

When Section 230 is Gone, Where Do We Go? Considerations for Content Creators and Social Media Platforms

Kallen Dimitroff*

Contracts between social media platforms (platforms) and content creators could use an update. While both Democrats and Republicans have called for new legislation that seeks to reshape internet regulation, neither Congress nor legal scholars have considered how their proposals might impact contracting between platforms (like Facebook and Twitter) and content creators. This Article asserts that should change.

Currently, platforms can remove content creators' accounts and posts without notice or consequence because of Section 230 of the Communications Decency Act, which is an affirmative defense to civil liability that has been broadly interpreted to protect platforms from almost all civil claims. This is especially problematic for the 24% of Americans who make money using digital platforms. But, even if Section 230 were fully repealed and content creators could sue platforms, creators would probably still be unsuccessful because platforms will almost certainly re-entrench statutory protections in their user contracts. Indeed, most major social media companies use one-size-fits-all contracts to govern their relationships with billions of users who utilize their platforms in a multitude of ways. These contracts are tilted in favor of platforms but have been uniformly upheld in American courts—there is no reason to believe courts will invalidate contracts containing the language of Section 230.

Thus, this Article will seek to explore both issues: Section 230 and platform-creator clickwrap contracts. Specifically, it will suggest that forthcoming legislative changes will be ineffective if there are no corresponding changes in the

DOI: <https://doi.org/10.15779/Z38H70817J>

*. Kallen Dimitroff is a JD candidate at The University of Texas School of Law.

regulation of platform-creator contracts. It will not, however, provide mechanisms through which to enact such regulation. Instead, it will make theoretical suggestions that may guide the inception of such regulation. Specifically, it will consider the current contracting regime through the lens of relational contract theory, which compels holistic, socially conscious considerations of exchanges between parties rather than isolated reviews of contractual instruments. It will proceed as follows: (1) an overview of Section 230, (2) a discussion of the problems it has presented, (3) an explanation of the relationship between platforms and content creators, (4) a broad description of the current state of platform contracting, and (5) an explanation and application of relational contract theory in the context of platform-creator relationships.

- I.Introduction 47
- II.Section 230..... 48
- III.The Problem..... 50
 - A. Evolution of the Internet 50
 - B. Entertainers, Artists, and Section 230..... 52
 - C. Paradigmatic Shift: Section 230 is Likely to be Amended, Repealed, or Struck Down as Unconstitutional in the Near Future 54
- IV.Business Models: Relationship Between Creators and Platforms 55
 - A. YouTube 55
 - B. Facebook..... 57
 - C. TikTok 58
- V.Platform Contracts: Current State of Affairs 59
- VI.Creators and Platforms: Relational Contract Theory Applied..... 60
 - A. Historical Development 61
 - B. Governing Precepts..... 63
 - C. Application of Precepts to Platform-Creator Relationship 65
 - 1. Role Integrity, Flexibility, and Harmonization of Social Matrices 65
 - 2. Reciprocity and Effectuation of Consideration..... 66
 - 3. Linking Norms, Creation of Power and Restraint, Implementation of Planning, and Propriety of Needs..... 69
- VII.Conclusion..... 70

The most pressing question for the future of the Internet is not how the technology will change, but how the process of change and evolution itself will be managed . . . With the success of the Internet has come a proliferation of stakeholders – stakeholders now with an economic . . . investment in the network.

Barry M. Leiner, A Brief History of the Internet (1997)

@Facebook You permanently deleted my account and ALL my pages I put much time and money into. I lost everything.

@Skankerman, Twitter (Oct. 1, 2020)

I. INTRODUCTION

Contracts between social media platforms and content creators could use an update. Fortunately, both Republicans and Democrats have called for new legislation that seeks to reshape internet regulation. However, platform-creator contracts are unique.

Currently, platforms can remove content creators' accounts and posts without notice or consequence because of Section 230 of the Communications Decency Act,¹ which is an affirmative defense to civil liability that has been broadly interpreted to protect platforms from almost all civil claims.² But, even if Section 230 were fully repealed and content creators could sue platforms, creators would probably still be unsuccessful because platforms will almost certainly re-entrench statutory protections in their user contracts. Indeed, most major social media companies use one-size-fits-all form contracts to govern their relationships with billions of users who utilize their platforms in a multitude of ways. These contracts are tilted in favor of platforms but have been uniformly upheld in American courts—there is no reason to believe courts will invalidate contracts containing the language of Section 230.³

Thus, this Article will seek to explore both issues: Section 230 and platform-creator clickwrap contracts. Specifically, it will suggest that forthcoming legislative changes to Section 230 will be ineffective if there are no corresponding changes in platform-creator contracts.⁴ It will not, however, provide mechanisms through which to enact such regulation. Instead, it will make theoretical suggestions that may guide the inception of such regulation. Specifically, it will consider the current contracting regime through the lens of relational contract theory, which compels holistic, socially conscious considerations of exchanges between parties rather than isolated reviews of contractual instruments. It will argue that a new platform-creator contracting regime that is attuned to the principles of relational contract theory will produce better outcomes for the parties that generate real value on social media platforms; namely, creators. Accordingly, this Article will proceed as follows: (1) an overview of Section 230, (2) a discussion of the problems it has presented, (3) an explanation of the relationship between platforms and content creators, (4) a

1. 47 U.S.C. § 230.

2. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (“[P]ublication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content”).

3. THE EFFECTIVENESS OF CLICKWRAP FOR LEGALLY ENFORCEABLE AGREEMENTS, DOCUSIGN, <https://www.docuSign.ca/white-papers/the-effectiveness-of-clickwrap-for-legally-enforceable-agreements-1> [<https://perma.cc/98AT-EGVU>].

4. For the purposes of this article, please note that these considerations are aimed at users that earn money via platforms, not lay users.

broad description of the current state of platform contracting, and (5) an explanation and application of relational contract theory in the context of platform-creator relationships.

II. SECTION 230

In 1996, Congress passed the Communications Decency Act (CDA), formally Title V of the Telecommunications Act of 1996.⁵ For decades, the Communications Act of 1934 has served as the primary mechanism for regulating the United States telecommunications industry.⁶ For its part, the CDA was primarily passed to address growing concerns that minors would have access to pornography on the internet.⁷ Section 230 was a subsection of that bill⁸ that provided platforms with an affirmative defense for civil liability arising from user-generated content.⁹ Practically speaking, this means that platforms cannot be held liable for user-generated content on their platforms.¹⁰ Notably, the inverse is true as well: platforms cannot be sued for decisions to remove user-generated content.¹¹

This protection emerged in response to judicial decisions related to classifying platforms as distributors or publishers of information.¹² Supreme Court precedent was clear: a line was drawn between publishers of content (like newspapers) and distributors of content (like libraries).¹³ Publishers were expected to have an awareness about, and a high degree of control over, the content of material they were publishing and, therefore, were liable for any illegal content they published.¹⁴ Conversely, distributors were less likely to be aware of or in control of content, and therefore, were immune from liability

5. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended at 47 U.S.C. § 609).

6. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934). The Telecommunications Act of 1996 amended the Communications Act of 1934 to modernize telecommunications law, including the internet in broadcasting and spectrum allotment. See TELECOMMUNICATIONS ACT OF 1996, FEDERAL COMMUNICATIONS COMMISSION <https://www.fcc.gov/general/telecommunications-act-1996> [<https://perma.cc/F9TH-FN6V>].

7. See William A. Sodeman, *Communications Decency Act*, ENCYC. BRITANNICA (Nov. 24, 2016), <https://www.britannica.com/topic/Communications-Decency-Act> [<https://perma.cc/UR4L-M5G3>].

8. 47 U.S.C. § 230.

9. Eric Taubel, *The ICS Three-Step: A Procedural Alternative for Section 230 of the Communications Decency Act and Derivative Liability in the Online Setting*, 12 MINN. J. L., SCL., & TECH. 365, 376 (2011).

10. Valerie C. Brannon, Eric N. Holmes, Nina M. Hart, & Chris D. Linebaugh, Cong. Rsch. Serv., LSB10484, UPDATE: Section 230 and the Executive Order on Preventing Online Censorship (2020).

11. *Id.*

12. Adi Robertson, *Why the Internet's Most Important Law Exists and How People Are Still Getting It Wrong*, THE VERGE (June 21, 2019), <https://www.theverge.com/2019/6/21/18700605/section-230-internet-law-twenty-six-words-that-created-the-internet-jeff-kosseff-interview> [<https://perma.cc/E6T8-QJJM>].

13. *Smith v. California*, 361 U.S. 147 (1959).

