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## Democratizing Platform Privacy

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## Democratizing Platform Privacy

### Cover Page Footnote

Ph.D. Candidate at Yale Law School and Resident Fellow at the Yale Information Society Project. I would like to thank Professor Robert Post, Professor Jack Balkin, Professor Amy Kapczynski, Professor Alvin Klevorick, Luke Herrine, Kenneth Khoo, Sanjayan Rajasingham, Samantha Grayman, Mitchell Johnston, Omar Shehabi, members of the Information Society Project community, including Christina Spiesel, Ximena Benavides, Przemyslaw Palka, and Michael Karanicolas, and participants in the Media Law & Policy Scholars Conference (2021), including Elettra Bietti, for their helpful feedback and comments.

# Democratizing Platform Privacy

Sari Mazzurco\*

*The online platform political economy—that is, the interrelationship of economic and political power in the exchange of online services for personal information—has endowed platforms with overwhelming power to determine consumers’ information privacy. Mainstream legal scholarship on information privacy has focused largely on an economic problem: individual consumers do not obtain their “optimal” level of privacy due to a bevy of market failures. This Article presents the political issue: that platforms’ hegemonic control over consumers’ information privacy renders the rules they impose illegitimate from a democratic perspective. It argues platform hegemony over consumers’ information privacy is a political problem, in the first instance, due to the social foundations of normative information privacy and the social character of personal information. Although issues affecting society in this manner are typically met with government intervention—through the promulgation of law—or class-action litigation, neither of these safeguards have effectively protected consumers’ information privacy. Rather than empower consumers to determine information privacy norms and how to protect them, the law’s reliance on platform self-regulation through notice and consent has empowered platforms to make these determinations unilaterally.*

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*Given the government's failure to regulate effectively the platform political economy, this Article proposes an alternative to government action. Specifically, this Article contends that the existing private governance of information privacy ought to strive for democratic legitimacy. This Article draws an analogy between the platform political economy and the labor political economy of the early twentieth century and proposes that concepts and mechanisms from industrial democracy, which sought to legitimate workplace decision-making can serve as a toolkit for the legitimation of information privacy rules.*

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## INTRODUCTION

In the online platform political economy—that is, the interrelationship of economic and political power in the exchange of online services for personal information—platforms have overwhelming power to determine consumers’ online information privacy. Platforms obtain this power through economic and structural forces: platforms have the economic incentive to extract as much commercial value as possible from personal information and the structural ability to determine unilaterally what personal information they will collect, how they will use it, and what protections, if any, they will provide consumers.<sup>1</sup> Individual consumers’ cognitive limitations and collective action problem magnifies their structural inability to counter platform power.<sup>2</sup> Applicable bodies of information privacy law entrench platform power insofar as they explicitly or implicitly rely on industry self-regulation through notice and choice. Hence, information privacy is relegated to a system of private governance—albeit hegemonic private governance—in which platforms unilaterally determine the information privacy afforded consumers.<sup>3</sup>

Viewing the platform political economy as engendering private governance over information privacy requires a preliminary reorientation—one must first understand information privacy as affecting society and not just individual consumers. The economics-based individualist paradigm, though helpful in describing platforms’ concentration of power, does little to explain the societal dimensions of information privacy. It postulates information privacy as a set of individual preferences to be satisfied vis-à-vis market forces. However, the manner in which it cabins information privacy to *individual* preferences and actions obscures the *societal* features of information

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<sup>1</sup> See *infra* Section I.A. This Article describes the relationship between platforms and the people whose personal information they collect as one between platforms and “consumers.” “Consumer,” albeit, is an imperfect term to describe people’s place in platforms’ private governance of information privacy insofar as it might suggest a simple commercial relationship in which a seller and a purchaser exchange goods or services for valuable consideration. Alternatives, such as “data subject” and “data citizen,” are also imperfect in different ways. I chose to proceed using the term “consumer” to connote that the relationship between platforms and people is one arising from a private, commercial context.

<sup>2</sup> See *infra* Section I.A.

<sup>3</sup> See *infra* Section I.B.

privacy—that is, the social paradigm, in which information privacy is determined by and affects society at large. Within the social paradigm of information privacy, platforms’ control over consumers’ information privacy gives rise to a question of political legitimacy: who ought to determine consumers’ information privacy and how it ought to be protected?

In the United States, we understand that the rules which affect society are legitimate when they emerge from democratic procedures—those that enable public participation in community norm development and the promulgation of corresponding protective rules.<sup>4</sup> Yet, typical democratic processes that protect against collective harms, such as curative legislation, government agency action, and private litigation have failed to place limits on platforms’ power over information privacy.<sup>5</sup> These bodies of information privacy law have become so tethered to notice and consent that calls for their reform and expansion make no attempt to remedy the consumer disenfranchisement brought about by this system of self-regulation.<sup>6</sup> In the absence of government intervention, the private governance of information privacy lacks democratic legitimacy, as rule-setting platforms are hegemonic, opaque, and unaccountable to consumers.

This Article proposes that, despite governmental inaction, democratizing private governance may legitimate information privacy within the existing legal framework. Just as democratic procedures legitimate political decision-making, information privacy’s private governance may attain democratic legitimacy when those governed by platforms’ information privacy rules are able to participate in developing them.

Democratizing the private governance of information privacy may seem like a radical proposition, insofar as it is difficult to conceptualize a disparate group of consumers counteracting platform hegemony. However, theories of industrial democracy—which introduced the notion of democratic political legitimacy to decision-making in the labor political economy—provide an interesting starting point to envision democratic platform information privacy.

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<sup>4</sup> See *infra* notes 87–88 and accompanying text.

<sup>5</sup> See *infra* Section I.B.

<sup>6</sup> See *infra* note 87 and accompanying text.

The concept of democratizing labor's private governance by empowering workers took hold at the turn of the twentieth century, when employer hegemony over the terms and conditions of unskilled workers' labor characterized the labor political economy, much like today's platform-consumer relationship.<sup>7</sup> Proponents of industrial democracy viewed worker collective bargaining organizations, i.e., unions, as a centerpiece of democratic private governance.<sup>8</sup> In their ideal type, unions democratized workplace decision-making on three levels: internal, through their democratic formation and operation; procedural, through accumulating bargaining power counter to employers; and contractual, through entering bargaining agreements that determine labor conditions and hold employers accountable.

Existing scholarship has conceived of a relationship between data (more broadly than personal information) and labor, arguing generally that users' production of data is akin to labor that ought to be compensated and users ought to form unions to negotiate for just compensation.<sup>9</sup> This Article takes no position on whether consumers' use of platforms amounts to compensable labor. Rather, it argues that labor provides a fruitful analogy to platform information privacy as both share similarly hegemonic political economies. Accordingly, industrial democracy can frame the democratic legitimation of information privacy. As in the labor context, collective action—here, on the part of consumers—ought to be a feature central to consumer enfranchisement with respect to information privacy. However, platform democracy will be characteristically different than industrial democracy: the platform political economy's unique

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<sup>7</sup> See, e.g., SYDNEY WEBB & BEATRICE WEBB, *INDUSTRIAL DEMOCRACY*, at vi (1897); JOHN H. GREENWOOD, *THE THEORY AND PRACTICE OF TRADE UNIONISM* 13 (1911).

<sup>8</sup> See, e.g., WEBB & WEBB, *supra* note 7, at 3–37 (describing primitive democracy of labor through trade unionism).

<sup>9</sup> Authors supporting a “labor” theory of the market for personal information have drawn the comparison to advocate for payments to Internet users for their “data labor.” See, e.g., Ryan Calo, *Privacy and Markets: A Love Story*, 91 NOTRE DAME L. REV. 649, 660 (2015) (citation omitted); Imanol Arieta Ibarra et al., *Should We Treat Data as Labor? One Hundred and Thirtieth Annual Meeting of the American Economic Association*, 108 AM. ECON. ASS'N PAPERS AND PROCEEDINGS 38, 39 (2018); *Should Internet Firms Pay for the Data Users Currently Give Away?*, THE ECONOMIST (Jan. 11, 2018), <https://www.economist.com/finance-and-economics/2018/01/11/should-internet-firms-pay-for-the-data-users-currently-give-away> [<https://perma.cc/B55C-TCM2>].

features, the organization of social life online, and consumers' understanding of their information privacy suggest collective bargaining in this context warrants certain departures and adaptations from industrial democracy's model.

I. THE PLATFORM POLITICAL ECONOMY & THE PRIVATE GOVERNANCE OF INFORMATION PRIVACY

The Internet today is, in large part, a medium through which consumers share vast amounts of personal information while making purchases, consuming news and entertainment media, and communicating with friends—among other activities. The online platforms that provide these services and collect, process, and analyze consumers' personal information in exchange have achieved tremendous financial success, largely by leveraging “insights” from consumer data sets to sell third parties advertising services.<sup>10</sup> The economics and structure of this data trade have imbued platforms with significant power to determine and diminish consumers' information privacy. In the face of platforms' power, individual consumers are effectively unable to protect their information privacy: they face cognitive limitations that impede them from taking information privacy protective actions and a collective action problem that impairs their ability to extract additional information privacy protections from platforms.<sup>11</sup> Existing information privacy law blesses platforms' control of information privacy: as long as platforms provide accurate notice of their data-handling practices and honor consumer choices—when platforms elect to provide choices—they are free to decide consumers' information privacy.

Mainstream legal scholarship regarding online information privacy has focused on the market's failure to provide individual consumers their desired level of privacy. Additionally, it has largely overlooked the political nature of platforms' power to decide information privacy regulation. There is, however, an emerging body of scholarship, including the works of Julie Cohen, Paul Schwartz, and Shoshana Zuboff, that focuses on the political aspects of information

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<sup>10</sup> See JULIE COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 37 (2019).

<sup>11</sup> See *infra* notes 25–45 and accompanying text.

privacy.<sup>12</sup> In short, platforms' power over information privacy is political due to the social foundations of information privacy and the social character of personal information. This power—to decide and grant, privately and unilaterally, information privacy—has enabled and supported platforms' private governance over a sector of society. In this context, platforms' overwhelming and unchecked power over consumers calls into question their information privacy rules' political legitimacy.

### A. *The Platform Political Economy*

Platforms' economics and structure have endowed them with the incentive and ability to determine unilaterally the extent of their personal information collection and use and, concomitantly, consumers' privacy with respect to that information. In this political economy, though consumers both consume the platforms' products (i.e., advertising and, among other things, a social network, search engine, or marketplace) and supply resources that enable their provision (i.e., their personal information), they are unable to shape platforms' rules that affect their information privacy.<sup>13</sup> Without legal limitations on platforms' power, hegemonic platforms'

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<sup>12</sup> See COHEN, *supra* note 10; see generally Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904 (2013); Julie E. Cohen, *Irrational Privacy?*, 10 J. TELECOMM. & HIGH TECH. L. 241 (2012); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000); Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133 (2017); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1607 (1999) [hereinafter "*Privacy and Democracy in Cyberspace*"]; Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815 (1999) [hereinafter "*Internet Privacy and the State*"]; SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* (2019).

<sup>13</sup> Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1127 (2000) (citation omitted); THE ECONOMIST, *supra* note 9; Andrew J. McClurg, *A Thousand Words Are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U. L. REV. 63, 132 (2003); Robert W. Hahn & Anne Layne-Farrar, *The Benefits and Costs of Online Privacy Legislation*, 54 ADMIN. L. REV. 85, 102 (2002); Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 845, 891, 898–99 (2002) (citation omitted). *But see* Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1297 (2000) (noting commenters suggest transaction costs for individual consumer negotiation with platforms will be so low that individuals will be able to reach individualized bargains over their privacy); see generally Daniel D. Barnhizer, *Propertization Metaphors for Bargaining Power and Control of the Self in the Information Age*, 54 CLEV. ST. L. REV. 69 (2006) (arguing individual consumers have bargaining power such that they should be expected to negotiate for their privacy).

information privacy rules lack political legitimacy in our democratic legal tradition.

Platforms have powerful incentives to collect and process as much personal information as they can obtain; for many of these businesses, consumer personal information has become a key commercial asset useful in large part to sell advertising.<sup>14</sup> The tremendous revenues produced by harvesting personal information have rendered the data trade a sort of “new economy”;<sup>15</sup> one in which information is in constant supply and acquired by platforms at near-zero cost.<sup>16</sup> The profits available in this economy have unsurprisingly led to even more businesses and technologies entering and coming to depend on it.<sup>17</sup> The near-zero cost to obtain personal information may be attributed to the economic conditions of platforms’ exchange with consumers. Many platforms provide consumers with “free” services, which generate and collect consumer personal information as a “by-product” of using the service.<sup>18</sup> Thus, consumers obtain a service for free that they ostensibly value at an above-zero cost, while platforms incur the comparatively small cost

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<sup>14</sup> See, e.g., ZUBOFF, *supra* note 12; Samuelson, *supra* note 13, at 1126 (citation omitted); Anne de Hingh, *Some Reflections on Dignity as an Alternative Legal Concept in Data Protection*, 19 GERMAN L.J. 1269, 1270, 1278 (2018); Eur. Data Prot. Supervisor, Opinion 4/2015: Towards a New Digital Ethics, Data, Dignity and Technology, at 6 (Sept. 11, 2015) [hereinafter “Opinion 4/2015”]; Stacy-Ann Elvy, *Commodifying Consumer Data in the Era of the Internet of Things*, 59 B.C. L. REV. 423, 428 (2018) (citation omitted); Ibarra et al., *supra* note 9, at 41; COHEN, *supra* note 10, at 38, 42; Joshua A.T. Fairfield & Christoph Engel, *Privacy as a Public Good*, 65 DUKE L.J. 385, 429–31 (2015); Spencer, *supra* note 13, at 898.

<sup>15</sup> See de Hingh, *supra* note 14, at 1270–71 (citation omitted); Opinion 4/2015, *supra* note 14, at 8; Elvy, *supra* note 14, at 435 (citation omitted). For example, “Facebook’s ‘maneuverings to get [users] to open up’ have led to soaring advertising revenue, with advertising revenue of \$3.8 billion in 2011, up from \$1.86 billion in 2010.” Nicole A. Ozer, *Putting Online Privacy Above the Fold: Building a Social Movement and Creating Corporate Change*, 36 N.Y.U. REV. L. & SOC. CHANGE 215, 238 (2012) (citation omitted).

