotiated agreement either be ratified by users in an up-or-down vote, or that its substance be approved by a government agency. The former possibility is relatively straightforward, but the latter could be more complex. First, a platform bargaining law could require an agency to evaluate a tentative agreement in light of specified procedural or substantive benchmarks—for example, whether the agreement was bargained in good faith and with input from user-members, or whether it contains an enforcement mechanism. Second, platform bargaining could take place on a tripartite or "social bargaining" basis—that is, with platforms and unions presenting their cases to a government

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*Reference Guide for Designing Federal, State, and Local Laws in the U.S.*, CLEAN SLATE FOR WORKER POWER 6–8 (May 2021), <https://clje.law.harvard.edu/app/uploads/2022/12/Clean-Slate-Principles-of-Sectoral-Bargaining.pdf> [<https://perma.cc/DNE2-RR74>] (discussing vertical, horizontal, and state approaches to sectoral bargaining).

340. Pascal McDougall, *European Cross-Sectoral Collective Bargaining as Post-Crisis Social Policy*, 29 *IND. J. GLOB. LEGAL STUD.* 163, 191 (2022).

341. See *supra* Part II.A–B (discussing current platform approaches to data privacy and content moderation).



body that is in turn empowered to adopt substantive provisions in the form of regulations.<sup>342</sup>

**The Obligation to Supply Information:** “Government and regulators are at an enormous informational disadvantage relative to technology companies.”<sup>343</sup> To put the problem plainly, regulators often don’t know what platforms are doing until after people have been hurt, or problematic business practices have become normalized.<sup>344</sup> Further, platforms are constantly making large and small changes to their operations—a problem that the FTC noted in its recent Advance Notice of Proposed Rulemaking under the heading of “Obsolescence,” inviting the public to comment on how the agency should “account for changes in business models in advertising as well as other commercial surveillance practices.”<sup>345</sup>

Labor unions have long contended with similar dynamics. How will unions know what employers are doing, and why? And what happens as circumstances change? Labor law deals with these problems in part by compelling employers to hand over certain kinds of information necessary for unions to represent their members effectively in bargaining to enforce resulting contracts.<sup>346</sup> The quintessential example is that an employer that argues during bargaining that it is unable—and not just unwilling—to pay a wage increase must then open its books to prove it is telling the truth. Without this information, the union could not represent its members effectively: the employer has an obvious incentive to lie, but a union may not serve its members well

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342. Professor Kate Andrias has explained that tripartite or social bargaining exists in the United States in the form of “wage boards,” which are empowered to hear testimony from worker representatives and employers and then adopt binding wage standards for a sector or jurisdiction. Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2, 63–68 (2016).

343. *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*, *supra* note 180, at 4–5.

344. For a discussion of this phenomenon with respect to platforms, including Facebook and Uber, see generally Elizabeth Pollman, *Tech, Regulatory Arbitrage, and Limits*, 20 *EUR. BUS. ORG. L. REV.* 567 (2019).

345. Trade Regulation Rule on Commercial Surveillance and Data Security, 87 *Fed. Reg.* 51273, 51285 (Aug. 22, 2022).

346. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–53 (1956) (holding that an employer’s refusal to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith); see also *Dynacorp/Dynair Servs., Inc.*, 322 N.L.R.B. 602, 602 (1996) (characterizing several categories of information about wages and working conditions as “presumptively relevant” information that must be “furnished on request”).

by forcing the issue if the employer is truly on the edge of insolvency. Inversely, the obligation to provide information does not apply to information that the employer has a particular need to keep confidential, especially if a decision-maker believes that the information is not critical to the union's ability to competently represent its members.<sup>347</sup> The result is a balancing test that considers the union's need for the information and the employer's need to maintain confidentiality on a case-by-case basis, with NLRB decisions helping shape employer and union expectations.<sup>348</sup>

A similar set of rules would be necessary in the platform bargaining context, striking a balance between platform unions' need to know what platforms are doing, and platforms' legitimate trade secrecy concerns. To make the accommodation of those priorities easier, a platform bargaining law could include measures to preserve confidentiality—for example, an agency responsible for overseeing platform bargaining could be empowered to issue protective orders that would allow for limited union (or even third party) access to information that was sensitive but also necessary for effective representation.

**Platform Unions and Collective Pressure:** Labor unions' leverage in reaching an agreement comes from two main sources: collective pressure exerted by workers and their supporters; and labor law. The “power resources approach” offers a theoretical framework elaborating sources of workers' collective power and the conditions under which workers can successfully deploy them.<sup>349</sup> First, economic or structural power refers to

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347. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 319–20 (1979) (holding that an employer was not obligated to produce validated standardized tests because it had marginal benefit to the union, and production could impose significant cost on the employer).