14. *Id.*

arising from the materials they sold.¹⁵

In the early 1990s, two significant lawsuits sought to impose liability on platforms: *Cubby, Inc. v. CompuServe Inc.* and *Stratton Oakmont v. Prodigy Services Inc.*¹⁶ The basis of each lawsuit was the same: the defendant platforms in those cases were sued for user-generated content hosted on their websites.¹⁷ Each companies' respective approaches to content moderation, however, were markedly different.¹⁸ CompuServe's policy was to regulate how users communicated on its servers, whereas Prodigy employed a team of moderators to check and approve content.¹⁹ Thus, under existing Supreme Court precedent, CompuServe was a distributor, and Prodigy was a publisher.²⁰

This arrangement struck Representative Christopher Cox (R-CA) as perverse: "if that rule was going to take hold[,] then the internet would become the Wild West and nobody would have any incentive to keep the internet civil."²¹ So, in hopes of creating a legal structure that incentivized content moderation to foster civil online discourse, Representative Cox and then-Oregon Congressman Ron Wyden drafted a bill that would enable platforms like Prodigy to moderate content without fear of civil litigation.²² During the House floor debate, Representative Cox stated:

We want to make sure that everyone in America has an open invitation and feels welcome to participate in the Internet. But as you know, there is some reason for people to be wary because, as a Time Magazine cover story recently highlighted, there is in this vast world of computer information, a literal computer library, some offensive material, some things in the bookstore, if you will, that our children ought not to see.

As the parent of two, I want to make sure that my children have access to this future and that I do not have to worry about what they might be running into online. I would like to keep that out of my house and off my computer.²³

Likewise, Congressman Wyden said: "We are all against smut and pornography, and, as the parents of two small computer-literate children, my

15. *Id.*

16. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 137 (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Matt Reynolds, *The Strange Story of Section 230, The Obscure Law That Created our Flawed, Broken Internet*, WIRED UK (Mar. 24, 2019), <https://www.wired.co.uk/article/section-230-communications-decency-act> [<https://perma.cc/J5TE-DD5B>].

22. *Id.* Cf. SECTION 230 PROTECTIONS, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/bloggers/legal/liability/230> [<https://perma.cc/D6FW-YY6F>] (last visited May 15, 2021) (noting Section 230 does not bar criminal claims, copyright or intellectual property claims, or claims arising under electronic communications privacy law); Valerie C. Brannon & Eric N. Holmes, Cong. Rsch. Serv., R46751, *Section 230: An Overview*, (2021) (noting Section 230 does not bar claims arising under federal sex trafficking statutes).

23. 141 CONG. REC. 129 (Aug. 4, 1995) (statement of Rep. Cox).

wife and I have seen our kids find their way into these chat rooms that make their middle-aged parents cringe.”²⁴ At the time, they also thought that keeping platforms out of court would allow the fledgling internet to become economically viable.²⁵ Thus, Section 230 reads: “No 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.”²⁶

III. THE PROBLEM

A. Evolution of the Internet

Of course, the context of Cox’s “Wild West” was the internet as it existed in 1996. At the time, less than 10% of Americans had access to the “world-wide-web” and used it, on average, for thirty minutes a month.²⁷ People paid for internet service by the hour, there were fewer than 100,000 websites, and Google did not exist.²⁸ There were chat rooms, small-scale online merchants, blogs, email, rudimentary games, and a few news outlets.²⁹

By 2018, the internet sector generated 10.1 % of U.S. GDP, supported over 13 million jobs and invested over \$60 billion into the economy.³⁰ In 2019, content creators, that is, people who make money by producing content on the internet, generated a market worth \$11 billion—that number is expected to rise to \$38.2 billion by 2030.³¹ As of 2020, 93% of Americans use the internet, and by some estimates, the average U.S. adult spends seven hours and fifty minutes consuming digital media every day.³²

Undoubtedly, the American internet sector has grown tremendously: Google has a 90% search-engine market share, and of the world’s 4.39 billion

24. 141 CONG. REC. 129 (Aug. 4, 1995) (statement of Rep. Wyden).

25. Felix Gillette & Laurence Arnold, *Why ‘Section 230’ is Nub of Fights Over Online Speech*, BLOOMBERG (Feb. 2, 2021), <https://www.bloomberg.com/news/articles/2021-02-02/why-section-230-is-nub-of-fights-over-online-speech-quicktake> [<https://perma.cc/LB3M-37K3>].

26. 47 U.S.C. § 230.

27. Farhad Manjoo, *Jurassic Web*, SLATE (Feb. 24, 2009), <https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html> [<https://perma.cc/XF68-ZVBP>].

28. *Id.*

29. *The Web Back in 1996–1997*, SOLARWINDS PINGDOM BLOG (Sep. 16, 2008), <https://www.pingdom.com/blog/the-web-in-1996-1997/#:~:text=The%20web%20browser%20of%20choice,28.8Kbps%20to%2033.6Kbps> [<https://perma.cc/XF68-ZVBP>].

30. Christopher Hooten, *Measuring the U.S. Internet Sector: 2019*, INTERNET ASSOCIATION (Sep. 26, 2019), <https://internetassociation.org/publications/measuring-us-internet-sector-2019/> [<https://perma.cc/M4XJ-U4MX>].

31. *Digital Content Creation Market Is Expected to Reach a Global Size of US \$38.2 billion by 2030*, GLOBE NEWSWIRE (Nov. 23, 2020), <https://www.globenewswire.com/news-release/2020/11/23/2131980/0/en/Digital-Content-Creation-Market-Is-Expected-To-Reach-a-Global-Size-of-US-38-2-billion-by-2030.html> [<https://perma.cc/JJA5-N3YT>].

32. Insider Intelligence Editors, *US Adults Added 1 Hour of Digital Time in 2020*, EMARKETER (Jan. 26, 2021), <https://www.emarketer.com/content/us-adults-added-1-hour-of-digital-time-2020>, [<https://perma.cc/38FH-B52X>].

internet users, 4 billion use Google.³³ Facebook has a 69% global social-media market share, and across its leading platforms—Instagram, Facebook, and WhatsApp—it has 2.2 billion users.³⁴ Mark Zuckerberg (Facebook), Jeff Bezos (Amazon), Bill Gates (Microsoft), Tim Cook (Apple), and Larry Page (Alphabet) are all ranked in the world’s top twenty-five most powerful people.³⁵ Indeed, most Americans feel social media companies have too much influence.³⁶

A careful review of Section 230 case law seems to support that position. Since 1996, platforms have invoked Section 230 to bar liability in cases far beyond those involving “smut and pornography.” It has been used to bar contract claims, civil claims arising under statutes like the Anti-Terrorism Act, and civil rights abuses.³⁷ In fact, Section 230 is used to bar a large portion of cases users and content creators bring against platforms—Facebook has won all but one of the cases in which it invoked section 230.³⁸ Section 230 was constructed to incentivize the removal of offensive content, but it has been interpreted to put platforms beyond the reach of their users.

So, where do we go from here? The modern internet poses dangers far beyond the proliferation of offensive content. Many Americans use platforms as a significant means of political expression.³⁹ Terrorists and hate groups use the platforms to recruit members and broadcast large-scale acts of violence.⁴⁰ Authoritarian governments marshal social media networks to orchestrate

33. Deyan Georgiev, *111+ Google Statistics and Facts That Reveal Everything About the Tech Giant*, REVIEW 42 (Feb. 19, 2021), <https://review42.com/resources/google-statistics-and-facts/#:~:text=Google's%20search%20engine%20market%20share,over%20one%20billion%20active%20users> [https://perma.cc/U57W-WN37].

34. David Cohen, *2.2 Billion People Use Facebook, Instagram, WhatsApp or Messenger Every Day*, ADWEEK (Oct. 31, 2019), <https://www.adweek.com/performance-marketing/2-2-billion-people-use-facebook-instagram-whatsapp-or-messenger-every-day/>.

35. *The World's Most Powerful People*, FORBES (2018), <https://www.forbes.com/powerful-people/list/#tab:overall> [https://perma.cc/LE6M-7PV9]. Notably, Jeff Bezos currently outranks the Pope.

36. Monica Anderson, *Most Americans Say Social Media Companies Have Too Much power, Influence in Politics*, PEW RESEARCH CENTER (July 22, 2020), <https://www.pewresearch.org/fact-tank/2020/07/22/most-americans-say-social-media-companies-have-too-much-power-influence-in-politics/> [https://perma.cc/HQ28-77HG].

37. See *Igbonwa v. Facebook, Inc.*, 18-CV-02027-JCS, 2018 WL 4907632, at *2 (N.D. Cal. Oct. 9, 2018), *aff'd*, 786 Fed. Appx. 104 (9th Cir. 2019) (defamation claim); *cf.* *Godwin v. Facebook, Inc.*, 160 N.E.3d 372 (Ohio Ct. App. 2020) (involving murder); *see also* *Crosby v. Twitter, Inc.*, 921 F.3d 617, 619 (6th Cir. 2019) (involving mass shooting).

38. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802 (N.D. Cal. 2011).

39. See generally Alcides Velasquez & Hernando Rojas, *Political Expression on Social Media: The Role of Communication Competence and Expected Outcomes*, 3 SOCIAL MEDIA + SOCIETY 1–13 (2017) (explaining the use of political speech on social media platforms in multiple countries, including America).