<sup>16</sup> See Ibarra et al., *supra* note 9, at 41.

<sup>17</sup> See Barnhizer, *supra* note 13, at 70 (citation omitted); Olivier Sylvain, *The Market for User Data*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1087, 1097 (2019).

<sup>18</sup> See, e.g., Steven A. Hetcher, *The Emergence of Website Privacy Norms*, 7 MICH. TELECOMM. & TECH. L. REV. 97, 102, 111, 130 (2000-2001); Barnhizer, *supra* note 13, at 98-99 (citations omitted); Ibarra et al., *supra* note 9, at 38; COHEN, *supra* note 10, at 38–44; Ozer, *supra* note 15, at 226 (internal citation omitted) (noting the “zero price effect” suggests consumers perceive “free” items as more valuable than they actually are).

of providing the service and obtain enormously profitable personal information from consumers as a result.<sup>19</sup>

This exchange, however, incents over-collection of personal information because it does not capture the relationship between personal information collection and use and information privacy. The collection and use of some personal information come at a cost to information privacy.<sup>20</sup> For example, collecting a person's geolocation when she is at an HIV clinic likely undermines her expectation of privacy. But platforms that rely financially on acquiring and analyzing personal information incur an opportunity cost (i.e., lost potential profits) when providing information privacy protections that limit the personal information they may collect and how they may use it.<sup>21</sup> Information about the consumer's location at the HIV clinic enables the platform to target her for antiretroviral drugs, making its advertising services more valuable to pharmaceutical companies. If the platform abstains from collecting or using this information, it loses the opportunity to obtain the associated advertising profits. Platforms, however, need not bear this opportunity cost as consumers routinely fail to "internalize" the cost to their information privacy in dollars and cents.<sup>22</sup> The clinic visitor, even if aware of the harm to her information privacy, is unlikely to reduce that harm to a monetary sum to then factor into the value she receives from the "free" service. Without consumers factoring information privacy costs into their decisions to engage, platforms bear less than their actual costs and thus have the incentive to collect an

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<sup>19</sup> See, e.g., Hetcher, *supra* note 18, at 102; Steven A. Hetcher, *Changing the Social Meaning of Privacy in Cyberspace*, 15 HARV. J.L. & TECH. 149, 167 (2001) (citation omitted) [hereinafter "*Changing the Social Meaning*"]; de Hingh, *supra* note 14, at 1278; COHEN, *supra* note 10, at 41.

<sup>20</sup> See, e.g., Vera Bergelson, *It's Personal but Is It Mine? Toward Property Rights in Personal Information*, 37 U.C. DAVIS L. REV. 379, 424 (2003).

<sup>21</sup> See, e.g., *Changing the Social Meaning*, *supra* note 19, at 174–98; Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1081–83 (1999).

<sup>22</sup> See Katherine J. Strandburg, *Privacy, Rationality, and Temptation: A Theory of Willpower Norms*, 57 RUTGERS L. REV. 1235, 1287–88 (2005); DIRK BERGEMANN & ALESSANDRO BONATTI, *THE ECONOMICS OF SOCIAL DATA* 3, 5 (2019); Ozer, *supra* note 15, at 227.

excess of personal information and under-provide information privacy protections.<sup>23</sup>

The structure of the online platform environment endows platforms with the ability to determine unilaterally the extent of their personal information collection and use and consumers' attendant information privacy. Consumers have little choice over what information they will reveal about themselves.<sup>24</sup> Some information is disclosed automatically through web browsers<sup>25</sup> and consumers must provide other information due to platforms' design.<sup>26</sup> The amount of personal information collected, and how it is used and shared, is the platforms' choice—platforms present these conditions to consumers

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<sup>23</sup> See Calo, *supra* note 9, at 659 (citation omitted); Hahn & Layne-Farrar, *supra* note 13, at 102; Spencer, *supra* note 13, at 891, 897–98 (citation omitted). For this opportunity cost to be in the platform's interest economically, it would have to be offset, perhaps by increased consumer participation (and therefore additional usable personal information) or better-quality information. See *Changing the Social Meaning*, *supra* note 19, at 201. Though offering privacy protections personalized to the individual consumer may reduce the potential revenue reduction, this "privacy price discrimination" will nonetheless entail an additional expense the platform would seek to offset. See Litman, *supra* note 13, at 1298; Spencer, *supra* note 13, at 891 (citation omitted).

<sup>24</sup> See James P. Nehf, *Recognizing the Societal Value in Information Privacy*, 78 WASH. L. REV. 1, 65 (2003). Commenters writing in the early 2000s have expressed a counterview that consumers *can* take privacy protective actions by choosing to engage with privacy respecting websites and not engage with others, providing errant websites false information or stirring gossip about their practices, employing ad blockers, and blocking cookies, among other things. See, e.g., Steven A. Hetcher, *The De Facto Federal Privacy Commission*, 19 J. MARSHALL J. COMPUT. & INFO. L. 109, 129 (2000) [hereinafter "*De Facto Federal Privacy*"]; *Changing the Social Meaning*, *supra* note 19, at 159–60; Christopher W. Savage, *Managing the Ambient Trust Commons: The Economics of Online Consumer Information*, 22 STAN. TECH. L. REV. 95, 145 (2019); Hetcher, *supra* note 18, at 114, 130; Spencer, *supra* note 13, at 894; McClurg, *supra* note 13, at 131–32. To be sure, some consumers engage in this kind of self-help. See Alessandro Acquisti et al., *The Economics of Privacy*, 54(2) J. ECON. LIT. 442, 447 (2016). For example, consumers sometimes pay a premium to purchase goods from more privacy protective merchants and teens have adopted a variety of strategies to engage online while protecting their privacy. *Id.* However, arguments that individual self-help suffices fail to appreciate the constrictive political economy consumers face with respect to online privacy (and some older arguments are based on an outdated view of the Internet).

<sup>25</sup> See Savage, *supra* note 24, at 101.

<sup>26</sup> See, e.g., Calo, *supra* note 9, at 661, 662 (citation omitted); Spencer, *supra* note 13, at 894, 900 (citations omitted); Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2036 (2013).

on a take-it-or-leave-it basis.<sup>27</sup> Even those platforms that provide consumers tools to opt in or opt out of various data-handling practices offer a highly circumscribed degree of “control” that may not accurately reflect consumers’ desires. The clinic visitor may deny a platform permission to collect her geolocation, yet the platform may nevertheless discover the clinic visitor’s location if she accesses the HIV clinic’s Wi-Fi network. Particularly where platforms share consumers’ personal information with third parties, such as service providers, data brokers, and advertisers, consumers are left unaware of the parties who obtain their information and lack any direct relationship with them, thereby precluding any semblance of “control.”<sup>28</sup> Moreover, even if an individual consumer opts out of a platform’s information collection or “exits” the platform, the platform can still derive information about her from third parties, including other consumers, other websites via web trackers, and data brokers.<sup>29</sup> Overall, the magnitude of platforms’ control over personal information collection, use, and sharing normalizes platforms’ over-collection of personal information and under-provision of information privacy protections, to the point that consumers believe they are inevitable conditions of using platform services.<sup>30</sup>

Moreover, an individual consumer’s threat to exit, or actual exit, from a platform imposes negligible costs on the platform and is thus unlikely to compel a platform to change its information privacy rules. Platforms typically derive value from consumers’ personal information by aggregating it over time, across consumers, and from various third parties—ultimately building comprehensive profiles

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<sup>27</sup> See Savage, *supra* note 24, at 101, 106–07; Spencer, *supra* note 13, at 901; Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056, 2081–82 (2004).

<sup>28</sup> See, e.g., Elvy, *supra* note 14, at 444–45; McClurg, *supra* note 13, at 136; Paul M. Schwartz, *Privacy Inalienability and the Regulation of Spyware*, 20 BERKELEY TECH. L.J. 1269, 1270 (2005); Acquisti et al., *supra* note 24, at 447; James A. Rothchild, *Against Notice and Choice: The Manifest Failure of the Proceduralist Paradigm to Protect Privacy Online (or Anywhere Else)*, 66 CLEV. ST. L. REV. 559, 563, 582 (2018).

<sup>29</sup> See also Schwartz, *supra* note 12, at 823, 827; Fairfield & Engel, *supra* note 14, at 411 (citation omitted); Elvy, *supra* note 14, at 444 (citation omitted); Acquisti et al., *supra* note 24, at 464 (citation omitted); Rothchild, *supra* note 28, at 563, 582; Savage, *supra* note 24, at 106–07.

<sup>30</sup> Strahilevitz, *supra* note 26, at 2036 (citation omitted); Spencer, *supra* note 13, at 844, 860, 863, 865 (citation omitted); COHEN, *supra* note 10, at 45.

that predict consumer behavior.<sup>31</sup> In the process of collecting information, each individual bit of information is far less valuable than it is in the aggregate, especially when the platform already has a comprehensive profile of the consumer.<sup>32</sup> Additionally, the cost an individual consumer incurs from exiting a platform far exceeds any privacy gain she could achieve. Platforms have become essential and ubiquitous to consumers' daily lives. When a platform has a monopoly over a particular service or is supported by network effects, consumers are unable to exit without impairing their participation in commerce or social life.<sup>33</sup> For a consumer, the cost of exit is concrete. By contrast, the privacy gain is both difficult to value (in part because it may not be reducible to dollars and cents) but also likely minimal, in light of platforms' ability to obtain much of a consumer's personal information regardless of her exit.<sup>34</sup>

Individual consumers lack the economic and structural foundations of power to protect their information privacy. Behavioral economists note that consumers face cognitive limitations—including information asymmetry, inter-temporal decision-making difficulty, and bounded rationality—and a collective action problem that limit significantly their individual bargaining power.<sup>35</sup> Individual consumers' practical inability to protect their information privacy and the social foundations of information privacy, discussed later, suggest that consumer communities, rather than individual consumers, ought to play a greater role in protecting information privacy.

First, whereas platforms know what personal information they collect about any given consumer and how they use it, consumers

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<sup>31</sup> ZUBOFF, *supra* note 12.

<sup>32</sup> THE ECONOMIST, *supra* note 9; BERGEMANN & BONATTI, *supra* note 22, at 6; Hahn & Layne-Farrar, *supra* note 13, at 104 (citation omitted); Spencer, *supra* note 13, at 487 (citations omitted).

<sup>33</sup> COHEN, *supra* note 10, at 39, 43; Spencer, *supra* note 13, at 901; Hahn & Layne-Farrar, *supra* note 13, at 115; THE ECONOMIST, *supra* note 9.

<sup>34</sup> Spencer, *supra* note 13, at 897.

<sup>35</sup> Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1227 (2016); Strandburg, *supra* note 22, at 1288; *Property, Privacy, and Personal Data*, *supra* note 27, at 2078, 2080; Acquisti, et al., *supra* note 24, at 448; Schwartz, *supra* note 12, at 822; Spencer, *supra* note 13, at 845.

generally do not have access to that knowledge.<sup>36</sup> Platforms typically provide privacy notices that ostensibly describe their collection, use, and sharing practices, but these notices often contain general terms that obscure the platform's practices and, moreover, do not apply to third parties with whom they share consumer information.<sup>37</sup> Platforms may also come to use consumers' personal information in ways they cannot predict.<sup>38</sup> Second, many consumers rationally fail to read privacy notices presented to them.<sup>39</sup> By one estimate, it would take 244 hours for the average Internet user to read all of the privacy notices presented to her in a given year.<sup>40</sup> Beyond the "notice fatigue" she would experience by attempting to read all of these notices, the opportunity cost of actually engaging in this effort would render the attempt irrational.<sup>41</sup> The value she

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<sup>36</sup> *Changing the Social Meaning*, *supra* note 19, at 203–04; Strandburg, *supra* note 22, 1302; de Hingh, *supra* note 14, at 1271–72; Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357, 368 (2006); Nehf, *supra* note 24, at 62; Rothchild, *supra* note 28, at 584, 614 (citation omitted); Spencer, *supra* note 13, at 892 (citation omitted); Acquisti et al, *supra* note 24, at 477.

<sup>37</sup> Elvy, *supra* note 14, at 445 (citation omitted); Lawrence Jenab, *Will The Cookie Crumble?: An Analysis of Internet Privacy Regulatory Schemes Proposed in the 106th Congress*, 49 U. KAN. L. REV. 641, 667–68 (2001) (citation omitted); McClurg, *supra* note 13, at 134; Schwartz, *supra* note 12, at 822; Nehf, *supra* note 24, at 63 (citation omitted); Rothchild, *supra* note 28, at 563; Spencer, *supra* note 13, at 896 (citation omitted).

<sup>38</sup> Kenneth Bamberger & Dierdre K. Mulligan, *Privacy on the Books and On the Ground*, 63 STAN. L. REV. 247, 297 (2011); Jane B. Baron, *Property as Control: The Case of Information*, 18 MICH. TELECOMM. & TECH. L. REV. 367, 382 (2012) (citation omitted); Patricia L. Bellia, *Federalization in Information Privacy Law*, 118 YALE L.J. 868, 898 (2009).

<sup>39</sup> Elvy, *supra* note 14, at 442 (citation omitted); Allyson W. Haynes, *Online Privacy Policies: Contracting Away Control over Personal Information?*, 111 PENN. ST. L. REV. 587, 588 (2007) (citation omitted); Priscilla M. Regan, *Response to Privacy As a Public Good*, 65 DUKE L.J. ONLINE 51, 52 (2016); Rothchild, *supra* note 28, at 563; PEW RESEARCH CENTER, AMERICANS AND PRIVACY: CONCERNED, CONFUSED AND FEELING LACK OF CONTROL OVER THEIR PERSONAL INFORMATION, 57 (2019) (finding 23% of consumers often or always read privacy policies before agreeing to them and only 22% of consumers read all of a privacy policy presented to them).