348. Critics have rightfully pointed out that decision-makers often over-prioritize employers' stated confidentiality needs. See, e.g., Newman, *supra* note 59, at 732–37 (describing the challenge of accessing employer held data used in hiring decisions). A platform bargaining law should recognize that platform unions cannot function without certain categories of information and should adopt strict rules to ensure that needed information is made available, subject to confidentiality protections.

349. See generally Stefan Schmalz et al., *The Power Resources Approach: Developments and Challenges*, 9 GLOB. LAB. J. 113, 115–24 (2018) (discussing various powers encompassed under the power resources approach); Erik Olin Wright, *Working-Class Power, Capitalist-Class Interests, and Class*

economic conditions that allow workers to disrupt their employers' operations, or that make workers less beholden to specific employers—for example, a tight labor market that makes it easy for workers to quit and find new jobs, or a robust social safety net.<sup>350</sup> Second, associational power comes from organizations like labor unions that can strategize and coordinate workers' collective action and maintain it over time.<sup>351</sup> Third, institutional power captures legal rights and structures, such as labor law, that institutionalize workers' collective power.<sup>352</sup> Fourth, societal power refers to workers' abilities to form durable coalitions with other groups, or to invoke support of the general public based on a general sense that the workers' cause is just.<sup>353</sup>

This Article is focused on institutional power—establishing a legally enforceable mechanism for platform workers and users to exert collective power. But institutional power alone is a recipe for a symbolic or ceremonial version of collective action that has little power to change anything.<sup>354</sup> So one important question is how platform unions will muster other sources of power.

In the labor context, collective pressure can take the form of strikes, consumer boycotts, and the like; whether to use these tactics during bargaining is a decision left to unions and workers themselves. Labor law comes into play by protecting some tactics and not others, and by limiting employers' permissible responses.<sup>355</sup> As the previous Part discussed, platform users

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*Compromise*, 105 AM. J. SOCIO. 957, 962 (2000) (“[P]ower can be thought of as the capacity of individuals and organizations to realize class interests.”).

350. See Schmalz et al., *supra* note 349, at 116–18 (discussing structural power, defined as “the position of wage earners in the economic system”).

351. See *id.* at 118–21 (discussing associational power, which arises from “workers uniting to form collective political or trade union workers’ associations” (citation omitted)).

352. See *id.* at 121–22 (discussing institutional power, which is “usually the result of struggles and negotiation processes based on structural power and associational power”).

353. See *id.* at 122–24 (discussing societal power, defined as “the latitudes for action arising from viable cooperation contexts with other social groups and organisations, and society’s support for trade union demands”).

354. *Id.* at 126 (discussing relationships between different forms of worker power and the risk of purely ceremonial bargaining that has little effect on workers’ wages or working conditions).

355. For example, labor law generally protects the right to strike, but bars labor unions from engaging in certain “secondary” conduct. 29 U.S.C. §§ 157, 158(b)(4) (providing union’s right to strike but prohibiting other conduct). It also

already use some similar tactics,<sup>356</sup> especially appeals to the public, advertisers, or the press, and regulatory complaints. Platform unions could adapt and innovate new forms of collective action that step up the pressure on platforms, perhaps including both primary strikes and secondary boycotts.<sup>357</sup> The key here is for law to encourage this innovation by broadly protecting and enabling collective action by users who are covered by a platform bargaining law.

Labor law also influences the likelihood that an employer and union will reach a collective bargaining agreement by determining what happens if the parties hit a bargaining impasse. In the NLRA context, an employer may unilaterally change working conditions at this point<sup>358</sup>—giving employers a strong incentive to hold out and refuse to reach an agreement. As a result, it often takes over a year for a union to negotiate its first contract with an employer, and some unions never reach a first

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bars employers from firing employees because of their protected concerted activity but permits other responses that undermine labor power. *Id.* § 158(a)(1), (3) (defining relevant “unfair labor practices”); Am. Baptist Homes of the W., 364 N.L.R.B. 75, 78 (2016) (discussing the scope of an employers’ right to “permanently replace” economic strikers). U.S. labor law has been rightly criticized for barring some of employees’ most powerful sources of leverage over employers, while permitting employers to undermine workers’ collective action. *See, e.g.*, Craig Becker, “Better than a Strike”: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act, 61 U. CHI. L. REV. 351, 353 (1994) (“Since the NLRA’s passage, however, the potency of the strike has been annihilated. Such is the recent conclusion of both labor and management.”); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 301–03 (1978) (discussing Supreme Court cases undermining legal protection for workers’ collective action).