40. See, e.g., Vera Mironova, *Who Are the ISIS People?*, 13 PERSPECTIVES ON TERRORISM 32, 32–33 (2019); Mitchell D. Silber & Arvin Bhatt, *Radicalization in the West*, N.Y. POLICE DEP'T (2007), (http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf [https://perma.cc/7TMV-P9E5] (“The Internet is a driver and enabler for the process of radicalization”).

genocide and monitor political dissidents.⁴¹ Antagonistic nations utilize algorithms to spread misinformation and affect the results of American elections.⁴² The majority of Americans file their taxes, do their banking, consume entertainment, shop, and perform countless day-to-day tasks online.⁴³

Although there are credible reasons to protect at least some platforms from civil defamation or First Amendment lawsuits arising from third-party content, Section 230 has outlived its usefulness in many respects.⁴⁴ Put simply, Section 230 imposes a one-size-fits-all bar to civil liability to a universe of multidimensional, previously unforeseen legal internet-based challenges. The current regulatory structure coupled with courts' platform-protective interpretation of Section 230 allows serious social, economic, and geopolitical problems to go unaddressed and leaves platforms' customers footing the bill.

B. Entertainers, Artists, and Section 230

Perhaps no one bears the costs imposed by the current regulatory structure more than online content creators—Section 230 bars any recourse when platforms remove content, suspend accounts, or permanently ban users. While there are contexts in which this bar can be helpful, it can be highly problematic for upwards of 24% of Americans who earn money on digital platforms.⁴⁵ For online content creators, platforms' ability to remove content can be devastating. For example, this summer, Instagram purged accounts it viewed as ripping off content. One online meme creator says he lost his sole source of income—\$4,000 a month—when Instagram deleted his three popular accounts.⁴⁶

Sometimes Instagram shuts down accounts without any apparent justification; Dani Diamond lost her photography account, the effective

41. Paul Mozur, *A Genocide Incited on Facebook, With Posts From Myanmar's Military*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> [<https://perma.cc/ZTN5-9Y4K>].

42. Julian E. Barnes, *Russian Interference in 2020 Included Influencing Trump Associates, Report Says*, N.Y. TIMES (Mar. 16, 2021), <https://www.nytimes.com/2021/03/16/us/politics/election-interference-russia-2020-assessment.html> [<https://perma.cc/X5WY-E69U>].

43. See generally Madison Troyer, *25 Fast Facts About How Americans Use The Internet Today*, STACKER (Jan. 29, 2021), <https://stacker.com/stories/3897/25-fast-facts-about-how-americans-use-internet-today> [<https://perma.cc/6VJS-59UQ>] (providing a list of common ways Americans use the internet).

44. The constraints of even the most advanced human and algorithmic content moderation make speech-based moderation decisions incredibly tenuous and difficult to manage. See, e.g., James Vincent, *Facebook is Now Using AI to Sort Content for Quicker Moderation*, THE VERGE (Nov. 13, 2020), <https://www.theverge.com/2020/11/13/21562596/facebook-ai-moderation> [<https://perma.cc/P573-7PVD>].

45. Aaron Smith, *Gig Work, Online Selling and Home Sharing*, PEW RESEARCH CENTER (Nov. 17, 2016), <https://www.pewresearch.org/internet/2016/11/17/gig-work-online-selling-and-home-sharing/> [<https://perma.cc/H5KK-8QBE>].

46. James Wellemeyer, *This Teenager Was Making \$4,000 a Month Reposting Memes on Instagram — Until He Got Purged*, MarketWatch (Aug. 31, 2019), <https://www.marketwatch.com/story/instagrams-purge-of-meme-accounts-cost-this-teenager-his-only-income-of-4000-a-month-2019-08-07> [<https://perma.cc/58P9-AZVW>].

storefront of her business, with over 135,000 followers, and never received any indication of what community guidelines she violated despite reaching out to the company.⁴⁷ The problem extends to influencers, musicians, and TikTok creators too. Controversial influencer Jesse Taylor said she felt like losing her account with over 100,000 followers in an apparent error felt like a “murder.”⁴⁸ Sarah Fischer, a German musician, claims she was permanently banned from Facebook for uploading covers of popular songs and was forbidden from rejoining the site when the rule against publishing covers was lifted.⁴⁹ One TikTok influencer alleges her account, with over 300,000 followers, was deleted after she posted a video about injecting estrogen.⁵⁰

Importantly, even non-permanent account deletion or single post-removal can cause disruption and loss of income. The internet was sent into a flurry when world-famous K-Pop boyband BTS’s TikTok account disappeared from the platform for several hours.⁵¹ Singer Jason Derulo was upset when Instagram deleted a racy (but not nude) photo of him in 2019, his “most liked photo in an afternoon.”⁵² StartupBros, a YouTube channel with 30,000 subscribers and over 2 million views, was deleted and subsequently reinstated after the influencers behind the account launched a campaign claiming to have invested \$10,000 in new studio equipment.⁵³

Under the current regulatory regime, none of these celebrities, creators, or influencers can sue the platforms that harmed them because of Section 230, which seems beyond the scope of the law’s initial intention. Instead, Congress wanted to make sure platforms had the latitude to remove offensive content, not accounts or pages created for entertainment or artistic purposes. Of course, it is worth noting that Section 230’s civil liability bar allows platforms to remove the

47. Dani Diamond, *Instagram Deleted My Account with 135K Followers. Zero Warning*, PETAPIXEL (Sep. 14, 2016), <https://petapixel.com/2016/09/14/instagram-deleted-account-135k-followers-zero-warning/> [<https://perma.cc/LUM3-39Y3>].

48. Lindsay Dodgson, *Instagram Says it Deleted a Controversial Influencer’s Account With 100,000 Followers ‘In Error,’ But She Called the Experience a ‘Blessing in Disguise’*, INSIDER (Apr. 12, 2019, 5:28 AM), <https://www.insider.com/controversial-influencers-instagram-account-deleted-in-error-2019-4> [<https://perma.cc/SM3N-ME7V>].

49. Sarah Fischer, *My Sad Facebook Story — How My Page Got Permanently Banned for Something Completely Legal*, DIGITAL MUSIC NEWS (Mar. 20, 2018), <https://www.digitalmusicnews.com/2018/03/20/facebook-page-banned/> [<https://perma.cc/7UUK-5NPH>].

50. Rosalynne Montoya, *TikTok Deleted My Account Because I’m a Latina Trans Woman*, L.A. BLADE (Dec. 15, 2020), <https://www.losangelesblade.com/2020/12/15/tiktok-deleted-my-account-because-im-a-latina-trans-woman/> [<https://perma.cc/FS2S-N7PB>].

51. Saahil A. Perival, *The BTS TikTok Account Goes Down For a While, Sends Twitter Into Meltdown*, SPORTSKEEDA (Oct. 3, 2020), <https://www.sportskeeda.com/esports/the-bts-tiktok-account-goes-while-sends-twitter-meltdown> [<https://perma.cc/WBJ7-YQAZ>].

52. Stacey Grant, *6 Celeb Pics That Were Banned on Instagram*, SEVENTEEN (Mar. 6, 2020), <https://www.seventeen.com/celebrity/celebrity-couples/g31251251/controversial-celebrity-instagram-pics/> [<https://perma.cc/WCB8-FKRV>].

53. Will Mitchell, *YouTube Instantly Deleted Our Entire Channel... What We Learned & How You Can Help*, STARTUPBROS (Aug. 11, 2020), <https://startupbros.com/youtube-channel-terminated/> [<https://perma.cc/F6CR-L5GG>].

sorts of accounts and content that Congress hoped it would moderate. Facebook's most recent transparency report indicates that the company removed posts and accounts that featured child pornography, violence, hate speech, and misinformation, through both human and algorithmic moderation.⁵⁴

C. Paradigmatic Shift: Section 230 is Likely to be Amended, Repealed, or Struck Down as Unconstitutional in the Near Future

At the moment, there are a range of proposals aimed at reforming Section 230, and the debate surrounding these efforts is contentious. At one end of the policy spectrum, pro-platform and free-speech advocates claim Section 230 is essential to a free-and-open internet and should be left as is.⁵⁵ At the other end, partisan commentators and policymakers say the law is oppressive and have advocated to repeal it entirely.⁵⁶ Of course, there are dozens of policy positions in between, and each has its merits. Indeed, Facebook recently released an interactive page highlighting various proposals it endorses.⁵⁷ Regardless of which proposal succeeds, Congress will take legislative action in this domain soon.⁵⁸

Additionally, the Supreme Court recently denied cert in several cases implicating Section 230, and Court observers speculate it will reach the issue this term.⁵⁹ Notably, the provisions surrounding Section 230 were struck down as improper abridgments of the First and Fifth Amendments in 1996.⁶⁰ Further, Supreme Court Justice Clarence Thomas recently took the peculiar step of issuing an opinion along with a majority decision that deemed an appeal moot. His concurrence “fired a warning shot at social media giants,” by suggesting they should be classified as common carriers.⁶¹ And thus, “[i]f the analogy between

54. COMMUNITY STANDARDS ENFORCEMENT REPORT, FACEBOOK, <https://transparency.fb.com/data/community-standards-enforcement/> [https://perma.cc/FA5T-6B7L] (last visited Feb. 25, 2022).