<sup>40</sup> Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J. OF LAW & POL. 543, 563 (2012). See also PEW RESEARCH CENTER, *supra* note 39, at 57 (finding 25% of consumers report are asked to agree to a privacy policy on an almost daily basis, 32% on a roughly weekly basis, and 24% on a roughly monthly basis).

<sup>41</sup> Rothchild, *supra* note 28, at 615–21. Exacerbating this opportunity cost is the fact privacy notices are continuously updated and consumers would have to check back to stay up-to-date with a given company's practices. *Id.* at 616. Notice fatigue is compounded by

would gain from this knowledge, considering privacy notices' general inadequacy, is unlikely to meet or exceed the cost to obtain it.<sup>42</sup> Third, it is difficult for consumers to understand how platforms' data-handling practices affect them, even when they read privacy notices.<sup>43</sup> Consumers generally do not understand the information privacy consequences of sharing or protecting their personal information and they cannot predict or understand the consequences of how platforms handle their information.<sup>44</sup> Fourth, even if consumers read and understood the privacy notices presented to them, they generally cannot verify or monitor platforms' compliance with their representations about their information privacy rules.<sup>45</sup>

Consumers' lack of knowledge exacerbates the difficulty of making inter-temporal decisions.<sup>46</sup> Given consumers' uncertainty about the future risks or rewards of providing a given platform their personal information and the immediate appeal of receiving a good or service (especially one that is "free"), consumers tend to discount the possibility and cost of future harm and provide more information

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"security fatigue," *i.e.*, consumers' inability to make granular privacy choice across the myriad websites with which they interact regularly. Elvy, *supra* note 14, at 443–44.

<sup>42</sup> Rothchild, *supra* note 28, at 619–20; Spencer, *supra* note 13, at 899.

<sup>43</sup> Balkin, *supra* note 35, at 1227; Barnhizer, *supra* note 13, at 78–79; Elvy, *supra* note 14, at 442; Haynes, *supra* note 39, at 588; Schwartz, *supra* note 28, at 1271 (citation omitted); Calo, *supra* note 9, at 672; Rothchild, *supra* note 28, at 563, 616; PEW RESEARCH CENTER, *supra* note 39, at 52–53, 57–58 (finding 59% of consumers report they understand very little or nothing about what companies are doing with the data they collect about them and 32% of consumers report they understand the privacy policies they read very little or not at all).

<sup>44</sup> Bellia, *supra* note 38, at 898; Fairfield & Engel, *supra* note 14, at 390; Acquisti, et al., *supra* note 24, at 444; Schwartz, *supra* note 12, at 822 (citation omitted); Rothchild, *supra* note 28, at 615; Ozer, *supra* note 15, at 226, 228 (citation omitted); Elvy, *supra* note 14, at 486 (citation omitted); Balkin, *supra* note 35, at 1200 (citation omitted). Advocacy organizations have made efforts to inform the public about the effect of website data-handling practices on consumer privacy in order to alleviate this source of asymmetry. *Changing the Social Meaning*, *supra* note 19, at 162.

<sup>45</sup> Balkin, *supra* note 35, at 1227; *Property, Privacy, and Personal Data*, *supra* note 27, at 2079; McClurg, *supra* note 13, at 134; Schwartz, *supra* note 28, at 1275; Hahn & Layne-Farrar, *supra* note 13, at 114.

<sup>46</sup> Edward J. Janger, *Locating the Regulation of Data Privacy and Data Security*, 5 BROOK. J. CORP. FIN. & COM. L. 97, 105 (2010) (citation omitted).

than they would prefer in the long term.<sup>47</sup> Moreover, under conditions of “bounded rationality,” i.e., “the fact that humans face limitations in the time they have available to gather information and in their cognitive abilities to process the information in order to arrive at a utility-maximizing decision,”<sup>48</sup> consumers will likely accept whatever information privacy terms a platform presents to them, rather than attempt to bargain over the terms presented or create their own terms.<sup>49</sup>

In addition to consumers’ cognitive limitations, free-riding and a collective action problem hinder individual consumers from bargaining with platforms over their information privacy terms. Information privacy is a public good: that is, whatever privacy there is among members of a community is inherently available to all, and one person’s “consumption” of privacy does not reduce the privacy available to others.<sup>50</sup> Individuals, however, incur costs to adopt and maintain a level of privacy. In an online platform setting, producing information privacy may require a consumer to demand that a platform adopt certain protections benefitting the whole consumer community. In this bargaining effort, the individual consumer incurs a cost, perhaps to form and communicate demands on the platform or to withhold her participation on the platform (and thus her supply of personal information and advertising consumption) until the platform concedes.<sup>51</sup> But the individual has a great incentive to “free ride,” i.e., to obtain the benefit without incurring the cost, because

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<sup>47</sup> Regan, *supra* note 39, at 52; Savage, *supra* note 24, at 98; Ozer, *supra* note 15, at 226 (citation omitted); Strandburg, *supra* note 22, at 1265–66, 1286 (citation omitted); Acquisti et al., *supra* note 24, at 447; Fairfield & Engel, *supra* note 14, at 391; Spencer, *supra* note 13, at 898 (citations omitted).

<sup>48</sup> Rothchild, *supra* note 28, at 619 (citation omitted).

<sup>49</sup> Spencer, *supra* note 13, at 900 (citation omitted); Schwartz, *supra* note 12, at 822–23 (citation omitted); Janger, *supra* note 46, at 105–06 (citation omitted); Schwartz, *supra* note 27, at 2081 (citation omitted); Strandburg, *supra* note 22, at 1238–39 (citation omitted).

<sup>50</sup> Schwartz, *supra* note 27, at 2084–85 (citation omitted); Fairfield & Engel, *supra* note 14, at 418–19, 423 (citation omitted); *De Facto Federal Privacy*, *supra* note 24, at 120, 131 (citation omitted); Hetcher, *supra* note 18, at 126.

<sup>51</sup> Spencer, *supra* note 13, at 900; *see, e.g.*, Jennifer Huddleston, *Preserving Permissionless Innovation in Federal Data Privacy Policy*, 22 NO. 12 J. INTERNET L. 1, 24 (2019) (citation omitted) (“[O]ne study finds that Facebook users would need to be paid up to \$1,000 to leave the service for one year.”).

once another consumer obtains the information privacy standard for the community, she need not incur any cost to benefit from it.<sup>52</sup> This incentive to free ride gives rise to a collective action problem<sup>53</sup> that impedes consumers from acting individually to demand that the platform provide greater protections.<sup>54</sup> That is, though consumers would benefit from greater information privacy protections, they will fail to take individual actions to achieve these protections because each individual would choose to free ride rather than incur the cost to act in the group's collective interest.<sup>55</sup>

### B. A Legally Ratified System of Self-Regulation

Applicable information privacy law, composed of sector-specific federal and state statutes, highly circumscribed common law, and limited agency action, has largely relegated information privacy to industry self-regulation and otherwise done little to regulate platforms' collection, use, and disclosure of consumers' personal information.<sup>56</sup> These bodies of law entrench platforms' dominance over information privacy insofar as they rely on individual autonomy and control<sup>57</sup> in a platform political economy in which individuals are politically powerless.

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<sup>52</sup> Spencer, *supra* note 13, at 900–01.

<sup>53</sup> *De Facto Federal Privacy*, *supra* note 24, at 120; Hetcher, *supra* note 18, at 115, 126; Schwartz, *supra* note 12, at 822–23 (citation omitted); Hetcher, *supra* note 28, at 1274–75; Strandburg, *supra* note 22, at 1286–87.

<sup>54</sup> *Privacy Norms*, *supra* note 18, at 116; Savage, *supra* note 24, at 111 (citation omitted); Spencer, *supra* note 13, at 891, 900 (citation omitted); Strandburg, *supra* note 22, at 1247; Schwartz, *supra* note 27, at 2079.

<sup>55</sup> Fairfield & Engel, *supra* note 14, at 387, 425 (citation omitted); Spencer, *supra* note 13, at 900; Regan, *supra* note 39, at 54 (citation omitted); Strandburg, *supra* note 22, at 1247–48 (citation omitted).

<sup>56</sup> Hetcher, *supra* note 18, at 97–98 (citation omitted); Samuelson, *supra* note 13, at 1131 (noting privacy laws generally do not recognize consumers' rights to exert control over their personal information); Schwartz, *supra* note 12, at 827 (noting privacy laws do not provide individuals a general right to access their personal information).

<sup>57</sup> Elvy, *supra* note 14, at 430; Bamberger & Mulligan, *supra* note 38, at 258–59 (citation omitted); Jenab, *supra* note 37, at 657, 660 (citation omitted); McClurg, *supra* note 13, at 90 (citation omitted); Haynes, *supra* note 39, at 611 (quoting Chris Jay Hoofnagle, *Privacy Self-Regulation: A Decade of Disappointment*, ELEC. PRIV. INFO. CTR. (Mar. 4, 2005), <http://www.epic.org/reports/decadedisappoint.pdf> [https://perma.cc/UVR8-B3V5]); Schwartz, *supra* note 12, at 854; Hahn & Layne-Farrar, *supra* note 13, at 111 (citation omitted); Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data*

Federal and state information privacy statutes ratify platform self-regulation through a notice and consent framework. The Gramm-Leach-Bliley Act, the Health Insurance Portability and Accountability Act, and the Electronic Communications Privacy Act, for example, each contain exceptions to their respective limitations when the covered entity obtains an individual's consent.<sup>58</sup> State laws mirror the notice-and-consent approach:<sup>59</sup> even the California Consumer Privacy Act, lauded as a major advance in consumer information privacy protection, requires covered entities to provide consumers only notice of their data-handling practices and limited opt-out choices.<sup>60</sup>

Common law—particularly in tort, contract, and property—also broadly excepts from liability acts undertaken pursuant to notice and consent. Tort liability for certain invasions of privacy depends on whether the plaintiff had a reasonable expectation of privacy.<sup>61</sup> But, if a platform-defendant presented the plaintiff-consumer with an accurate privacy notice, it would be unreasonable for the plaintiff to have a different expectation of privacy.<sup>62</sup> Moreover, the plaintiff's consent to the defendant's practice would eviscerate her tort claim.<sup>63</sup> Property and contract law, likewise, sanction actions undertaken with an ostensibly harmed individual's consent.<sup>64</sup>

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*Protection*, 83 GEO. WASH. L. REV. 2230, 2273 (2015); Nehf, *supra* note 24, at 48 (citation omitted).

<sup>58</sup> Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510, *et seq.*; Privacy Rule, Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. pt. 160, 164(A), 164(E); Gramm-Leach-Bliley Act, 15 U.S.C. § 6801, *et seq.*; Haynes, *supra* note 39, at 597–99 (citation omitted); Nehf, *supra* note 24, at 6, 46, 58.

<sup>59</sup> Solove & Hoofnagle, *supra* note 36, at 401; Bellia, *supra* note 38, at 885.

<sup>60</sup> Haynes, *supra* note 39, at 601–02 (citations omitted); Delaware Online Privacy and Protection Act, 6 Del. Code § 1201C, *et seq.*; California Consumer Privacy Act of 2018, Cal. Civ. Code § 1798.100, *et seq.*

<sup>61</sup> *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D, 652E (1965).

<sup>62</sup> *See, e.g.*, *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 994 (9th Cir. 2019); *In re Nw. Airlines Priv. Litig.*, No. Civ.04–126, 2004 WL 1278459, at \*5 (D. Minn. 2004); *Deering v. CenturyTel, Inc.*, No. CV–10–63, 2011 WL 1842859, at \*2 (D. Mont. 2011); *In re Facebook Internet Tracking Litig.*, 263 F. Supp. 3d 836, 846 (N.D. Cal. 2017).

<sup>63</sup> Elvy, *supra* note 14, at 486 (citation omitted); McClurg, *supra* note 13, at 70, 128–29 (noting tort law's respect for consent protects personal freedom and autonomy).

<sup>64</sup> RESTATEMENT (SECOND) OF CONTRACTS, §§ 275, 284, 287 (1981); *see, e.g.*, *Cenna v. United States*, 402 F.2d 168, 170 (3d Cir. 1968) (stating Pennsylvania conversion law is

Finally, the Federal Trade Commission (“FTC”) has explicitly relied on industry self-regulation through notice and consent.<sup>65</sup> The Commission has focused its enforcement related to information privacy on businesses’ misrepresentations or failure to follow their privacy notices and honor consumer choice (deemed “deceptive”) and misuse of personal information without providing any privacy notice (deemed “unfair”).<sup>66</sup> Hence, businesses need only provide accurate disclosures of their practices and honor consumer choice, when they decide to provide choices, to mitigate the risk of FTC enforcement.

Proponents of notice and choice generally laud its promotion of individual autonomy and control.<sup>67</sup> The platform political economy,

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“the deprivation of another’s right of property . . . without the owner’s consent and without lawful justification.”); *In re Gen. Plastics Corp.* 184 B.R. 996, 1004 (S.D. Fla. 1995) (“There can be no conversion where a person consents to the possession by another of the assets allegedly converted.”).

<sup>65</sup> Through its authority under Section 5 of the Federal Trade Commission Act, the FTC has broad authority to police “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1).