356. *See supra* Part III.B (discussing how platforms undermine users’ collective action).

357. “Secondary” activity puts pressure on an entity that does business with the entity that is the subject of the labor dispute. For an analysis of how platform users could use put pressure on platforms by boycotting their advertisers, *see Mazzurco, supra* note 65, at 842.

358. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that an employer’s unilateral change in employment conditions without first negotiating to impasse violates the NLRA); *see also Collective Bargaining Rights, supra* note 216 (“If negotiations reach an impasse, an employer can impose terms and conditions so long as it offered them to the union before impasse was reached.”).

contract.<sup>359</sup> This system is obviously flawed and should not be imported into the platform union context.

One alternative would be to flip the default, precluding platforms from making changes without first securing the agreement of platform unions. Another would be to allow the platform or platform union to request assistance from a government mediator or arbitrator during negotiations. For example, many public-sector jurisdictions rely on “interest arbitration,” which entrusts the resolution of contract disputes to arbitrators to resolve contract disputes.<sup>360</sup> But legislators could also opt for a middle-ground approach, such as requiring interest arbitration in only limited circumstances,<sup>361</sup> or permitting the union or platform to request a mediator to assist in reaching an agreement.<sup>362</sup> The key, though, would be to ensure that the structure of a platform-bargaining law does not undermine platforms’ incentives to reach an agreement.

## CONCLUSION

This Article has argued that the collective problems posed by social media platforms call for a collective solution, and proposes one shape that this solution could take: platform unions, designed to promote users’ democratic participation in platform governance. Specifically, it argued that platform collective bargaining could usefully address the data-privacy and content-management problems posed by social media platforms.

Collective bargaining could also be useful in other contexts. For example, future work could consider how users of dating apps, period trackers, or Google Home speakers could bargain

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359. See Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECON. POL’Y INST. 22 (May 20, 2009), <https://files.epi.org/page/-/pdf/bp235.pdf> [<https://perma.cc/VWU5-5K2R>] (providing data on first contract rates).

360. For a description of different models of interest arbitration, see Martin H. Malin, *Two Models of Interest Arbitration*, 28 OHIO ST. J. DISP. RES. 145, 147 (2013).

361. For example, the Protecting the Right to Organize Act, which would reform many aspects of the National Labor Relations Act, would allow unions to select interest arbitration to reach a first contract, but not subsequent contracts. Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021).

362. For example, the NLRA requires unions and employers in the healthcare setting to work with the Federal Mediation and Conciliation Service in reaching a collective bargaining agreement. 29 U.S.C. § 158(d)(4)(C).

collectively over what the companies may do with the highly sensitive data they collect. In addition, authors focused on topics including consumer rights, tenants' rights, and the provision of government social services have all called for greater empowerment of affected communities, with some identifying unionism and collective bargaining as a way to achieve that empowerment.<sup>363</sup> While those contexts are beyond the scope of this Article, I am sympathetic to the approach, and I hope this Article's discussion of adapting collective bargaining into the platform context will be useful to authors considering collective bargaining as a solution to other problems. Thus, this Article ultimately aims to achieve three main purposes: to make the case for platform unionism; to begin grappling with some key implementation questions; and to offer a model for thinking about collective bargaining's potential to address other kinds of widespread power imbalances.

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363. *E.g.*, Ira S. Rubinstein & Bilyana Petkova, *Governing Privacy in the Datafied City*, 47 FORDHAM URB. L.J. 755, 769–77 (2020) (calling for city data governance to account for algorithmic discrimination); Jonathan F. Harris, *Can Consumer Law Protect Workers?*, LAW & POL. ECON. PROJECT (Feb. 27, 2023), <https://lpeproject.org/blog/can-consumer-law-protect-workers> [<https://perma.cc/22H3-38LU>] (“[C]onsumer law could adopt from labor law a collective rights regime . . .”); Hannah Bloch-Wehba, *Algorithmic Governance from the Bottom up*, 48 BYU L. REV. 69, 119 (2022) (calling for “bottom-up control” of governmental use of technology); Karl Klare, *A ‘Wagner Act’ for Tenants – A Law Reform Proposal to Institutionalize Countervailing Tenant Power* (Northeastern Univ. Sch. of L., Research Paper No. 464, 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4467492](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4467492) [<https://perma.cc/Z6CY-EPEF>] (arguing for tenant unions).