55. See David Morar & Chris Riley, *A Guide For Conceptualizing the Debate Over Section 230*, BROOKINGS (Apr. 9, 2021), <https://www.brookings.edu/techstream/a-guide-for-conceptualizing-the-debate-over-section-230/> [https://perma.cc/BBJ9-HQKQ] (providing a framework for the Section 230 debate and laying out chief argument of both sides).

56. *Id.*

57. FACEBOOK, about.facebook.com/regulations (last visited Feb. 25, 2022).

58. See Kiran Jeevanjee, Brian Lim, Irene Ly, Matt Perault, Jenna Ruddock, Tim Schmeling, Niharika Vattikonda, & Joyce Zhou, *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021, 5:43 AM), <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html> [https://perma.cc/BA2G-P9TR] (listing and describing all congressional legislation aimed at altering Section 230).

59. See, e.g., *Dyroff v. Ultimate Software Group Inc.*, SCOTUSBLOG (May 18, 2020), <https://www.scotusblog.com/case-files/cases/dyroff-v-ultimate-software-group-inc/> [https://perma.cc/34FS-EUNB]; *Force v. Facebook Inc.*, SCOTUSBLOG (May 18, 2020), <https://www.scotusblog.com/case-files/cases/force-v-facebook-inc/> [https://perma.cc/Q5JV-ZBP3].

60. See generally *Reno v. American Civil Liberties Union*, 521 U.S. 884 (1997).

61. Marguerite Reardon, *A Supreme Court Justice Weighs in on Section 230: Here's What it Means*, CNET (Apr. 12, 2021), <https://www.cnet.com/news/a-supreme-court-justice-weighs-in-on-section-230-heres-what-it-means/> [https://perma.cc/9AXL-WXLY].

common carriers and digital platforms is correct, then an answer may arise for dissatisfied platform users who would appreciate not being blocked: laws that restrict the platform's right to exclude."⁶² That answer would be that Section 230 is an unconstitutional abridgment of the First Amendment, antitrust law, and public accommodation laws.⁶³

While it is beyond the scope of this paper to discuss which legislative proposal poses the "correct" solution or to speculate about when the Supreme Court might reach the constitutionality of Section 230, one thing is clear: its days are numbered. Most of the policy dialogue surrounding the inevitable paradigm shift is directed at issues like counterterrorism, revenge porn, and human trafficking.⁶⁴ This paper, however, seeks to advance concepts that should be considered after weightier topics are fleshed out—specifically, the contract theory underpinning agreements between platforms and content creators. Thus, the following Parts will consider the relationships between platforms and content creators, the value that each creates, and the interdependence of their relationships. In light of these relationships, it will suggest that a radically different approach is needed to produce fair contractual arrangements.

IV. BUSINESS MODELS: RELATIONSHIP BETWEEN CREATORS AND PLATFORMS

To evaluate the contract theory underpinning platform and creator agreements, one must consider the relationship between platforms and content creators. These relationships are not invariable; Major social platforms have different business models, and creators use platforms for a variety of purposes. Indeed, a single creator might use one site for several purposes. Therefore, this section will use YouTube, Facebook, and TikTok as case examples of platform-creator relationships.

A. YouTube

In 2005, Jawed Karim, Chad Hurley, and Steve Chen, newly rich from eBay's purchase of PayPal, created Youtube to make it easier for users to generate content.⁶⁵ At the time, video-sharing on the internet was clunky and primarily controlled by brands and businesses.⁶⁶ YouTube was born out of the trio's desire for video-sharing to be more free-flowing, allowing users, rather

62. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1225 (2021) (Thomas, J., concurring).

63. *Id.*

64. Robertson, *supra* note 12.

65. *The Business Model of YouTube*, BUSINESS MODELS INC., <https://www.businessmodelsinc.com/business-model-youtube/> [<https://perma.cc/NEQ5-ETG3>]. (Hereinafter *YouTube*, BUSINESS MODELS).

66. Paige Leskin, *YouTube is 15 Years Old. Here's a Timeline of How YouTube Was Founded, its Rise to Video Behemoth, and its Biggest Controversies Along the Way*, BUSINESS INSIDER (May 30, 2020), <https://www.businessinsider.com/history-of-youtube-in-photos-2015-10> [<https://perma.cc/664E-MLDG>].

than corporations, to generate content.⁶⁷ YouTube’s approach was revolutionary. In large part this was because of its focus on user-generated content, as one site describes it:

Content creators were given a platform to display their high-quality videos and viewers were given a seemingly limitless supply of entertainment. The two parties were not only connected with each other, but they could interact with one another. Allowing creators to produce content that users requested. A whole new level of power was bestowed upon both parties. Viewers could choose exactly what they wanted to watch, when they wanted to watch it. The world of multimedia entertainment would never be the same again.⁶⁸

In 2006, Google purchased YouTube and harnessed the platform for targeted advertising. Now, YouTube has close to 2 billion active monthly users, and in keeping with the founders’ initial aim, the platform is user-centric.⁶⁹ That is, “[e]very video posted by a content creator on the platform is judged by a jury of their peers. Advertisers do not decide which content is the most viewed, it is the everyday person that decides.”⁷⁰

Under this model, YouTube has two principal revenue streams: (1) advertising revenue and (2) subscriber accounts.⁷¹ In 2019, YouTube generated \$15 billion in revenue,⁷² and Alphabet CFO Ruth Porat stated that the company uses approximately \$8.5 billion from this revenue for “content acquisition.”⁷³ It is unclear how much of that money goes to creators, however. The site’s top creators are paid directly if their content is advertiser-friendly. Still, other creators receive funds through YouTube’s “Partner Program,” individually secured sponsorship deals, channel memberships, branded merchandise, fan-sponsored messaging features, and YouTube Premium subscriptions.⁷⁴ But,

67. Casey Newton, *How YouTube Perfected the Feed*, THE VERGE (Apr. 30, 2017), <https://www.theverge.com/2017/8/30/16222850/youtube-google-brain-algorithm-video-recommendation-personalized-feed> [<https://perma.cc/946Z-V54P>].

68. *YouTube*, BUSINESS MODELS.

69. Ben Gilbert, *YouTube Now Has Over 1.8 Billion Users Every Month, Within Spitting Distance of Facebook’s 2 Billion*, BUSINESS INSIDER (May 4, 2018), <https://www.businessinsider.com/youtube-user-statistics-2018-5> [<https://perma.cc/WDB2-7P6X>].

70. *YouTube*, BUSINESS MODELS.

71. Nick Statt, *YouTube is a \$15 Billion-A-Year Business, Google Reveals For the First Time*, THE VERGE (Feb. 3, 2020), <https://www.theverge.com/2020/2/3/21121207/youtube-google-alphabet-earnings-revenue-first-time-reveal-q4-201> [<https://perma.cc/6HSW-BBKR>].

72. *Id.*

73. Julia Alexander, *Creators Finally Know How Much Money YouTube Makes, and They Want More of it*, THE VERGE (Feb. 4, 2020), <https://www.theverge.com/2020/2/4/21121370/youtube-advertising-revenue-creators-demonetization-earnings-google> [<https://perma.cc/6SG6-J2WQ>].

74. YOUTUBE PARTNER PROGRAM OVERVIEW & ELIGIBILITY, YOUTUBE.COM, <https://support.google.com/youtube/answer/72851?hl=en> [<https://perma.cc/UTR6-EASU>] (last visited May 12, 2021) (“You can make money on YouTube through the following features: Advertising revenue: Get ad revenue from display, overlay, and video ads. Channel memberships: Your members make recurring monthly payments in exchange for special perks that you offer.

“[t]he reality is that no one is happy . . . [a] large portion of YouTube’s advertising payouts goes to the top 1 percent of creators . . . [t]he creators who feel like they’re being screwed over the most by YouTube are the ones in the middle.”⁷⁵ One commentator described YouTube’s relationship with content creators this way:

Creators are the beating heart of YouTube, but advertising is the blood that flows throughout. Creators upload videos to YouTube; viewers flock to the platform; advertisers come to YouTube because that’s where the audience is; YouTube gives creators a portion of that advertising revenue to entice them to continue uploading; and creators stay on YouTube because they receive advertising money. Rinse and repeat.⁷⁶

B. Facebook

Facebook was founded in 2004 by Mark Zuckerberg, Eduardo Saverin, Dustin Moskovitz, and Chris Hughes to facilitate connections between pre-existing social networks.⁷⁷ Unlike YouTube, Facebook was not invented to host user-generated content.⁷⁸ Facebook’s business model is astonishing in that it offers high scale, achieves high growth, and maintains high profit margins.⁷⁹ Facebook incurs no production cost for its content (users and companies provide content for free), it has no marketing costs (the platform is ubiquitous), and it incurs no selling costs (advertisements are purchased through an automated platform).⁸⁰ Also, unlike YouTube, Facebook refuses to adopt a subscription service, so out of necessity, the company’s data monetization is more aggressive than that of peer companies.⁸¹

Facebook allocates some ad revenue to creators for views and engagement

Merch shelf: Your fans can browse and buy official branded merchandise that’s showcased on your watch pages. Super Chat & Super Stickers: Your fans pay to get their messages highlighted in chat streams. YouTube Premium Revenue: Get part of a YouTube Premium subscriber’s subscription fee when they watch your content.”