<sup>66</sup> Haynes, *supra* note 39, at 599–600, 603–04 (citing *In re BJ’s Wholesale Club, Inc.*, 140 F.T.C. 465 (2005)); *Fed. Trade Comm’n v. ToySmart.com, LLC*, No. Civ.A. 00–CV11341RGS, 2000 WL 1523287 (D. Mass. Aug. 21, 2000); *In re Vision I Props., LLC*, 139 F.T.C. 296, 302 (2005); *In re Gateway Learning Corp.*, 138 F.T.C. 443, 457 (2004); *In re Educ. Rsch. Ctr. of Am., Inc.*, 135 F.T.C. 578, 596 (2003); *In re GeoCities* 127 F.T.C. 94, 1999 FTC LEXIS 17, at \*11 (1999); Terrell McSweeney, *FTC 2.0: Keeping Pace with Online Platforms*, 32 BERKELEY TECH. L.J. 1027, 1036–37 (2017) (citing FED. TRADE COMM’N, PRIV. & DATA SEC. UPDATE: 2016 at 2–5 (Jan. 2017); Complaint at ¶¶ 13–14, In the Matter of Twitter, Inc., Fed. Trade Comm’n Matter No. 0923093 (Mar. 2, 2011) (Docket No. C–4316); Complaint at ¶¶ 17–18, In the Matter of Facebook, Inc., Fed. Trade Comm’n Matter No. 0923184 (July 27, 2012) (Docket No. C–4365); Complaint at ¶ 6, In the Matter of Google Inc., Fed. Trade Comm’n Matter No. 1023136 (Oct. 13, 2011) (Docket No. C–4336); Complaint at ¶¶ 6, 16–17, In the Matter of Snapchat, Inc., Fed. Trade Comm’n Matter No. 1323078 (Dec. 23, 2014) (Docket No. C–4501)) (describing cases against Twitter, Snapchat, and others alleging misrepresentations about privacy practices); Calo, *supra* note 9, at 683 (citation omitted); Steven A. Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041, 2042–43, 2057 (2000) (citations omitted); Elvy, *supra* note 14, at 485 (citations omitted); Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 628–29 (2014).

<sup>67</sup> Hetcher, *supra* note 18, at 102, 130; *Changing the Social Meaning*, *supra* note 19, at 169; Fairfield & Engel, *supra* note 14, at 408–09 (describing dominance of privacy-as-control theory and critiquing individual-focused education and empowerment as somewhat ineffective); Schwartz, *supra* note 12, at 820–22, 825 (asserting privacy-as-control must

however, unmoors notice and choice from the prospect that it gives consumers autonomy over their personal information. Instead, notice and choice likely exploit individual consumer vulnerability with respect to information privacy. Platforms are legally sanctioned to determine what, if any, information privacy protections they will provide and consumers are expected to exercise the options platforms afford them, rather than to determine what protections and options ought to be provided in the first instance. Individual consumer consent or, more accurately, acquiescence to platforms' data-handling practices does not reflect consumer "autonomy" or

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allow meaningful choice); de Hingh, *supra* note 14, at 1280 (describing notice and choice solutions as focused on individual autonomy); Opinion 4/2015, *supra* note 14, at 4, 11–12 (describing the European model which seeks to empower individual consumers with greater control). A deep discussion into the relative merits and pitfalls of relying on notice-and-choice frameworks for privacy protections is beyond the scope of this Article. There is extensive debate on this matter, generally centered on whether consent mechanisms ought to be opt-in or opt-out. Sovern, *supra* note 21, at 1083, 1090, 1094, 1101–02 (arguing opt-out is ineffective in light of bargaining power imbalance); Savage, *supra* note 24, at 1040 (arguing notice is inadequate in light of its unilateral determination by the particular business); Nehf, *supra* note 24, at 63, 67–68 (noting business incentives to make vague and limited commitments in privacy notices and indicating preference for opt-in over opt-out consent); Ozer, *supra* note 15, at 225–26, 240 (asserting greater transparency will lead to consumers better understanding privacy risks and taking more privacy protective actions); Hahn & Layne-Farrar, *supra* note 13, at 98–101, 146–50 (evaluating arguments in favor of opt-in consent regime and stating consumers' failure to act on opt-out opportunities reveals their preference for the particular transaction); Opinion 4/2015, *supra* note 14, at 12 (noting the volume of online activity places the notion of consent under strain); Rothchild, *supra* note 28, at 562–63, 608–11, 613–14 (describing failure of notice-and-choice model of privacy protection but nonetheless advocating for a privacy framework that affords individual consumers control over their personal information); Solove & Hoofnagle, *supra* note 36, at 368–70, 403 (advocating for notice and consent and arguing consumer choice is only meaningful where consumers have sufficient knowledge of businesses' data-handling practices); Elvy, *supra* note 14, at 433–35, 441–45, 466–67, 475, 486–87, 516, 518 (arguing against notice and choice); Haynes, *supra* note 39, at 593, 596–97 (noting privacy notices bind the consumer vis-à-vis consent rather than the website operator); de Hingh, *supra* note 14, at 1274, 1278–79 (critiquing reliance on notice and consent); Litman, *supra* note 13, at 1310–11 (supporting notice and meaningful consent mechanisms); Schwartz, *supra* note 27, at 2103–06 (supporting opt-in over opt-out consent), 1272–74; Spencer, *supra* note 13, at 910–11 (advocating for opt-in consent and better notice); Strandburg, *supra* note 22, at 1303–04 (supporting opt-in consent and customized privacy plans that allow more granular choice); Jenab, *supra* note 37, at 642–43, 664, 666, 668–69 (supporting notice and consent).

“control”<sup>68</sup> in light of platforms’ ability to determine unilaterally consumers’ information privacy.

*C. The Individualist Paradigm and The Social Paradigm of Information Privacy*

Much privacy scholarship has focused on consumers’ inability to protect their information privacy in terms of market forces: consumers’ cognitive limitations prevent them from receiving a market-optimal level of information privacy.<sup>69</sup> In line with existing information privacy law, framing information privacy in terms of a market allocation relies on an individualist paradigm. This paradigm characterizes information privacy as an individual’s control over the guarding or disclosure of her personal information, which requires others to respect the secrecy of the information she has chosen to guard.<sup>70</sup> The individualist paradigm certainly helps frame the

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<sup>68</sup> Savage, *supra* note 24, at 107, 109; Sovern, *supra* note 21, at 1094 (noting consumer acquiescence when opt-out consent is available is unlikely to reflect actual preferences); Ozer, *supra* note 15, at 225 (quoting Priscilla M. Regan, Associate Professor, Geo. Mason Univ., Address at the Annual Meeting of the American Political Science Association: Privacy as a Common Good in the Digital World (1999) (“[P]eople are less likely to make choices that protect their privacy unless these choices are relatively easy, obvious, and low cost.”)).

<sup>69</sup> Acquisti, et al., *supra* note 24, at 448 (citation omitted); Spencer, *supra* note 13, at 891 (citation omitted); Ozer, *supra* note 15, at 226, 231; Strandburg, *supra* note 22, at 1239, 1285–86, 1288 (citation omitted); Savage, *supra* note 24, at 109 (citation omitted); Calo, *supra* note 9, at 662 (citation omitted); Regan, *supra* note 39, at 52 (citation omitted); BERGEMANN & BONATTI, *supra* note 22, at 5; Ibarra et al., *supra* note 9, at 40 (citation omitted).

<sup>70</sup> *Changing the Social Meaning*, *supra* note 19, at 169–70 (arguing online privacy requires websites to abstain from collecting and using personal information except to the extent the consumer consents to the collection and use); Schwartz, *supra* note 12, at 820 (describing privacy as control); Hahn & Layne-Farrar, *supra* note 13, at 101–02 (describing belief that information privacy is a personal right pursuant to which individuals should be allowed to act in their own best interests with respect to guarding or alienating their personal information); Bergelson, *supra* note 20, at 402 (explaining control paradigm places the individual at the center of decision-making regarding the use of her personal information); Opinion 4/2015, *supra* note 14, at 12 (“Control is necessary but not sufficient.”); Baron, *supra* note 38, at 392 (describing privacy as control); *Changing the Social Meaning*, *supra* note 19, at 167 (noting an extreme view, with respect to information privacy, is “the less that personal data is collected and used, the better”) (citation omitted); Schwartz, *supra* note 12, at 828; Nehf, *supra* note 24, at 9, 35. *C.f.* Robert Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV 647,

platform political economy, insofar as it describes why individual consumers are politically powerless against platforms that decide consumers' information privacy. However, in the context of privacy protection, this paradigm focuses on satisfying individual preferences—however an individual sets the metes and bounds of permissions and limitations with respect to information about her. This characterization of information privacy, sounding in data protection, ought not be confused with normative information privacy; that is, social norms concerning personal information.<sup>71</sup> The social foundations of normative information privacy, and the social character of personal information—the social paradigm of privacy—recast consumers' inability to protect their information privacy as a political, rather than economic, problem. The question of how to correct a failure in the market for information privacy does not answer the political question of who ought to determine what information privacy entails and how it ought to be protected. Rather, democratic theory suggests consumers should have a role in developing information privacy norms and the rules that protect them.

To be sure, individuals have particular preferences with respect to their privacy—to some, a portrait photograph may not personally offend, whereas to others, it may. But in either case, privacy's social construction gives these preferences meaning. Understanding portrait photography as a practice that implicates privacy derives from shared expectations, intuitions, and standards of respect. In the context of privacy torts, Professor Robert Post describes privacy norms as comprising “rules of civility” that constitute individuals and community.<sup>72</sup> Privacy takes shape in the forms of respect individuals

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651 (1991) (quoting Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198, 206 (1890)) (noting Warren & Brandeis's privacy torts center on individual control).

<sup>71</sup> HELEN NISSENBAUM, PRIVACY IN CONTEXT 3 (2019); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 963–64 (1989).

<sup>72</sup> Post, *supra* note 71, at 959; Post, *supra* note 70, at 652; see also Spencer, *supra* note 13, at 853–54 (describing Post's “civility rules”); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1167 (2004) (describing Post's “civility rules” as well as similar ideas in Warren and Brandeis's article *The Right to Privacy*). Per Professor Post, privacy norms provide the basis for “dignitary privacy,” *i.e.*, privacy rules that “follow[] a normative logic designed to prevent harm to personality

owe one another as members of the same community.<sup>73</sup> The identities of both the individual and the community are, in some part, shaped by the observance of the community's privacy norms.<sup>74</sup>

Information privacy norms are constituted no differently than are privacy norms more generally; they are formed by common expectations regarding what personal information ought to be shared and how it ought to be used in different contexts and circumstances.<sup>75</sup> Further, information privacy norms shape individual and community identity by ascribing meaning to various social practices.<sup>76</sup> An individual "receives" information privacy when these norms are observed with respect to her personal information.<sup>77</sup> An intrusion on information privacy, by contrast, injures the individual's social personality and, when societally pervasive, leads to erosion of the norm.<sup>78</sup> Preservation of information privacy, however, does not require norms to be fixed or uniform: as with any social norms, information privacy norms are characteristically non-universal, deeply contextual, and constantly in flux.<sup>79</sup>

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caused by the violation of civility rules." Robert Post, *Data Privacy and Dignitary Privacy: Google Spain, The Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 982 (2018) [hereinafter "*Data Privacy and Dignitary Privacy*"]. This contrasts with "data privacy," *i.e.*, those privacy rules that "operate[] according to an instrumental logic, . . . seek[] to endow persons with 'control' over their personal data," and may be violated regardless of any showing of harm. *Id.*

<sup>73</sup> Post, *supra* note 70, at 651; Post, *supra* note 71, at 985.

<sup>74</sup> Post, *supra* note 70, at 668–69; Post, *supra* note 71, at 964. *See also* Spencer, *supra* note 13, at 853 (describing Frederick Schauer's view that the harm underlying privacy torts is socially constructed).

<sup>75</sup> Strandburg, *supra* note 22, at 1238, 1259; Fairfield & Engel, *supra* note 14, at 423; Bergelson, *supra* note 20, at 402; Baron, *supra* note 38, at 394–95 (applying Post's "civility rules" to information privacy); *c.f.* Savage, *supra* note 24, at 110 (arguing one individual can have some privacy even if others do not).

<sup>76</sup> *C.f.* Schwartz, *supra* note 27, at 1270 (describing value of information to community as well as individual); Schwartz, *supra* note 12, at 834 (calling information privacy a "constitutive value" that helps for the society in which we live and shapes individual identities).

<sup>77</sup> Post, *supra* note 71, at 968.

<sup>78</sup> *Id.* at 964, 966–68.

<sup>79</sup> Post, *supra* note 71, at 984 (describing socially determined variability of social norms, such as the character of the social occasion and the characteristics of the disclosure and recipient of information); Savage, *supra* note 24, at 109 (citation omitted) (describing scholars' assertion that "privacy" describes a range of shifting and context-dependent

Consider a religious group as a type of community with shared expectations, meanings, and norms. One religious group's information privacy norms may encourage the dissemination of information about its rites and rituals, but another religious group may find such publicity highly privacy invasive. A member of the relevant community, who operates with the understanding of the community's norm, may have a divergent preference if she did not internalize her community's norm.<sup>80</sup> Disclosing information about her religion's practices may not offend her, though she understands it to be offensive within her community. The aggregation of these individual preferences, though, does not equate to information privacy norms. The social underpinnings of information privacy are interrelational and normatively antecedent: if members of a community did not understand, among themselves, knowledge about their religious practices to have any social significance, "privacy preferences" with respect to their disclosure would be incoherent.

The individualist paradigm's inappositeness to addressing privacy protection is particularly acute in the platform political economy. This paradigm conceives of information privacy harms as affecting individual consumers. The social character of personal information on the Internet complicates this premise—personal information nominally about one individual bears implications about numerous others, whether related by family or community ties, shared demographics, or other characteristics.<sup>81</sup> Thus an individual's loss of information privacy not only harms her, but also other similar or proximate individuals.<sup>82</sup> "Individual" harms, at scale, also

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social norms); Spencer, *supra* note 13, at 844, 846 (noting societal expectations of privacy fluctuate with changing social practices and society inevitably disagrees about particular privacy expectations); Acquisti et al., *supra* note 24, at 446–47 (noting privacy sensitivities are subjective, idiosyncratic, and vary over time and across circumstances); Strahilevitz, *supra* note 26, at 2022; Samuelson, *supra* note 13, at 1172 (noting concepts of information privacy are evolving over time). *See generally* HELEN NISSENBAUM, *PRIVACY IN CONTEXT* (2009) (describing privacy norms as deeply contextual).

<sup>80</sup> Post, *supra* note 71, at 963.

<sup>81</sup> BERGEMANN & BONATTI, *supra* note 22, at 2.

<sup>82</sup> Strandburg, *supra* note 22, at 1261 (describing concrete individual harms from losses of privacy, such as identity theft and other forms of fraud); Nehf, *supra* note 24, at 26–27 (describing individual harms as loss of dignity, autonomy, or self, as well as a loss of control over how information about an individual is used by others in a way that affects

undermine a community's ability to form norms and overpower their expectations of information privacy.<sup>83</sup>

Further, individual control presumes the individual, acting in her own interest, will preserve the community norm that gives her particular preference its meaning. This condition fails on the Internet, where the individual (and immediate) benefit is more palpable than the subtle erosion of the information privacy to which she ought to be entitled.

Finally, the individualist paradigm takes platform information privacy rules as given. Scholars and lawmakers thus use the paradigm to attempt to ameliorate individual consumers' difficulties making preference-satisfying information-sharing decisions within a platform's information privacy rules and otherwise do not question who ought to decide the rules that afford these decisions.<sup>84</sup> Presuming platforms decide their own information privacy rules overlooks and, in effect, displaces communities' role in constructing and protecting information privacy norms.<sup>85</sup> Reliance on the individualist paradigm therefore enables platform hegemony over information

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her); Hartzog & Solove, *supra* note 57, at 2283; Baron, *supra* note 38, at 390 (describing individual harm as loss of power to determine which facts about oneself are disclosed and how they are presented). In economic terms, the second-order harm felt by the community and other individuals within it is described as an "externality" because it is not borne by the individual whose information is disclosed. Savage, *supra* note 24, at 110; BERGEMANN & BONATTI, *supra* note 22, at 2.

<sup>83</sup> Fairfield and Engel write that the individual will contribute rationally to the erosion of her privacy vis-à-vis sharing personal information as long as the individual's direct costs and share of social costs are together less than her private gain. Fairfield & Engel, *supra* note 14, at 423; *see also* Rothchild, *supra* note 28, at 614; Nehf, *supra* note 24, at 9, 14 (describing the tradeoff between obtaining the benefits of information technologies and having to disclose personal information in the process); Acquisti et al., *supra* note 24, at 477. *But see* Bergelson, *supra* note 20, at 402 (arguing individual control will not necessarily lead to erosion of privacy when combined with government supervision).

<sup>84</sup> Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 525–27 (1988).

<sup>85</sup> *C.f.* Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1186–87, 1194 (2018); Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2436 (2020).

privacy's private governance, which precludes consumers from shaping and protecting the norms that characterize their identities.<sup>86</sup>

#### *D. Democracy without Government*

In a democratic society, collective harms are typically met with government intervention<sup>87</sup> and private litigation. As in the case of environmental pollution, when a private entity harms society at large, the government intervenes to regulate and, perhaps, prohibit the offensive behavior.<sup>88</sup> Similarly, class actions provide groups of citizens redress against collectively harmful behavior.<sup>89</sup> However, as described, both government intervention and private litigation have failed to mitigate platforms' erosion of communities' information privacy. Instead, information privacy law's reliance on notice and consent has entrenched platform power.<sup>90</sup> Even calls for legal reform have generally sought to improve notice and provide more granular choice mechanisms rather than reform the self-regulatory system that gives platforms overwhelming control over information privacy.<sup>91</sup>

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<sup>86</sup> *C.f.* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1617 (2018) (“[N]ew governance model[s] identify several features that accurately describe the interplay between user and platform: a ‘dynamic’ and ‘iterative’ ‘law-making process’; ‘norm-generating’ ‘[i]ndividuals’; and ‘convergence of processes and outcomes.’”) (internal citations omitted).

<sup>87</sup> Hetcher, *supra* note 18, at 121; Strandburg, *supra* note 22, at 1292–94, 1304; Calo, *supra* note 9, at 677–78 (quoting Jules Coleman, *Competition and Cooperation*, 98 ETHICS 76, 80 (1987)); Janger, *supra* note 46, at 105; Fairfield & Engel, *supra* note 14, at 420; *c.f.* Nehf, *supra* note 24, at 5 (stating the resolution to general societal concerns tends to be enforcement of a legal norm through government agency oversight and regulation).

<sup>88</sup> *See generally*, Omri Ben-Shahar, *Data Pollution* 6–7, 33–44 (Univ. of Chi., Pub. L. & Legal Theory, Working Paper No. 679, 2018) (calling for data regulation that conceives of privacy harms as “pollution” akin to environmental harms that justify government intervention).

<sup>89</sup> Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 352 (2003) (“The class action mechanism is, of course, often posited as the preferred solution to aggregate cases where the collective harm is widespread . . .”).

<sup>90</sup> *See supra* Section I.B.

<sup>91</sup> These calls for legal reforms include calls for federal omnibus legislation, FTC empowerment, and expansions to common law tort, property, and contract law theories and causes of action. Balkin, *supra* note 35, at 1199 (citation omitted) (describing Eugene Volokh's proposed contractarian privacy framework); Bamberger & Mulligan, *supra* note 38, at 259 (citation omitted) (describing general support for omnibus legislation adopting

In the absence of governmental regulation, platforms' private governance of information privacy lacks political legitimacy from the beginning. However, democratic theory suggests rules affecting society gain political legitimacy when they are determined by those whom they affect (and thus are not determined by an alien "ruling class").<sup>92</sup> Hence, private governance may gain political legitimacy if those affected are able to participate in its rule promulgation. Democratic freedom requires citizens to have a voice in the decisions to which they are subject, whereas in an autocracy decisions are imposed on citizens through compulsion, requiring citizens' submission.<sup>93</sup> Democracy does not require unanimity; some amount of dissidence can be presumed.<sup>94</sup> Rather, democratic legitimacy is derived from "a basic agreement" in which citizens agree to be bound by their collective decisions, regardless whether they individually agree with them.<sup>95</sup> In the context of First Amendment doctrine, Professor Robert Post explains the "essence of democracy" is the opportunity to participate in the formation of the communal will, through ongoing deliberation in which majority and minority views

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Fair Information Practices and, potentially, creation of a new data protection agency); Hartzog & Solove, *supra* note 57, at 2245, 2266, 2271–73, 2275, 2294, 2297–98 (arguing in favor of empowered and aggressive FTC); David A. Hyman & William E. Kovacic, *Implementing Privacy Policy: Who Should Do What?*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1117, 1125, 1136–37, 1142–43, 1145–47 (2019) (describing characteristics federal privacy law ought to have and arguing for expanded FTC jurisdiction due to its expertise, experience, and resources, or creation of a dedicated federal privacy commission); Litman, *supra* note 13, at 1288, 1312–13 (arguing in favor of expanded tort law, based on breach of confidence, because it would avoid the alienability trap of property rules and allow courts to appreciate subtle distinctions in context); Samuelson, *supra* note 13 at 1127, 1150–51, 1156, 1158, 1167 (advocating for expanded tort law by setting a default rule forbidding certain data-handling practices absent consent); Solove & Hartzog, *supra* note 66, at 669, 673 (arguing the FTC should take holistic view of consumer experience when determining consumer expectations); see McClurg, *supra* note 13 (setting out in detail a tort approach to online privacy, expanding the appropriation tort). See also Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1310–11 (1998) (citation omitted) (describing a range of other arguments in favor of contract).

<sup>92</sup> ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 3, 6 (Harper Collins Publishers 2004); *c.f.* PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 24 (1969) (describing the morality of cooperation as emergent from below rather than imposed from above).

<sup>93</sup> MEIKLEJOHN, *supra* note 92, at 3, 5.

<sup>94</sup> *Id.* at 9.

<sup>95</sup> *Id.* at 9; see also Post, *supra* note 71, at 978.

are heard.<sup>96</sup> In this sense, democracy is not “majoritarian,” but rather the product of dialogic communication.<sup>97</sup>

Platforms’ private governance, in which they unilaterally determine consumers’ information privacy<sup>98</sup>, lacks democratic legitimacy. In effect, platforms form a sort of “ruling class” that determines the information privacy consumers may receive and expect. Platforms’ determination of information privacy affect consumers individually and collectively insofar as platforms undermine and override consumers’ ability to generate the information privacy norms that shape their identities. Moreover, consumers have no voice in platforms’ decisions with respect to their information privacy. Platforms attain hegemonic status; consumers are their subjects.

Democratic legitimation of information privacy may be possible, however, even without the promulgation of law. Within a system of private governance, it would require that those affected by private rules have a role in their determination. Accordingly, private governance of information privacy could gain democratic legitimacy if consumers were able to shape and determine information privacy norms and the rules that protect them. Democratic private governance of information privacy cannot occur at the level of the individual consumer. Information privacy’s social foundations indicate that communities, rather than individuals, form information privacy norms in the first instance.<sup>99</sup> And, practically, in the platform political economy, individual consumers lack the requisite bargaining power to affect platforms’ information privacy rules. Moreover, the social character of personal information online suggests myriad other consumers may have an interest in

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<sup>96</sup> Robert C. Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1115 (1993) [hereinafter “*Meiklejohn’s Mistake*”]; see also Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in *Democratic Community*: 35 NOMOS: AM. SOC’Y POL. LEGAL PHIL. 163, 170–71 (1993) (citation omitted) (describing Hans Kelsen’s view that self-determination is in the ability of persons to participate in the creation of their social order) [hereinafter “*Between Democracy and Community*”].

<sup>97</sup> *Between Democracy and Community*, *supra* note 96, at 170–71 (citation omitted).

<sup>98</sup> See *supra* Sections I.A., I.C., & I.D.

<sup>99</sup> See *supra* notes 64–71 and accompanying text; see also ZUBOFF, *supra* note 12, at ch. 17 (calling for collective action to countervail the power of surveillance capital).

any individual's information privacy.<sup>100</sup> Hence, democratic private governance would require the consumer-community, as a collective, to be able to decide information privacy norms and the rules that protect them.<sup>101</sup>

In 2009, Facebook attempted to “democratize” its platform governance. It announced it would open up certain documents in its suite of Terms of Service to a user referendum designed by Facebook; it planned to extend this same procedure to its Privacy Policy.<sup>102</sup> The planned referendum process centered on user input on proposed “Facebook Principles” and a “Statement of Rights and Responsibilities” drafted by Facebook.<sup>103</sup> It involved, at the first stage, virtual Town Hall meetings open to user comments and the solicitation of written comments.<sup>104</sup> Facebook would then review users' comments, revise the two documents to incorporate any changes it decided to make, and release a summary of the most common and significant comments it received.<sup>105</sup> The revised documents would then be submitted to a user vote on whether to adopt the documents,

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<sup>100</sup> In the case of non-normative “data protection,” consumer collectivization may not be socially imperative, insofar as data privacy does not constitute individual and community identity. Regardless, collectivization may be practically imperative due to the government's abstention from intervention, the social character of personal information online, and individual consumers' inability to bargain effectively.

<sup>101</sup> Wikipedia is often offered a model of democratic private governance within the realm of speech regulation. See Tim Wu, *Is the First Amendment Obsolete?*, in EMERGING THREATS (2017); LAWRENCE LESSIG, *CODE 2.0* (2006); JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET—AND HOW TO STOP IT* (2008); MIKE ANANNY & KATE CRAWFORD, *SEEING WITHOUT KNOWING: LIMITATIONS OF THE TRANSPARENCY IDEAL AND ITS APPLICATION TO ALGORITHMIC ACCOUNTABILITY* (2016). Notably, Wikipedia's data practices are not decided by dispersed, decentralized contributors in the same way as its content moderation. See *Privacy Policy*, WIKIMEDIA FOUND. (May 17, 2018), [https://foundation.wikimedia.org/wiki/Privacy\\_policy](https://foundation.wikimedia.org/wiki/Privacy_policy) [https://perma.cc/YV54-TTAG] (stating Wikipedia privacy policy is promulgated by the Wikimedia Foundation's Board of Trustees). Whether the Wikipedia model of democratic speech governance could support democratic privacy governance is a rich question deserving of standalone attention and, as such, it is not pursued in this Article.

<sup>102</sup> See *Facebook Opens Governance of Service and Policy Process to Users*, FACEBOOK (Feb. 26, 2009), <https://about.fb.com/news/2009/02/facebook-opens-governance-of-service-and-policy-process-to-users/> [https://perma.cc/6HKD-G7YP].

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

scheduled to occur on a single day.<sup>106</sup> That vote would become “binding” if more than 30% of then-active Facebook users (an estimated 52 million users) voted.<sup>107</sup>

When referendum day arrived, 665,654 users voted, with the majority in favor of adopting the proposals as written.<sup>108</sup> Then, in 2012, Facebook held a vote on a new policy—to get rid of voting.<sup>109</sup> Eighty-eight percent of the 668,500 votes cast opposed this revision.<sup>110</sup> Facebook implemented the new policy regardless.<sup>111</sup>

Setting aside the referendum’s implementation failure, its design reveals a key misunderstanding about democratic process. The opportunity to voice concerns and vote (ceremonially) in favor or against rules drafted unilaterally by a ruler does not amount to democratic decision-making. Rather, it more closely resembles a form of authoritarian constitutionalism, which “accepts many governance features of constitutional democracy with the noteworthy exception of . . . democracy itself.”<sup>112</sup> Facebook’s control over the decision-making process precludes it from creating public discourse that truly instantiates democratic decision-making; democratic self-determination reaches past the substance of collective decisions and encompasses decision-making about the process of deliberation and decision-making as well.<sup>113</sup> Democratic legitimacy thus requires the public to not only make decisions about societal matters collectively, but also determine collectively the form and structure of the decision-making process. Even if Facebook had subjected its

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<sup>106</sup> *See id.*

<sup>107</sup> *Id.*; see *Facebook Opens Up Voting for Site’s Terms of Service*, ADWEEK (Apr. 16, 2009), <https://www.adweek.com/performance-marketing/facebook-terms-voting/> [https://perma.cc/H9X6-YGAH].

<sup>108</sup> See Adi Robertson, *Mark Zuckerberg Wants to Democratize Facebook—Here’s What Happened When He Tried*, THE VERGE (Apr. 5, 2018), <https://www.theverge.com/2018/4/5/17176834/mark-zuckerberg-facebook-democracy-governance-vote-failure> [https://perma.cc/4CVU-9J8K].