This list does not include individually secured sponsorship deals between creators and brands, which is another significant source of revenue).

75. Alexander, *supra* note 73.

76. *Id.*

77. Mark Hall, *Facebook*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Facebook> [<https://perma.cc/4EA6-8FMF>] (last visited May 12, 2021).

78. Amanda Lenhart & Mary Madden, *Social Networking Websites and Teens*, PEW RESEARCH CENTER (Jan. 7, 2007), <https://www.pewresearch.org/internet/2007/01/07/social-networking-websites-and-teens/> [<https://perma.cc/P6JC-RMNN>].

79. Len Sherman, *Why Facebook Will Never Change its Business Model*, FORBES (Apr. 16, 2018), <https://www.forbes.com/sites/lensherman/2018/04/16/why-facebook-will-never-change-its-business-model/?sh=7ceca21e64a7> [<https://perma.cc/5UB8-SK5N>].

80. *Id.*

81. Georgia Wells & Deepa Seetharaman, *Snap Detailed Facebook’s Aggressive Tactics in ‘Project Voldemort’ Dossier*, WALL STREET JOURNAL (Sep. 24, 2019), <https://www.wsj.com/articles/snap-detailed-facebooks-aggressive-tactics-in-project-voldemort-dossier-1156923640> [<https://perma.cc/YN4U-NFXV>].

on their pages, but this process has been fraught.⁸² Typically, creators maintain a page where they upload videos, pictures, or other content. Facebook’s ad revenue tool will project how much money they stand to make from a particular video.⁸³ In recent months, Facebook’s tool has shorted creators, who criticize the platform’s revenue-sharing approach ambiguous, even as Facebook has increased its efforts to lure creators away from sites like YouTube and Twitch.⁸⁴ Indeed, court records show that Facebook provided advertisers with “inflated” metrics for years on how many people their ads reached.⁸⁵

C. TikTok

TikTok, unlike YouTube and Facebook, is a Chinese company and represents the conglomeration of three apps: Musical.ly, Douyin, and TikTok.⁸⁷ Essentially, Musical.ly was a lip-synching and dancing routine sharing platform that allowed users to upload fifteen-second clips of themselves.⁸⁶ It was launched in Shanghai but had a strong U.S. presence.⁸⁷ Douyin, launched by Chinese tech giant ByteDance, was essentially a Musical.ly duplicate that served Chinese and Thai markets.⁸⁸ In 2018, ByteDance rebranded as TikTok, bought Musical.ly, and created the platform as it exists today.⁸⁹

TikTok is noted for its extraordinarily powerful algorithm, enabling the platform to learn users’ preferences more quickly than other apps, making it particularly attractive to advertisers.⁹⁰ Like YouTube and Facebook, TikTok generates revenue through advertising, i.e., by selling the data it collects on its users to advertisers.⁹¹ However, up until recently, when the company launched its \$200 million Creator’s Fund, TikTok creators did not make money.⁹² Unlike other platforms, the Creator Fund is not a grant or ad revenue sharing program.

82. Ashley Carman, *Facebook Shorted Video Creators Thousands of Dollars in Ad Revenue*, THE VERGE (Mar. 31, 2021), <https://www.theverge.com/2021/3/31/22358723/facebook-creators-video-revenue-estimate-tool-pages> [<https://perma.cc/F57Y-7CDU>].

83. *Id.*

84. *Id.*

85. Adi Robertson, *Facebook Employee Warned it Used ‘Deeply Wrong’ Ad Metrics to Boost Revenue*, THE VERGE (Feb. 18, 2021), <https://www.theverge.com/2021/2/18/22289232/facebook-ad-revenue-proposed-reach-inflation-lawsuit-unredacted-filings> [<https://perma.cc/XEZ3-54A6>].

86. Rebecca Jennings, *TikTok, Explained*, VOX (Jul. 12, 2019), <https://www.vox.com/culture/2018/12/10/18129126/tiktok-app-musically-meme-criinge> [<https://perma.cc/5CZJ-T7FJ>].

87. Joe Tidy & Sophia Smith Galer, *TikTok: The Story of a Social Media Giant*, BBC NEWS (Aug. 5, 2020), <https://www.bbc.com/news/technology-53640724> [<https://perma.cc/5NU3-B7FL>].

88. *Id.*

89. *Id.*

90. *Id.*

91. Julia Alexander, *TikTok’s a Year Old, When Will its Creators Make Money?*, THE VERGE (Aug. 2, 2019), <https://www.theverge.com/2019/8/2/20748770/tiktok-monetization-youtube-anniversary-twitch-facebook-creators> [<https://perma.cc/6LQD-8KK3>].

92. Julia Alexander, *TikTok Announces First Wave of Creators Set to Receive Payment for Their Videos*, THE VERGE (Aug. 10, 2020), <https://www.theverge.com/2020/8/10/21362060/tiktok-creators-fund-recipients-david-dobrik-brittany-tomlinson-youtube-adsense> [<https://perma.cc/6BQU-PCVR>].

“Creators receive funds based on a variety of factors from their videos,” and there is no fixed limit on the amount of money creators can earn.⁹³ However, to participate, creators must have over 10,000 followers and 100,000 monthly viewers.⁹⁴ TikTok’s total revenue in 2019 was well over \$25 billion, meaning the Creator Fund represents less than 1% of the company’s value.⁹⁵

V. PLATFORM CONTRACTS: CURRENT STATE OF AFFAIRS

Overall, the relationship between platforms and creators can be broadly characterized as platforms providing creators with a location to upload their content. Users come to the site to watch this content, and platforms generate money through advertisements based on users’ browsing history or subscriber accounts. Thus, platforms and creators have a co-dependent relationship. Without creators, platforms would not have services to offer advertisers and without platforms, creators would not have a forum to showcase their content.

Nevertheless, as illustrated above, these relationships are inherently imbalanced from contractual and regulatory perspectives. Platforms are free to remove or suppress content and retain all discretion over whether (or to what extent) to share advertising revenue with creators. Further, individual creators rarely have the resources to challenge the platform, and when they try, they are routinely unsuccessful. Thus, platforms retain too much control, and neither civil remedies nor external regulatory mechanisms compels transparency or accountability. The status quo is partly attributable to Section 230, but it is also caused by contracts that currently govern these relationships.

Before the advent of the internet, courts required affirmative evidence of an agreement to form a contract.⁹⁶ However, every court that has considered clickwrap contracts, i.e., licenses in which an online user clicks “I agree” to a standardized form, has found them enforceable so long as they are not “unconscionable.”⁹⁷ Additionally, courts have upheld browsewrap contracts, i.e., contracts formed by the mere fact that a user is browsing a website without any other affirmative action.⁹⁸ Most major platforms have some form of clickwrap or

93. *TikTok Creator Fund: Your Questions Answered*, TIKTOK (Mar. 25, 2021), <https://newsroom.tiktok.com/en-gb/tiktok-creator-fund-your-questions-answered> [https://perma.cc/FP3K-8GNN].

94. *Id.*

95. Julie Zhu & Yingzhi Yang, *Exclusive: TikTok-Owner ByteDance to Rake in \$27 Billion Ad Revenue by Year-End: Sources*, REUTERS (Nov. 11, 2020), <https://www.reuters.com/article/china-bytedance-revenue/exclusive-tiktok-owner-bytedance-to-rake-in-27-billion-ad-revenue-by-year-end-sources-idUSKBN27R191> [https://perma.cc/WKN3-XPXZ].

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

97. *See, e.g.*, *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002) (citing *Blake v. Ecker*, 93 Cal. App. 4th 728, 741 (2001)); *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F. 3d 931, 940-41 (9th Cir. 2001); *Mercuro v. Superior Court*, 96 Cal. App. 4th 167, 176, 184-85 (2002).

98. BROWSEWRAP AGREEMENT, REUTERS PRACTICAL LAW, <https://1.next.westlaw.com/Document/12e45ae49642211e38578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=%28sc.Default%29#:~:text=A%20website%20agreement>

browsewrap agreements that govern relations with their users, which most users never read.⁹⁹ These contracts routinely contain forced arbitration clauses, which require disputes to be mediated in a venue of the platforms' choosing, involve hefty filing fees, and are often governed by interpretive rules that do not apply to other contracts.¹⁰⁰

For a clickwrap contract's arbitration clause to be invalid it must be procedurally and substantively unconscionable, which are difficult legal burdens for plaintiffs to prove.¹⁰¹ Procedural unconscionability refers to a contract of adhesion, which is "a standardized contract imposed and drafted by [a] party of superior bargaining strength, [that] relegates to the subscribing party only the opportunity to adhere to the contract or reject it."¹⁰² And substantive unconscionability refers to manifest unfairness but is usually found where arbitration fees are insurmountable.¹⁰³ A contract is especially susceptible to unconscionability claims when it might be changed at any time, without notice, and at the company's sole discretion.¹⁰⁴ Indeed, the author could not find an instance of TikTok, Facebook, or YouTube's arbitration clauses being found unconscionable in an American court.¹⁰⁵

Thus, if a dispute arises between a content creator and a platform, Section 230 will probably bar the suit. If it does not, then the contract between creators and platforms will compel arbitration, which is notoriously unfavorable to plaintiffs.¹⁰⁶ This arrangement allows platforms to run unchecked, causing unfortunate consequences for millions of Americans. Therefore, as we enter the next generation of internet reform, policymakers should consider the underlying relationship between content creators and platforms when drafting new legislation concerning online contracting.

VI. CREATORS AND PLATFORMS: RELATIONAL CONTRACT THEORY

%20(typically%20the,his%20consent%20to%20be%20bound (last visited May 12, 2021).

99. Andreas Johansson, *The Enforceability of Clickwrap Agreements*, UMEA UNIVERSITY (2014), <http://www.diva-portal.org/smash/get/diva2:807840/FULLTEXT01.pdf> [https://perma.cc/GA86-CD6R]. As an aside, the author could not find an example of a freely negotiated contract between a content creator and a platform.

100. Richard Frankel, *The Arbitration Clause as a Super Contract*, 91 WASH. U. L. REV. 531, 531 (2014).

101. See *Blake v. Ecker*, 93 Cal. App. 4th 728, 742 (2001).

102. *Delmore v. Ricoh Americas Corp.*, 667 F. Supp. 2d 1129 (N.D. Cal. 2009).

103. Florencia Marotta-Wurgler, "Unfair" *Dispute Resolution Clauses: Much Ado about Nothing?*, BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 45, 64 (Omri Ben-Shahar ed., 2007).

104. Peter A. Alces, *They Can Do What!? Limitations on the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1099, 1136 (2012).

105. Cf. *Canada: Supreme Court Clears Way for Facebook Privacy Lawsuit*, LIBRARY OF CONGRESS (Jul. 24, 2017), <https://www.loc.gov/law/foreign-news/article/canada-supreme-court-clears-way-for-facebook-privacy-lawsuit/> [https://perma.cc/BE2S-63XK].

106. J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1741 (2006).

APPLIED

Fortunately, no new legal theory is required to consider improvements to platform-creator contracts. Instead, Ian Macneil and Stewart Macauley's relational contract theory provides a helpful framework to analyze problems with the current system. This section will embrace this theory and proceed as follows: (1) an overview of relational contract theory, (2) a discussion of its governing precepts, and (3) an application of those precepts in the platform-creator context.

A. Historical Development

Traditional contract theory is rooted in English common law.¹⁰⁷ In general, traditional contract theory is formalistic and considers only the four corners of a governing document. On a traditional account, contracts are created between relatively equally situated parties with mutual intent to engage in a freely bargained-for exchange, in which the parties will perform mutual promises to receive something of relative value.¹⁰⁸ The historical elements (give or take) of contracting are offer and acceptance, consideration, capacity, and legality.¹⁰⁹

Aside from traditional contract theory, there is neoclassical contract theory, which is the predominant theory taught in American law schools.¹¹⁰ It is advanced in the Second Restatement of Contracts, Article II of the Uniform Commercial Code, and in American courts.¹¹¹ Neoclassical theory consists of the same basic concepts as traditional theory. However, neoclassical theory assigns standards to the parties' underlying conduct, such as the doctrine of unconscionability, the duty of good faith, and increased consideration of reliance.¹¹² It also extends the traditional four-corners perspective to pre-contracting and closing behaviors as well as trade and industry customs at the periphery of commercial contracts.¹¹³

Relational contract theory goes further.¹¹⁴ Relational contract theorists claim that traditional and neoclassical theories are too narrowly focused, and although neoclassical theory has injected social elements into the rules governing contracts, those elements are still applied to discrete transactions.¹¹⁵ Instead, they

107. Lon L. Fuller, *Williston on Contracts*, 18 N.C. L. REV. 1, 14 (1939).

108. David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1452 (2018).

109. CONTRACT, LEGAL INFORMATION INSTITUTE AT CORNELL, <https://www.law.cornell.edu/wex/contract> [<https://perma.cc/4R7T-RCPR>] (last visited May 13, 2021).

110. Chen Wei Zhu, *Copyleft Reconsidered: Why Software Licensing Jurisprudence Needs Insights From Relational Contract Theory*, 22 SOC. & LEGAL STUD. 289, 300 (2013).

111. Jared Wessel, *Relation Contract Theory and Treaty Interpretation: End-Game Treaties v. Dynamic Obligations*, 60 N.Y.U. ANN. SURV. AM. L. 149 (2004).

112. *See id.* at 157.

113. *Id.*

114. Hoffman, *supra* note 108 at 1455.

115. *See* Wessel, *supra* note 111 at 153 (generally suggesting that, the relationship, or the dynamic aspect of the relationship, is a non-tangible investment by both parties in the contract which produces benefits that cannot be readily valued at a discrete time.).

suggest that many transactions exist in the context of long-term and evolving relationships.¹¹⁶ Additionally, in practice, most contractual relationships produce rules and behaviors that are not captured in a governing document's terms.¹¹⁷ Importantly, on a relational account, the more relational an exchange becomes, the more artificial the conventional notion of utility maximization, which underpins both traditional and neoclassical theory, becomes as well.¹¹⁸

Further, there are narrow and broad conceptions of relational contract theory.¹¹⁹ In a narrow sense, it can be applied to describe the acceptability of practices that might violate a contract's explicit terms in other commercial contexts like franchisor-franchisee relationships.¹²⁰ In a broad sense, relational contract theory can be applied to every contractual relationship and might be better characterized as a sociological accounting of contract, where contracting is an inherently social act involving layers and relationships.¹²¹

Either view can be mapped onto platform-creator relationships. In this context, the importance of relational contract theory is its acceptance of dynamism and its realization that the most relational exchanges are the least well suited to maximize utility. When a creator first signs up for YouTube they may accept a clickwrap contract without ever having produced content on that forum. Indeed, they may never have produced any content at all. And yet, the same contract remains operative regardless of how an individual interacts with that platform in the future.¹²² Further, given that YouTube's profitability depends entirely upon exchanges and interactions between its users, the dynamic between YouTube and its users highly relational, and thus, users are ill-suited to maximize utility.

To illustrate the evolving nature of these relationships, take an account from one Instagram influencer and Dallas fashion blogger, Ashley Deathradge, the woman behind "Never Without Lipstick."¹²³ Ms. Deathradge first signed up for Instagram while she was a sophomore in high school in 2010. She used her account for personal purposes and to keep up with friends.¹²⁴ After receiving engagement on her posts and organically growing her following, she shifted her personal account to a blog, which she described as "a part-time hobby."¹²⁵ In time, she worked with brands, secured sponsorship deals, and embraced other

116. *Id.*

117. *Id.*

118. Ian Macneil, *Values in Contract: Internal and External*, 78 NW. L. REV. 340, 345(1991).

119. *Id.* at 412.

120. *Id.* at 377-78.

121. *Id.* at 418.

122. After conducting an Instagram poll and connecting with forty-three individuals who have both personal and business accounts, none reported entering into different contracts as they toggled between accounts.

123. Telephone Interview with Ashley Deathradge, Former Blogger, Never Without Lipstick (Mar. 11, 2021).

124. *Id.*

125. *Id.*

monetized aspects of the platform, such as paid promotion and business analytics.¹²⁶ Her blog became a “significant part of [her] income,” and she amassed over 12,000 followers.¹²⁷ However, in 2019 she decided to attend graduate school and stepped back from full-time blogging.¹²⁸ She shifted her account to “@justashleylane.” While she still features her outfits and favorite beauty products, she no longer uses the app’s monetized functions.¹²⁹ The only contract she ever entered with Instagram was at her initial sign-up in 2010.¹³⁰

B. Governing Precepts

In applying or assessing relational contract theory at the level of a particular contract,¹³¹ Ian Macneil delineated between external and internal governing norms. External norms include positive law and other organizing principles such as trade association rules.¹³² Outside of these “vertical” impositions, external rules have a “horizontal” component as well, such as those arising from industry or commercial customs.¹³³ Internal norms refer to the actual behavior of the two parties and the principles that guide their actions.¹³⁴ Ten concepts are generally considered, including: (1) role integrity, (2) reciprocity, (3) implementation of planning, (4) effectuation of consent, (5) flexibility, (6) contract solidarity, (7) linking norms, (8) creation and restraint of power, (9) propriety of needs, and (10) harmonization with social matrix.¹³⁵ According to Macneil, these norms affect all contracting behaviors. Whether such contracts are discrete or relational, he suggests that all transactions exist along a spectrum from the most discrete to fully integrated and relational.¹³⁶

Role integrity, the first of Macneil’s factors, refers to what level a party acts in accordance with the principles delineated in a contract.¹³⁷ It requires “consistency, involving internal conflict, and being inherently complex.”¹³⁸ The “reciprocity,” “implementation of planning,” and “flexibility” factors comport with their common meanings. Further, “effectuation of consent” carries the same meaning as it does in traditional contract theory, i.e., delivering promises.¹³⁹

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Macneil’s theory is expansive and evaluates contracts on sociological, normative, and moral dimensions. These topics are beyond the scope of this paper.