<sup>109</sup> *See id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See David Pozen, *Authoritarian Constitutionalism in Facebookland*, KNIGHT FIRST AMEND. INST., COLUM. UNIV. (Oct. 30, 2018) (internal quotation marks omitted), <https://knightcolumbia.org/content/authoritarian-constitutionalism-facebookland> [https://perma.cc/LK4R-FDSS].

<sup>113</sup> *Meiklejohn’s Mistake*, *supra* note 96, at 1117.

Privacy Policy to a user referendum, the results of the process would not have been decided democratically. Instead, we can begin to understand how information privacy may be decided more democratically within the existing private governance system by looking to concepts from industrial democracy, which sought to democratize workplace decision-making through robust self-determination mechanisms.

## II. INDUSTRIAL DEMOCRACY AS A MODEL FOR PLATFORM DEMOCRACY

Democratizing private governance is a novel approach to legitimating platform information privacy. It has, however, been theorized extensively as a response to an analogous context: the labor political economy of the late nineteenth and early twentieth centuries.<sup>114</sup> Confronting similar conditions of employer hegemony and worker powerlessness over the conditions of labor, concepts of industrial democracy arose to democratize workplace decision-making.<sup>115</sup> Industrial democracy borrowed heavily from political democracy, calling for workers to have the opportunity to participate in workplace governance.<sup>116</sup> It sought to implement a number of democratizing structures that can be organized into three levels: first, in the internal processes of the intermediating bargaining institution (i.e., the union); second, through the rebalancing of bargaining power between workers and an employer vis-à-vis workers' collective action; and, third, by governing the terms and conditions of labor through a collective bargaining agreement which holds the employer accountable to its workers.<sup>117</sup>

Industrial democracy may serve as a roadmap to democratize platform information privacy due to both the fundamental similarities between the labor and online platform political economies and the notion that, in each, private governance ought to be legitimated

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<sup>114</sup> See MILTON DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865–1965*, 6–22 (1970) (tracing the history and theorization of industrial democracy from late 1797 to the 1940s).

<sup>115</sup> *Id.* at 10.

<sup>116</sup> *Id.* at 10, 18–19.

<sup>117</sup> I categorize the structures proposed in industrial democracy literature into these three levels to lay out, in as streamlined a manner as possible, the process of making private governance more democratic from the inside out. This is not a taxonomy made explicit by any single source in the literature.

through democratic procedures. The dissimilarities of the platform political economy, however, suggest industrial democracy structures will have to adapt considerably to legitimate platform information privacy.

#### *A. Labor and Online Platform Political Economies*

The labor political economy in the late nineteenth and early twentieth century shared fundamental characteristics with the platform political economy. It similarly gave rise to a system of private governance in which employers had hegemonic power to determine the terms and conditions of unskilled workers' labor.<sup>118</sup> Employers were able to set wages and other conditions of labor—including hours, time off, fringe benefits, and health and safety precautions—and they were incented to set these terms at their lowest cost.<sup>119</sup> Employers' overwhelming decision-making power came from their bargaining advantage relative to individual workers.<sup>120</sup> Employers knew the state of the market and the demand for labor, were more skilled at bargaining by virtue of their past bargaining experience, and did not depend on employing any particular worker—therefore, they were indifferent to individual employment decisions.<sup>121</sup>

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<sup>118</sup> Barnhizer, *supra* note 13, at 86–88, 93–94, 98–99 (citations omitted); Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 991 (1984); Eric Tucker, *Renorming Labour Law: Can We Escape Labour Law's Recurring Regulatory Dilemmas?*, 39 INDUS. L.J. 99, 107 (2010). *But see* Horacio Spector, *Philosophical Foundations of Labor Law*, 33 FLA. ST. U. L. REV. 1119, 1133 (2006) (arguing monopsonist employers are willing to provide contract terms that buyers, i.e., workers, are willing to pay for, such that the employer's market power does not prevent free negotiation between the employer and an individual employee).

<sup>119</sup> Jedidiah J. Kroncke, *The False Hope of Unions Democracy*, 39 U. PA. J. INT'L L. 615, 637–38 (2018) (citation omitted) (noting Elizabeth Anderson uses the term “private government” to describe the vastness of employers' power over workers); Marc T. Moore, *Reconstituting Labour Market Freedom: Corporate Governance and Collective Worker Counterbalance*, 43 INDUS. L. J. 398, 408 (2014) (citation omitted) (“[W]ithin the typically broad limits stated in the employment contract, the entrepreneur is free to direct and organise [sp] the employee's work in accordance with her own discretion and in light of the perceived exigencies of the business, without the need either to seek the assent of the employee to each ordered task or to negotiate the latter's compensation for each task on an ongoing basis.”)

<sup>120</sup> GREENWOOD, *supra* note 7, at 12–13.

<sup>121</sup> *Id.* at 13.

By contrast, individual workers had little power to decide the terms of their labor, let alone demand their employers adopt terms they favor.<sup>122</sup> Though workers may have understood generally that they were undercompensated or worked in dangerous conditions, they lacked knowledge of business, their industry, and the demand for labor, which limited their ability to articulate demands on their employers.<sup>123</sup> Additionally, workers were eager to be employed so that they could earn wages<sup>124</sup>; if there were only a small number of nearby employers, workers were unable to substitute employment<sup>125</sup> and, in general, they could not exit the labor market altogether—and forgo wages—while sustaining their lives.<sup>126</sup> Moreover, employers’ control over labor terms and conditions led workers to believe they lacked the ability to exert any such control and, accordingly, they sought only modest rewards.<sup>127</sup>

A collective action problem compounded individual workers’ inability to bargain. When workers are treated uniformly, the goals they pursue, i.e., higher wages and better working conditions,<sup>128</sup> are “public goods” that suffer from a free-rider problem. An individual worker would incur costs to pursue these goals, but, once achieved by other workers, she could benefit without incurring any cost. A rational, self-interested worker thus would not incur the expenses, pecuniary or otherwise, to obtain higher wages and better working conditions and would instead rely on others to provide the good so

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<sup>122</sup> See MARK PERLMAN, *LABOR UNION THEORIES IN AMERICA* 150–51 (1958); GREENWOOD, *supra* note 7, at 12.

<sup>123</sup> See PERLMAN, *supra* note 122, at 201 (quoting SELIG PERLMAN, *A THEORY OF THE LABOR MOVEMENT* 239 (1928) [hereinafter “A THEORY OF THE LABOR MOVEMENT”]); see also GREENWOOD, *supra* note 7, at 13.

<sup>124</sup> See GREENWOOD, *supra* note 7, at 13.

<sup>125</sup> Judge Richard Posner skeptically acknowledges that workers may be either ignorant of their alternative employment opportunities or otherwise incur heavy costs by changing jobs. See Posner, *supra* note 118 at 991–92; see also Barnhizer *supra* note 13, at 93–94 (citations omitted).

<sup>126</sup> See Eric Tucker, *Renorming Labour Law: Can We Escape Labour Law’s Recurring Regulatory Dilemmas?*, 39 *INDUS. L.J.* 99, 107 (2010); see also SELZNICK, *supra* note 92, at 144.

<sup>127</sup> See PERLMAN, *supra* note 122, at 200–201 (quoting *A THEORY OF THE LABOR MOVEMENT*, *supra* note 122, at 238–39).

<sup>128</sup> See generally ALBERT REES, *THE ECONOMICS OF TRADE UNIONS* 27 (1962).

that she may benefit for free.<sup>129</sup> This incentive to free ride creates a collective action problem—though workers would benefit from coming together to pursue higher wages and better working conditions, they fail to do so because of the economic incentive to defect.<sup>130</sup> Individual workers’ divergent, or even antithetical, preferences may exacerbate this collective action problem.<sup>131</sup> For example, some workers may prioritize higher wages over more time off, or vice versa, and junior workers may oppose the seniority rights more senior workers would enjoy. Workers’ geographic dispersion would also make collective action more difficult to achieve.<sup>132</sup>

Platforms’ sources of bargaining power mirror and expand beyond those employers enjoyed. Platforms, by virtue of their experience monetizing personal information, are able to evaluate the market and demand for personal information.<sup>133</sup> They may also be more skilled at bargaining due to their business experience and professional staff. Finally, they are indifferent to the collection of individual pieces of personal information and personal information from particular individuals, due to their relatively insignificant monetary value and platforms’ ability to obtain information from third parties.<sup>134</sup>

The ability to obtain personal information from third parties confers an even greater bargaining advantage on platforms than

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<sup>129</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 11, 21 (1965); see also Posner, *supra* note 118, at 994.

<sup>130</sup> See Peter Levine, *The Legitimacy of Labor Unions*, 18 HOFSTRA LAB. & EMP. L.J. 529, 546 (2001) (citation omitted).

<sup>131</sup> See OLSON, *supra* note 129, at 11. Writing in 1911, Greenwood describes the collective action problem as due to the “poverty, timidity, and lack of intelligence” that render workers almost incapable of self-organizing. GREENWOOD, *supra* note 7, at 57–58.

<sup>132</sup> See D. Bruce Johnsen, *Who Captures the Rents from Unionization? Insights from Multiemployer Pension Plans*, 1 AM. BUS. L. REV. 193, 205–06 (2012) (citation omitted).

<sup>133</sup> Publicly traded companies, including Facebook and Google, file quarterly Form 10-Q reports with the Securities and Exchange Commission that include managements’ predictions of market demand. See, e.g., Form 10-Q, 30, Facebook, Inc. (filed Oct. 30, 2020) (stating management’s expectations about upcoming demand for online advertising services); Form 10-Q, 35–36, Alphabet, Inc. (filed Oct. 30, 2020) (stating management’s expectations about effect of COVID-19 pandemic on market).

<sup>134</sup> See Danielle Keats Citron & Frank A. Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 26 (2014); see also *supra* notes 23–24 and accompanying text.

employers have: even if a consumer abstains from a platform, that platform may nevertheless obtain a constant stream of her personal information as she browses webpages that contain the platform's cookies or other plug ins.<sup>135</sup> In the labor context, this would be the equivalent—however paradoxical—of an employer obtaining a worker's labor regardless of the worker's employment. And, whereas for labor, both employers and workers knew the existing wages and working conditions, only the platforms know precisely what personal information they collect, how they use it, and how their promised information privacy protections are operationalized. Moreover, platforms have the unique ability to undermine consumers' information privacy demands by leveraging their knowledge of each particular consumer's interests, tastes, and beliefs. Altogether, platforms can be viewed as a type of "super bargainer" which hold sole knowledge about the subject of the bargain, are able to obtain what they seek regardless of their counterparty's walk-away, and can manipulate their counterparty due to their vast and intimate knowledge.

Likewise, consumers share a number of workers' bargaining constraints, but suffer additional impairments due to structural differences in the platform political economy. Akin to workers, most consumers know little of the market and demand for their personal information.<sup>136</sup> But, because consumers also lack knowledge of how platforms collect and use personal information,<sup>137</sup> they could not know the value platforms ascribe to their personal information or how platforms' data-handling practices affect their information privacy. In this context, the difference between workers' wages and consumers' information privacy is evident. Workers know both the

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<sup>135</sup> See, e.g., Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Toward Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 70–73 (2019) (describing in depth the deployment of Facebook code on third-party websites for tracking purposes); see also John Koetsier, *Google Is Tracking You on 86% of the Top 50,000 Websites on the Planet*, FORBES (Mar. 11, 2020), <https://www.forbes.com/sites/johnkoetsier/2020/03/11/google-is-tracking-you-on-86-of-the-top-50000-websites-on-the-planet/?sh=18d1dc84750f> [https://perma.cc/TR2C-NW4K].

<sup>136</sup> PEW RESEARCH CENTER, *supra* note 39, at 60 (noting that 73% of survey respondents heard little to nothing about the aggregation of personal data used to form comprehensive behavioral profiles for advertising and risk assessment purposes).

<sup>137</sup> See *supra* notes 37–46.

amount of their wages and how their wages affect their standard of living and hence could formulate demands for higher wages. By contrast, consumers do not know how their personal information is collected and used and do not know how those practices affect their information privacy. Without this knowledge, consumers could not know what to demand from platforms.

Consumers' need for platforms mirror, in part, workers' need to work, but is somewhat more complex. Just as workers need to earn wages to support their lives and may be unable to substitute employers in their locality, consumers face concrete costs from abstaining from participation on certain platforms and may be unable to find adequate substitutes. Even for those platforms whose consumer products are not as essential as a worker's wages, consumers are driven to engage because of the attractive value proposition of a "free" service, network effects, and addictive qualities.

Finally, consumers, as compared to workers, face a greater collective action problem. Consumers-at-large of online platforms are both geographically and socially distant. For example, Facebook users in India and Mexico are not only physically distant, but they also may not be connected through their networks of friends. Moreover, they come from cultures and sub-cultures that may differ substantially on information privacy norms and standards. This stands in contrast to an employer's workers who, though perhaps located in different cities, could nevertheless locate one another through their shared employment and could be expected to share a set of common cultural values and norms with respect to their labor. And, whereas workers' preferences may diverge but are nevertheless concrete (e.g., a dollar amount of wages, a number of paid days off, or specific health and safety precautions), consumers' information privacy preferences may be highly idiosyncratic, conflicting, and difficult to describe.<sup>138</sup>

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<sup>138</sup> Consider, for example, three siblings. The first sibling elects to send her saliva sample to a company that uses it to diagnose food sensitivities and intolerances, target advertising, and build and improve its products and services. She does not feel that any of these practices violate her privacy. The second sibling would send his saliva sample to the company if it used it solely to diagnose his food sensitivities and intolerances; using his biometric information for advertising and improving products would violate his desired

In the labor context, the bargaining-power disparity between employers and individual workers placed workers at the mercy of their employers with respect to wages and working conditions,<sup>139</sup> under threat of being forced down to a bare subsistence level.<sup>140</sup> Labor scholars, most notably Sidney and Beatrice Webb, witnessed employer hegemony and, in the absence of worker-protective law, called for the private legitimation of workplace decision-making through democratic structures.<sup>141</sup> Unions were a centerpiece in the movement for industrial democracy. The ideal labor union would channel and represent workers' interests against overreaching employers,<sup>142</sup> counteract the power imbalance inherent in the employer-worker relationship,<sup>143</sup> and thereby enable workers to influence the terms and conditions of their labor.

The platform political economy's more pronounced bargaining-power disparity yields a dynamic much the same as for employers and workers. Individual consumers are at the mercy of platforms with respect to their information privacy and they are already forced down to a level that maximizes financial returns to the platforms, at

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privacy in that information. The third sibling would consider the disclosure of her biometric information to any company a violation of her privacy. Yet, the second and third siblings' privacy preferences inherently conflict with those of the first sibling: when the first sibling shares her saliva with the company, the company obtains valuable information not only about that first sibling, but about the second and third siblings as well, given that they share genetic characteristics. Not only do these siblings' privacy preferences differ—but if one sibling's preferences are granted, the other two siblings' preferences are infringed.

<sup>139</sup> See GREENWOOD, *supra* note 7, at 12; see Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 36 (2006); see also Moore, *supra* note 119, at 416–17. See generally ZUBOFF, *supra* note 12, ch. 6.

<sup>140</sup> See GREENWOOD, *supra* note 7, at 15, 30; see also Moore, *supra* note 119, at 411 (describing employers' allocative discretion due to the open-endedness of their ability to make decisions within the employment relationship).

<sup>141</sup> See WEBB & WEBB, *supra* note 7. See also GREENWOOD, *supra* note 7, at 36; Tucker, *supra* note 126, at 108; Moore, *supra* note 119, at 415, 422.

<sup>142</sup> See Johnsen, *supra* note 132, at 205–06 (citation omitted).

<sup>143</sup> See Tucker, *supra* note 126, at 107, 114 (quoting J. W. Budd, R. Gomez, & N. Meltz, *Why Balance Is Best: The Pluralist Industrial Relations Paradigm of Balancing Competing Interests*, in THEORETICAL PERSPECTIVES ON WORK AND THE EMPLOYMENT RELATIONSHIP 201, 201 (B. E. Kaufman ed., 2004); see Levine, *supra* note 130, at 547–48 (internal citations omitted); see Kate Andrias, *Janus's Two Faces*, SUP. CT. REV. 21, 46–47 (2018); see also SELZNICK, *supra* note 92, at 144.

their information privacy's expense. Just as poor wages and working conditions harmed workers, the harm to information privacy is serious. Platform hegemony precludes consumers, as a sector of society, from producing information privacy norms that form aspects of their identities. Though such societal harm would typically spur governmental action, such an intervention is not forthcoming. Alternatively, a private counterforce, helmed by the consumer community, may legitimate platforms' information privacy rules by empowering and enfranchising affected consumers.

Industrial democracy may instruct on how to theorize the democratization of platform information privacy. It builds from a starting point characterized by hegemony and it provides a ready model for the translation of themes and structures from political democracy into private governance. Hence, features of industrial democracy can help frame platform democracy, but that frame must be filled based on the platform political economy's divergences and idiosyncrasies.

### *B. Democracy at Three Levels*

Proponents of industrial democracy sought to legitimate workplace decision-making by deploying a number of democratizing structures, which may be organized into three levels: (1) internal, through the democratic formation and operation of a collective bargaining organization (i.e., the union); (2) procedural, through workers' accumulation of bargaining power to counteract that of employers; and (3) contractual, through a mutually enforceable agreement that binds workers and employers, grants some of the workers' demands, and holds employers accountable. These structures would legitimate workplace decision-making much in the same way government is democratically legitimated: they allow workers to participate in a sort of "public forum," influence the terms that bind them, and hold employers-qua-decision-makers accountable to them. Though industrial democracy's structures apply concepts of political legitimacy to the particularities of the labor political economy, the labor and platform political economies' fundamental similarities suggest these structures can help frame information privacy's legitimation within private governance.

### 1. Internal Democracy

Industrial democracy begins internally, through democratic self-government within a collective bargaining organization—typically, a union. Unions, in their ideal form, achieve internal democracy through membership participation in union formation, its internal organization and procedures, including the articulation of demands on employers,<sup>144</sup> and union leadership accountability to members.

Unions form democratically through the establishment of a “common rule”: an agreement among a cohort of workers on the terms under which they will accept employment, an understanding among them that no one will accept less favorable terms, and the coordination of labor withdrawal (i.e., a strike) if their employer does not accede.<sup>145</sup> Formation may be bottom-up, that is, led by a group of workers at a particular workplace, or top-down, in which an existing national organization reaches into a workplace to organize its workers. Whereas prior to the promulgation of labor law, unions relied on employers’ voluntary or coerced acknowledgement to gain recognition as workers’ bargaining agent,<sup>146</sup> labor law formalized union formation through majoritarian voting. In short, after the National Labor Relations Board approves of a particular “bargaining unit”—a group of workers that is sufficiently homogenous, yet distinct from other workers, to enable it to bargain on behalf of the entirety of the unit<sup>147</sup>—a majority of workers in that unit must agree to form a union.<sup>148</sup>

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<sup>144</sup> See Kroncke, *supra* note 119, at 619; see Levine, *supra* note 130, at 544; see also Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 794 (1984).

<sup>145</sup> See GREENWOOD, *supra* note 7, at 16; see also Moore, *supra* note 119, at 423.

<sup>146</sup> See REES, *supra* note 128, at 28.

<sup>147</sup> See Andrias, *supra* note 143, at 24; see Posner, *supra* note 118, at 995 (citing National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (1982)). Judge Posner notes the bargaining unit will ordinarily be limited to one factory even if the factory’s owner owns other factories as well and there are often more than one unit in a particular factory. *Id.* at 995.

<sup>148</sup> See Andrias, *supra* note 143, at 24; see Posner, *supra* note 118, at 993–94 (citation omitted). If less than fifty percent, but at least thirty percent of workers in the bargaining unit agree to unionize, the Board will order a representation election. See Posner, *supra* note 118, at 996 (citing 29 C.F.R. § 101.18(a) (1983)). Following an election campaign, members of the bargaining unit must vote on whether to make the proposed union the exclusive bargaining agent of the bargaining unit. See Posner, *supra* note 118, at 995 (citing 29 U.S.C. §§ 9(a), 159(a)). A majority must vote in favor for the union to form. 29 U.S.C. § 159(a).

Workers may then organize and operate a union democratically through worker participation in deliberation, election of representatives, and voting.<sup>149</sup> Unions are typically structured as representative organizations; members elect union officials who craft the union agenda and demands on employers and select negotiators to bargain on the union's behalf.<sup>150</sup> Procedures for membership participation may range, at the high end, from demand formation through deliberation and popular ratification of bargaining agreements,<sup>151</sup> to voting for their officials, to the bare minimum of voting for the union's formation. The greater opportunities for member participation the better for union democracy.<sup>152</sup> When workers are able to make collective decisions about the working conditions they seek, they

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<sup>149</sup> See Levine, *supra* note 130, at 544, 568; see also Kroncke, *supra* note 119, at 619.

<sup>150</sup> See REES, *supra* note 128, at 174. There is a robust debate on the extent to which representative governance reduces union democracy. Scholars supporting representative democracy in unions argue that workers benefit from relying on experts to represent them to negotiate on their behalf due to the complex nature of calculating wage rates, the difficulty of negotiations between a large number of workers and a single or multiple employers, the superior knowledge of the industry representatives attain through the bargaining process, and representatives' proclivity to make more tempered (and thereby, agreeable) demands on employers. See GREENWOOD, *supra* note 7, at 16, 40; see PERLMAN, *supra* note 122, at 152, 153; see Hyde, *supra* note 144, at 830; see REES, *supra* note 128, at 180; see also DONALD L. MARTIN, AN OWNERSHIP THEORY OF THE TRADE UNION 86–87 (1980); ORLEY ASHENFELTER & GEORGE E. JOHNSON, BARGAINING THEORY, TRADE UNIONS, AND INDUSTRIAL STRIKE ACTIVITY 36 (1969). On the other side of the debate, scholars acknowledge that agency costs (*i.e.*, the transaction costs principals incur to monitor and constrain their agents) make it difficult for workers to monitor their representatives, which could lead to representatives' unchecked abuse of their role. See Johnsen, *supra* note 132, at 206–08; see Levine, *supra* note 130, at 544–45. Others argue relying on representation makes the bargaining process inherently “less participatory and less democratic.” See Hyde, *supra* note 144, at 867–937.

<sup>151</sup> See PERLMAN, *supra* note 122, at 150, 153 (quoting U.S. Comm'n on Indus. Rel., Joint Agreements, at 193–94 (unpublished research paper) [hereinafter “Joint Agreements”]).

<sup>152</sup> Professor Alan Hyde argues union democracy requires a baseline of member participation that includes, among other things, the opportunity for members to express their views on potential bargaining demands (especially through small, unstructured meetings and referenda), member communication with their negotiators, member representation on the negotiating team, member ratification of all bargaining demands and all proposed agreements with employers, members' right to oppose agreements, and negotiators' duty to educate the members about bargaining conditions. See Hyde, *supra* note 144, at 794–95, 830, 845–47. He argues increased member participation will increase the likelihood members will comply with the agreements which they have ratified. *Id.* at 830. *But see* Kroncke, *supra* note 119, at 643 (citation omitted) (noting little evidence supports the proposition that a lack of participation weakens high-performing unions).

“engage in democratic decision-making on a daily basis”<sup>153</sup> generating “an inner public sphere” in the union that is akin to the liberal state.<sup>154</sup> The benefits that inhere in union democracy likewise mirror those observed in democratic government: workers are free to associate and to criticize their workplace, they become educated about their industry, including its requirements for production and its limitations, and they develop individual responsibility to their organization that tempers extreme, idiosyncratic views.<sup>155</sup>

As in democratic government, tensions exist when a union purports to speak for all workers, including members who dissent and those who are not members in the first instance.<sup>156</sup> However, a union’s democratic legitimacy derives from workers’ ability to contribute to formation of the group will, despite the presence of internal disagreement about particular aims.<sup>157</sup> As such, these critiques do not undermine a union’s legitimacy, which rests on workers’ *ability* to participate. Rather, they caution that unionization’s democratic benefits require internal procedures that give voice to all union constituents.<sup>158</sup>

Leadership accountability to members is crucial to a union’s democratic formation, lest union official hegemony replace employer hegemony. At base, union leaders are accountable to members because members may vote them out of office. Union leaders are also, in general, more likely to be responsive to members’ interests when they align ideologically and take pride in their

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<sup>153</sup> Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 647 (2019) (citation omitted); Andrias, *supra* note 143, at 46–47.

<sup>154</sup> Levine, *supra* note 130, at 568; *see also* GREENWOOD, *supra* note 7, at 38; PERLMAN, *supra* note 122, at 153 (quoting Joint Agreements, *supra* note 151, at 193–94) (“The workers are not only members of a democratic organization of their own for collective action in regard to the terms of employment, but citizens of a dual government for the industry as a whole in labor matters. They elect representatives to a joint legislative body; they participate directly or through their national officers in the selection of members of a joint judiciary which is in many cases also a joint executive with large powers of enforcing its decision.”); *c.f.* Kroncke, *supra* note 119, at 619.

<sup>155</sup> PERLMAN, *supra* note 122, at 152–53; Levine, *supra* note 130, at 568–69.

<sup>156</sup> Kroncke, *supra* note 119, at 654; Andrias, *supra* note 153, at 628; Levine, *supra* note 130, at 545–46, 565.

<sup>157</sup> Hyde, *supra* note 144, at 794–95, 806–08, 832.

<sup>158</sup> *Id.* at 807–08.

advocacy.<sup>159</sup> Finally, unions' duty of fair representation, a fiduciary obligation imposed by law,<sup>160</sup> keeps union leadership accountable to all constituents, including non-members, by requiring unions to represent fairly all constituents' views when entering collective bargaining.<sup>161</sup>

Internal platform-democratic structures can draw from internal industrial-democratic structures, but they will have to diverge in certain respects to address the platform political economy and online social networks' nuances. As in the labor context, a consumer collective bargaining organization could gain democratic legitimacy through democratic formation, consumer participation in the organization's formation and operations, and leadership accountability. Each of these features of internal industrial democracy will likely look substantially different in the platform context.

As for labor organizing, consumer organizing can take a bottom-up ("grassroots") or top-down ("institutional") approach. The online grassroots approach is bound to look fairly different than in the workplace, where workers are able to identify each other easily, petition each other directly, and organize a meeting among themselves to decide their demands and agree to strike if they are not met.<sup>162</sup> By contrast, consumers' abilities to directly identify, petition, and deliberate with one another are limited by the reach of their online social networks. The nested, overlapping structure of online social

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<sup>159</sup> REES, *supra* note 128, at 174, 180; Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1013 (1986); Ashenfelter & Johnson, *supra* note 150, at 36.

<sup>160</sup> The duty of fair representation was developed by courts rather than statute. Campbell, *supra* note 159, at 1013 n.112 (citing 29 U.S.C. § 159(a); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)).

<sup>161</sup> Hyde, *supra* note 144, at 806; Andrias, *supra* note 143, at 24 (citing *Vaca v. Sipes*, 386 U.S. 171, 186 (1967)); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202–03 (1944); REES, *supra* note 128, at 29; *see also* Campbell, *supra* note 159, at 1013 (internal citations omitted). Unions' fiduciary obligation to all workers in the unit is often attached to the workers' obligation to pay dues, regardless of their membership in the union; though in some systems, unions' obligation attains even though non-members are not required to pay. Andrias, *supra* note 143, at 24–25 (internal citation omitted). Alan Hyde describes in detail the procedural requirements courts have imposed on unions under the duty of fair representation, including the use of a "rational decision-making process" to ascertain worker interests and desires and an equitable procedure for protecting the interests of all workers in the event of intraunion conflict. Hyde, *supra* note 144, at 805–06.

<sup>162</sup> *See* REES, *supra* note 128, at 27.

networks<sup>163</sup> suggest identification and petitioning may be possible iteratively—consumers can identify and petition those within their network and those who agree can identify and petition members of their other social groups. Online organizing efforts may spread broadly, rapidly, at low cost, and with little time investment.