132. Macneil, *supra* note 118 at 418.

133. *Id.*

134. *Id.*

135. See IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980) [Hereinafter MACNEIL, NEW SOCIAL CONTRACT].

136. Macneil, *supra* note 118 at 418.

137. *Id.*

138. See *id.* at 347 nn. 19 (“Some evenness of exchange, some mutuality, is a sine qua non norm without which contractual relations will not work.”).

139. Jean Perrien, Raoul Graf, Fabien Durif & Lionel Colombe, *The Role of Norms in the Evolution of a Relationship: The Case of an Asymmetrical Process in the Banking Industry*, BANKS

“Contract solidarity” is “a belief in being able to depend on another.”¹⁴⁰ “Linking norms” are the concepts of restitution, reliance, and expectation interests.¹⁴¹ “Creation and restraint of power” refers to the importance of specific contract terms’ enforceability. “Proprietary of needs” appears to be Macneil’s way of imputing good faith and fair dealing into relational contract theory.¹⁴² And finally, “harmonization with the social matrix” means ensuring that the substantive aspects of the contract are consistent with relevant community standards of appropriate behavior.¹⁴³

Although some of these terms appear contradictory, many reinforce one another. For example, solidarity begets reciprocity, which enables the effectuation of consideration. That is, when parties assume they can rely on one another, they are more likely to engage in mutually beneficial behavior and, therefore, exchange promises. Likewise, role integrity can be defined to account for the inherent flexibility of dynamic relationships. And linking norms can turn on the power norms, i.e., restitution and reliance may be prescribed in a contract’s terms, which is valuable for protecting each party’s expectations interest.

It is important to note that Macneil’s theory has detractors; it has been criticized as too expansive, vague, and variable.¹⁴⁴ He famously feuded with noted law-and-economics scholar and Seventh Circuit Judge Richard Posner, who once stated, “I do not think . . . Professor Macneil [is] a reliable guide to the nature and problems of modern contract law.”¹⁴⁵ However, even Posner’s most substantive critique of Macneil’s theory simply suggests that economic theory can also account for the phenomena Macneil seeks to address:

Macneil believes that contract law has been too much concerned with spot contracts to the exclusion of contracts embedded in an ongoing relationship between the contracting parties . . . unfortunately, although all too commonly when one is speaking of legal ‘theories’ that lack a foundation in economics, Macneil’s theory of contracts has very little content . . . If [Macneil] means that we must recognise the problems and opportunities that arise when parties have a continuing relation rather than merely meeting in a spot market, I agree. Such a relation may make

AND BANK SYSTEMS (Feb. 6, 2009), https://www.businessperspectives.org/images/pdf/applications/publishing/templates/article/assets/2377/BBS_en_2008_4_Perrien.pdf [<https://perma.cc/7F4N-CBAX>].

140. Macneil, *supra* note 118 at 348–49.

141. *Id.* at 374, nn. 20 (1983) (stating that “procedural justice” does not properly describe this term, but good faith and fair dealing comes closer).

142. *Id.*

143. *Id.* at 347 nn. 21.

144. Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil’s Relational Contract Theory*, 78 *UNI. VA. L. REV.* 1175, 1180–82 (1992).

145. David Campbell, *Ian Macneil and the Relational Theory of Contract*, CDAMS Discussion Paper (Mar. 2004), <http://alliancecontractingelectroniclawjournal.com/wp-content/uploads/2017/04/Campbell-D.-2004-%E2%80%98Ian-Macneil-and-the-Relational-Theory-of-Contract%E2%80%99.pdf>.

contracts self-enforcing, because each party stands to lose if the relation terminates. Conversely, it may create temptations to opportunistic[ally] breach - maybe one party's performance precedes the other's - or problems of bilateral monopoly, which can be acute in cases in which one party seeks modification of a contract, because the parties can deal only with each other. These are problems on which economics has a strong grip; so far as I am able to determine, neither Macneil nor any other 'legal theorist' has anything to contribute to their solution¹⁴⁶

While it is beyond the scope of this Article (and the author's expertise) to offer an assessment of Judge Posner's critique, the fact is that law and economics, the prevailing theoretical approach to contracting, has failed to produce equitable results in the online marketplace. Indeed, law and economics jurists routinely find contracts of adhesion enforceable¹⁴⁷ and as a result, perpetuate the current scheme leaving creators and consumers to foot the bill. Macneil's theory offers some plausible alternative grounded in principles beyond notions of freely bargained exchange that fail to appreciate the technical realities of online contracting.

C. Application of Precepts to Platform-Creator Relationship

This section will apply relational contract theory principles to platform-creator relationships and suggest possible mechanisms to improve platform-creator contracts. As stated above, many of these principles reinforce one another. The discussion will, therefore, consider Macneil's principles in groups rather than individually. Accordingly, the discussion will begin by considering role integrity, flexibility, and harmonization of social matrices. Next, it will address reciprocity, solidarity, and effectuation of consideration. Finally, it will conclude by analyzing linking norms, creation of power and restraint, implementation of planning, and propriety of needs.

1. Role Integrity, Flexibility, and Harmonization of Social Matrices

Like all analyses under relational contract theory, role integrity, flexibility, and harmonization of the social matrix must be considered in light of the co-dependent relationship between platforms and content creators. First, role integrity must be centered around "consistency, involving internal conflict, and being inherently complex." For platforms, this can mean providing accurate advertising revenue projections and creating more transparent processes for dispute resolution when creators violate community standards or copyright law. For creators, this could involve contracts associated with account settings designed to indicate what sort of account a creator has (personal, creative, or

146. *Id.* at 31.

147. Andrew Tutt, *On the Invalidity of Terms in Contracts of Adhesion*, 30 *YALE L. J.* 443, 447 (2013) ("Law and economics scholars began to debate market rationality . . . [u]nder this framework, many scholars concluded that contracts of adhesion should always be enforced because their terms are likely to be systematically efficient").

informational) or whether they intend to use the platform to generate income. Second, flexibility might factor into this process by enabling users to toggle between various types of accounts and, therefore, be bound by different terms and conditions.

Third, harmonization of the social matrix will be better supported if users know they are operating in a new role (indicated by the type of their account) and bound by terms and conditions that correspond with how they engage with the platform. Put differently, the social structures underpinning social relationships between business owners and customers are not the same as those between fashion influencers and followers. If users can delineate their account's purpose, they can comport with and reinforce social norms appropriately. Although this change may be subtle, research indicates that individuals are more likely to comply with social norms when their roles are defined and obvious to others.¹⁴⁸

In a survey of 105 Instagram users, eighteen reported they used the platform for monetary purposes at some point after joining.¹⁴⁹ The eighteen respondents used Instagram for a variety of businesses. Some sold artisan crafts like needlepoint artwork and stained glass.¹⁵⁰ Others maintained fitness or fashion blogs.¹⁵¹ Some ran social media platforms for major brands like Kiehls and Trunk Club.¹⁵² In a series of follow-up questions with the author, none of these respondents reported that they had ever selected a different "type" of account (like business or personal) or entered into anything other than Instagram's initial terms and conditions even as their platform use drastically changed. If platforms enabled users to choose specialized rather than generic account types, creators would have a more consistent and tailored means to interact with platforms, thus, improving role integrity, flexibility, and harmonization of various social matrices.

2. *Reciprocity and Effectuation of Consideration*

Reciprocity is an equitable exchange for mutual benefit. Currently, reciprocity is largely absent in platform-creator contracting. To illustrate the reciprocal nature of online relationships, some observers have likened platforms to real estate companies: they provide space to creators in exchange for revenue from advertising.¹⁵³ However, this analogy misses key distinctions between

148. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 928 (May 1996) ("Social norms can also be produced by social roles."); see also Cristina Bicchieri, Ryan Muldoon, & Alessandro Sontuoso, *Social Norms*, STAN. ENCYC. OF PHIL. (Sep. 24, 2018) ("Insofar as individuals are role-bearers, in Parsons' theory it is social entities that act: entities that are completely detached from the individual actions that created them").

149. @kallen_dimitroff, Instagram Poll, "Have you used Instagram for monetary purposes" (May 10, 2021).

150. *Id.* (@imsewintoit and @forestcitystainedglass).

151. *Id.* (@sotorho and @domnnasaur).

152. *Id.* (@charlottemintosparks and @jaquelinebruni).

153. See generally Sonia Simone, *Digital Sharecropping: The Most Dangerous Threat to*

physical real estate and digital real estate.

First, physical tenants on real property have recourse if their landlords act in ways that defy the reciprocity underpinning their contracts. For example, if a tenant pays rent and the landlord subsequently changes the locks on the store and destroys the tenant's merchandise, the tenant can sue the landlord.¹⁵⁴ Conversely, if a platform deletes an account and destroys an active creator's videos or posts, the creator is barred from suit because of Section 230. Indeed, as discussed earlier in this paper, Facebook has never lost such a case.¹⁵⁵

Next, unlike real estate companies, platforms are not required to update their users about changes to their services. Likewise platforms need not maintain a minimum quality of services, which real estate companies must do through tenant protection mechanisms, such as the implied warranty of use or habitability. This has caused significant disruption when users rely on particular features only to have their business strategies upended by swift changes in company policy. For example, thousands of OnlyFans creators experienced a disruption to their core business when the company suddenly capped the number of subscribers they could accrue within a particular day.¹⁵⁶ Likewise, digital platforms may become uninhabitable when a company changes its algorithm and pushes traffic elsewhere.¹⁵⁷ If a commercial landlord cuts off traffic flow to a particular store in a shopping center, the impacted tenant would be entitled to recover. But unlike commercial landlords, platforms cannot be held liable because of Section 230.

Finally, in a reciprocal commercial real estate transaction, a tenant pays a flat fee for rental space, plus an additional percentage, approximately 5%, of the tenant's monthly sales revenue. For example, if three stores in a shopping center each pay a flat monthly rate of \$1,000 plus 5% of their monthly profits and if stores collectively generated \$100,000 in sales revenue every month, they would each owe their landlord \$32,000 at the end of the year and each take home \$368,000. The flat fee allows landlords to profit from providing the space, and also share in the profits their tenants generate. These contracts are negotiated to

Your Content Marketing Strategy, COPYBLOGGER (July 28, 2015), <https://copyblogger.com/digital-sharecropping/> [<https://perma.cc/QLU5-97XC>].

154. Assuming he has not violated other substantive portions of their contract that would warrant the landlord's actions.

155. See Kallen Dimitroff, Note, *Mark Zuckerberg, Joe Manchin, and ISIS: What Facebook's International Terrorism Lawsuits Can Teach Us About the Future of Section 230-Reform*, 100 TEXAS L. REV. 153, 163 (2021).

156. Canela Lopez, *OnlyFans is Limiting How Much People Can Tip Creators After Bella Thorne Earned \$1 million on the Site in a Day*, INSIDER (Aug 28, 2020), <https://www.insider.com/onlyfans-limit-tips-after-bella-thorne-earned-1m-2020-8#:~:text=OnlyFans%20is%20limiting%20how%20much,the%20site%20in%20a%20day&text=OnlyFans%20changed%20its%20payment%20policy,can%20be%20tipped%20to%20%24100> [<https://perma.cc/DG88-MQSW>].

157. See e.g., *Fyk v. Facebook, Inc.*, C 18-05159 JSW, 2019 WL 11288576, at *2 (N.D. Cal. June 18, 2019), aff'd, 808 Fed. Appx. 597 (9th Cir. 2020), cert. denied, 141 S. Ct. 1067, 208 L. Ed. 2d 530 (2021).

provide reciprocal benefits. If a store is particularly popular, they might negotiate for a lower revenue-fixed percentage and a higher flat rate or vice versa.

If TikTok was a shopping center, its “tenants” generated \$27 billion in ad revenue, in 2019.¹⁵⁸ Creators paid a \$0 flat fee and lost out on 100% of the ad revenue they generated. Only a few thousand were compensated with less than 0.03% of the company’s net gains, which were “not tied to ad revenue.” Imagine if the commercial landlord offered its stores free rent and unlimited customers (without the possibility of earning money from customer’s consumption) in exchange for \$1,200 each? The result would hardly constitute an economically reciprocal relationship.

Of course, this analogy is simplistic and does not account for industry-specific factors like operational costs. Nevertheless, it is stark to compare platforms’ profit margins to margins in other service-based industries. This analysis indicates that an updated creator payout model, increased ad revenue sharing, and meaningful civil recourse might establish reciprocity in the next generation of platform-creator relationships. Solidarity, i.e., the ability to depend on one another, is closely related to reciprocity and may be served by many suggestions above.

Long real estate analogy notwithstanding, effectuation of consent is also negligible in the current contracting regime. Under clickwrap contracts, effectuation of consent effectively exists in name only. For example, as mentioned above, consent may result from the mere act of browsing a website, and few users read websites’ terms and conditions.¹⁵⁹ Nevertheless, whether a party reads an agreement or not does not affect consent nor bear on its legal enforceability.¹⁶⁰ Rather, consent is present when both parties mutually agree to contract. However, where negotiating costs of obtaining consent become too high, there are theoretical justifications against enforcing even voluntary transactions, like choosing to join a particular social media platform.¹⁶¹ In the context of platform-creator contracts, negotiating costs might be characterized as too high in part because of their scale. Any user may become a creator, and the most powerful platforms have billions of users. Effectively securing the consent of each user in a freely bargained-for manner is ostensibly impossible.

Nevertheless, on a relational view of contracting, there may be room for improvement. If users opted into particularized accounts or contracts, then they might have clearer expectations about the platforms’ behavior and, thus, be able

158. Zhu & Yang, *supra* note 95.

159. A Deloitte survey found that over 90% of consumers accept legal terms and conditions without reading them. Caroline Cakebread, *You’re Not Alone, No One Reads Terms of Service Agreements*, BUSINESS INSIDER (Nov. 15, 2017), <https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11>, [https://perma.cc/92TV-WURE].

160. Fred Abramson, *Can You Be Held Responsible for an Agreement Without Reading It?*, N.Y. LAW BLOG (Aug. 15, 2013), <http://nylawblog.com/2013/08/can-you-be-held-responsible-for-an-agreement-without-reading-it/> [https://perma.cc/XPZ9-L6J9].

161. Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 282–283 (1986).

to offer a greater degree of consent. Furthermore, platforms could create forums or internal processes for some users to negotiate their contracts. For example, if a content creator drives a particular amount of traffic to a platform, perhaps there could be some mediated process whereby the platform and the creator could craft a unique set of terms and conditions premised upon the value generated by high-volume creators. Such an arrangement would not only bolster effectuation of consent but also solidarity and reciprocity. If a party can substantively negotiate, it can promote its interests and allow the other party to do the same, thereby achieving a greater sense of solidarity and promoting reciprocal transactions.

3. *Linking Norms, Creation of Power and Restraint, Implementation of Planning, and Propriety of Needs*

The phrase “linking norms” encapsulates the concepts of restitution and reliance interests. Restitution refers to gains-based recovery that seeks to make a victim of harm whole, which are all but impossible to receive in the context of platform-creator relationships because of Section 230.¹⁶² Reliance interests accrue by virtue of acting upon another’s statement of alleged fact, claim, or promise.¹⁶³ However, reliance interests are not necessarily contributing to the most pressing contemporary contracting problems between platforms and content creators. Examining relevant scholarship did not produce evidence that unreliability of representations of fact or unreliability of promises was an issue among content creators or platforms. Rather, the principal complaints are that recovery is nearly impossible and that clickwrap contracts are unfair and one-sided.¹⁶⁴ Stated alternatively, the problem is not that clickwrap contracts are unreliable but that the bargaining structure underpinning them is inherently flawed.

The same critique applies to the implementation of planning norms and creation of power and restraint. Indeed, nothing in the relevant research suggested that existing planning structures or positive expressions of power and restraint were particularly bad. Instead, the inherent flaw allegedly arises at the drafting stage, which neglects to consider content creators’ interests.¹⁶⁵ These contracts might be improved if there were some form of guardians ad litem for creators involved in the process. Additionally, creators might create unions or centralized governing bodies to represent their interests in the regular drafting of platforms’ terms and conditions.

Overall, the exact mechanisms matter less than achieving the objective—increasing the representation of creators’ interests in their contracts with platforms. Ensuring that creators’ interests are adequately represented is

162. Restitution definition, *Black’s Law Dictionary* (11th Ed. 2019), available at Westlaw.

163. Reliance definition, *Black’s Law Dictionary* (11th Ed. 2019), available at Westlaw.

164. See generally Lucille M. Ponte, *Getting a Bad Rap? Unconscionability in Clickwrap Dispute Resolution Clauses and a Proposal for Improving the Quality of These Online Consumer “Products,”* 26 OHIO S. J. DISPUTE RES. 119 (2011).

165. *Id.* at 123.

subjective and might be another way of describing equity or moral contracting. However, increasing creator representation during contract drafting would ensure that propriety of needs, Macneil's notion of good faith, is met.

VII. CONCLUSION

Although this Article involved academic concepts like technology policy and legal theory, the problems that inspired it are the practical experiences of millions of Americans. At present, platforms have the power to draft contracts, destroy user content, and escape accountability. Section 230 bars most content creators' claims regardless of the harm that arises, and contracts of adhesion are not particularly equitable, especially given the importance of users to platforms' bottom line.

Unfortunately, these problems are not going away. Indeed, the internet marketplace continues to make up a growing percentage of America's GDP, and each year more Americans produce content for profit. Thus, as Congress moves towards a new generation of internet regulation, it should consider applying aspects of relational contract theory to platform-creator contracts. Undoubtedly, internet regulation and online contracting could benefit from a system-wide update.