These vast interconnected networks are unlikely to “meet” to decide collectively their demands in any proper sense. Rather, grassroots-turned-institutional movements such as Black Lives Matter<sup>164</sup> suggest anecdotally that a smaller group of highly motivated individuals may formulate and propose demands and lead the organizing effort. Consumers’ agreement to organize would be reflected in their public statement of solidarity. Consumer “deliberation” over the smaller group’s articulated demands may, at a minimum, involve consumers’ individual, public agreement or disagreement with the set of demands. They may also involve public-facing conversation (e.g., Facebook posts, Twitter tweets, or Reddit threads) about these demands that may lead to their revision.<sup>165</sup>

The democratic operation of online grassroots organizing must also adapt to the Internet’s affordances and constraints. As noted, direct participation in articulating a set of demands may practically be limited to public-facing conversation. Likewise, consumers’ agreement to act collectively and to align on a set of demands—their “vote”—and their “election” of representatives may be limited to public affirmation of their solidarity with the smaller group’s articulated mission. There are, however, technologies that enable a more traditional type of deliberation and voting. Liquid Feedback is a software that allows users to start an “initiative,” disseminate it to others, receive others’ feedback, and allow them to vote on the initiative.<sup>166</sup>

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<sup>163</sup> Fairfield & Engel, *supra* note 14, at 435 (citing Michal Kosinski, David Stillwell, & Thore Graepel, *Private Traits and Attributes are Predictable from Digital Records of Human Behavior*, 110 PROC. NAT’L ACAD. SCI. U.S. 5802, 5802 (2013)).

<sup>164</sup> *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory/> [<https://perma.cc/K36G-QH6D>].

<sup>165</sup> Schwartz, *supra* note 12, at 836 (noting the Internet is a forum for deliberative democracy).

<sup>166</sup> LIQUID FEEDBACK, <https://liquidfeedback.org/> [<https://perma.cc/7MHM-ENXZ>].

Leadership accountability is a particular challenge following the grassroots approach, as those who helm the grassroots effort may not be subject to “election” in a traditional sense. Rather, leaders’ accountability will likely depend heavily on a high degree of ideological alignment between them and the broader group of consumers whose interests are at stake.

An institutional approach to consumer organizing for information privacy may mirror labor organizing more closely. An institution already involved in privacy advocacy, much like a national labor union, may identify and petition consumers to join a collective bargaining organization, perhaps through advertising or by drawing on existing membership or donor lists. The institution could then implement labor-union-like internal democratic structures. Creating these structures may involve public deliberation through online fora, voting, and the election of representatives. It could create highly participatory mechanisms, such as bottom-up formation of demands from its members’ deliberation and membership ratification of bargaining agreements, or limit participation to the decision to join the institution’s collective bargaining organization.

One group, called RadicalxChange, is currently attempting to organize people to pursue a number of initiatives including one focused on “data dignity.”<sup>167</sup> It also draws from a metaphor to labor and it intends to implement a range of internal democratic mechanisms, such as voting on priorities and initiatives and deliberation through written comment.<sup>168</sup> Such an organization could prove to be a formidable testing ground for consumer collectivization and would be a good fit to organize consumers for information privacy as well.

Following either a grassroots or an institutional approach, a consumer collective bargaining organization’s constituent base will be characteristically different than in the labor context. Legally, labor union formation by voting requires the circumscription of a

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<sup>167</sup> *About RxC*, RADICALXCHANGE, <https://www.radicalxchange.org/about/> [https://perma.cc/EMN7-7ATZ]; *Data Dignity*, RADICALXCHANGE, <https://www.radicalxchange.org/concepts/data-dignity/> [https://perma.cc/W686-FRE9].

<sup>168</sup> *THE DATA FREEDOM ACT 4–5*, RADICALXCHANGE, <https://www.radicalxchange.org/kiosk/papers/data-freedom-act.pdf> [https://perma.cc/4UEW-PXQM]; Alex Randaccio, *Introducing RxC Voice*, RADICALXCHANGE (Dec. 16, 2020), <https://www.radicalxchange.org/kiosk/blog/introducing-rxc-voice/> [https://perma.cc/HL7B-LBB5].

sufficiently homogenous yet distinct bargaining unit and a majority vote in favor of formation.<sup>169</sup> This requirement ensures unions represent their constituents fairly. In the platform setting, defining a “bargaining unit” would prove difficult and may be unnecessary. Whereas in the labor setting there were clear homogeneity markers such as job roles, superficial markers of consumer homogeneity (e.g., demographics, geographic location, and educational attainment) may not correlate with information privacy norms.<sup>170</sup> Even limiting the bargaining unit to a platform’s users in a particular country may prove problematic, as platforms’ collection and use of personal information extend beyond their user bases. However, instead of attempting to define *ex ante* a bargaining unit, a consumer collective bargaining organization may limit its constituents to those who decide to join. Even if an organization limits its constituency in this manner, due to the social character of personal information online, it ought to adopt a “duty of fair representation” to represent the views of non-members affected by a platform’s information privacy rules, regardless whether those non-members use the platform.

As in the labor context, platform democracy’s internal structures would ideally generate a public sphere that resembles the liberal state. Consumers would make collective decisions about their information privacy and thereby engage in democratic decision-making. Consumers would likewise receive the benefits of democratic association: they would be able to criticize a platform, become educated about information privacy rules and how they are affected by them, develop a responsibility to their collective interest, and transcend idiosyncrasies to form shared norms. The organization would attain democratic legitimacy on the same grounds as a labor union. Regardless of dissent among those organized and the likelihood the organization’s information privacy demands, if granted, would affect non-members, the organization would be legitimate democratically due to consumers’ *ability* to contribute to the formation of group will.

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<sup>169</sup> See *supra* notes 128–129.

<sup>170</sup> Posner, *supra* note 118, at 995.

## 2. Procedural Democracy

Internal democracy would legitimate a collective bargaining organization as a political institution. Instituting a process that empowers workers to influence the terms and conditions of their labor would then legitimate workplace decision-making. Unions democratize the employer-worker relationship by accumulating worker bargaining power through collective action and then bargaining collectively with employers, thereby serving as a counterforce to employer hegemony. Collective bargaining also reduces bargaining costs relative to individual employer-worker negotiations by channeling otherwise diffuse worker demands on and commitments to the employer into streamlined, overarching conditions that would apply to all workers under the union's purview.<sup>171</sup>

Through unions, workers engage in "private self-help": they channel worker voice into a set of streamlined and actionable demands, contribute to a robust civil society in which private groups engage in public work,<sup>172</sup> and shift power from employers to workers in the workplace.<sup>173</sup> Unions counteract the harms to human

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<sup>171</sup> Moore, *supra* note 119, at 423; GREENWOOD, *supra* note 7, at 15–16; *see also* Levine, *supra* note 130, at 538 (citation omitted). Moreover, unions' ability to channel and formally communicate worker voice and grievances, discipline workers who attempt unauthorized strikes, and provide job security to workers, confers onto employers greater workplace stability and reduced labor strife. Campbell, *supra* note 159, at 996 (citation omitted); Posner, *supra* note 125, at 1000 (citation omitted); Tucker, *supra* note 126, at 114; *c.f.*, Levine, *supra* note 130, at 540. Additionally, collective bargaining agreements may contain "no-strike" clauses that allow an employer to get an injunction and, potentially, monetary damages in the event of a union strike. Posner, *supra* note 118, at 999.

<sup>172</sup> Levine, *supra* note 130, at 558; Andrias, *supra* note 153, at 648–49. Democratic union governance as described fits what the late Professor Philip Selznick calls "the morality of cooperation," which is supportive of the development of civil society. The morality of cooperation describes individuals as having commitments deriving from personal autonomy and group requirements, norms as arising from group experience, cognizant of individual and group differences, and focused on joint problem-solving through effective communication and openness to divergent views. Selznick, *supra* note 92, at 24–25; *see also* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 93 (2016); PERLMAN, *supra* note 122, at 152 (stating collective bargaining agreements also enable workers to influence the governance of their industry).

<sup>173</sup> Andrias, *supra* note 172, at 73, 76, 77; Levine, *supra* note 130, at 566–67 (noting unions overcome workers' collective action problem by channeling worker voice, thereby contributing to a robust public debate to the benefit of the rest of society); Andrias, *supra* note 143, at 56. Arthur S. Miller, *A Modest Proposal for Helping to Tame the Corporate*

dignity<sup>174</sup> caused by the “commodification of labor” (that is, the notion that workers sell their labor, and employers buy that labor, for a price determined by the market)<sup>175</sup> by facilitating the collective action of otherwise unempowered and disenfranchised workers.<sup>176</sup> “[U]nions differentiate laborers from their tools, because the tools remain commodities that belong to the firm, but the workers enjoy self-government through their union.”<sup>177</sup> Unions resist commodification and support workers’ freedom by protecting workers from abuse by their employers.<sup>178</sup>

Consumer collective action, through an intermediating bargaining organization, may democratize information privacy in much the same way. A vehicle to channel and articulate consumer voice and a mechanism for consumers to assert collective control would provide consumers a role in determining their information privacy norms and the rules that protect them, lending those rules democratic legitimacy. Collective bargaining, in this context, would reduce bargaining costs relative to the cost of (already unlikely) individual consumer-platform negotiations by channeling consumers’

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*Beast*, 8 HOFSTRA L. REV. 79, 85 (1979); Levine, *supra* note 130, at 544; Andrias, *supra* note 153, at 647 (citation omitted).

<sup>174</sup> Work is viewed as having a “special dignity” and value in that, through work, man achieves “fulfillment as a human being.” Levine, *supra* note 130, at 550–51 (quoting POPE JOHN PAUL II, *LABOREM EXERCENS* (Sept. 14, 1981), available at [http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_14091981\\_laborem-exercens.html](http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html) [<https://perma.cc/4FMP-XB5H>]; see also Spector, *supra* note 118, at 1137 (quoting Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1894 (1987)). Commodification of labor reduces the human being to an economic transaction, an “object outside us.” Garcia, *supra* note 139, at 33 (citation omitted); E. Christi Cunningham, *Identity Markets*, 45 HOW. L.J. 491, 498–99, 501 (2002) (describing commodification of labor as workers’ alienation from the “meaningfulness” of their labor).

<sup>175</sup> GREENWOOD, *supra* note 7, at 31; Levine, *supra* note 130, at 550 (citation omitted); Garcia, *supra* note 139, at 27 (citing Karl Marx, *Capital, Volume One*, in THE MARX-ENGELS READER 191, 308–19 (Robert C. Tucker ed., 2d ed. 1978)).

<sup>176</sup> Spector, *supra* note 118, at 1137 (quoting Radin, *supra* note 174, at 1919); Tucker, *supra* note 126, at 106, 109 (describing the harm to human dignity caused by the commodification of labor and Marxian views that labor can overcome commodification through collective action); GREENWOOD, *supra* note 7, at 57; Levine, *supra* note 130, at 551.

<sup>177</sup> Levine, *supra* note 130, at 551.

<sup>178</sup> See REES, *supra* note 128, at 182; Garcia, *supra* note 139, at 33–34, 36 (internal citations omitted).

information privacy demands into an overarching set that would apply to all consumers represented by the organization. Moreover, the bargaining process may further educate consumers on how platforms' practices affect their information privacy insofar as it is information-forcing: to achieve a mutually agreeable solution, the platform will have to share more information about its data-handling practices and the collective bargaining organization will have to share information about consumers' values and desired protections.

Democratizing information privacy through a consumer collective bargaining organization would also ameliorate the harms to human dignity caused by the commodification of personal information.<sup>179</sup> Much like a labor union, which de-commodifies labor by allowing workers to decide the terms of their labor, a vehicle for consumer collective autonomy over information privacy de-commodifies personal information by returning power over the privacy of that information to consumers. Moreover, whereas individual consumers lack the power to bargain for their information privacy with platforms, a consumer collective bargaining organization would accumulate bargaining power by making collective demands and threats that may affect a platform's revenue.

Unions democratize workplace decision-making through collective bargaining, i.e., private negotiations between a union (as a representative of its constituent workers) and an employer to obtain

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<sup>179</sup> On the commodification of personal information, see Hetcher, *supra* note 18, at 130 (citation omitted); Baron, *supra* note 38, at 391; de Hingh, *supra* note 14, at 1270, 1272, 1278, 1284; Opinion 4/2015, *supra* note 14, at 11 (citation omitted); Savage, *supra* note 24, at 98; Schwartz, *supra* note 27, at 2057 (citation omitted); Schwartz, *supra* note 28, at 1282; Elvy, *supra* note 14, at 463–64, 466 (citations omitted); Bergelson, *supra* note 20, at 403–04 (citations omitted). On the dignitary harms of the commodification of personal information and privacy, see Barnhizer, *supra* note 13, at 70, 72–73 (citations omitted); Calo, *supra* note 9, at 662; Baron, *supra* note 38, at 390–91, 393–96, 398–400 (citations omitted); de Hingh, *supra* note 14, at 1271–73, 1275–76, 1278, 1281, 1286–87 (citations omitted); Meg Leta Jones, *The Right to a Human in the Loop: Political Constructions of Computer Automation and Personhood*, 47 SOC. STUD. SCI. 217, 218–19 (2017); Radin & Wagner, *supra* note 91, at 1312 (citations omitted); Savage, *supra* note 24, at 109 (citation omitted); Post, *supra* note 70, at 662–63, 667–70 (citations omitted); Opinion 4/2015, *supra* note 14, at 4, 12 (citations omitted); see also generally Radin, *supra* note 174; Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347 (1993); Cunningham, *supra* note 174.

employer concessions to wage and working condition demands.<sup>180</sup> The union typically initiates bargaining; whereas the employer may be satisfied with the status quo, the union seeks employer concessions that would benefit its members.<sup>181</sup> A union's prospect of success depends on its bargaining power against an employer.<sup>182</sup> Bargaining power, in turn, derives from a number of interrelated factors: strike, organization size, constituent cohesion, counterparty resistance, product market structure, and external conditions, such as public opinion, the state of the economy, and governmental action.

Collective bargaining may also democratize platform information privacy decision-making: a consumer collective bargaining organization could bargain with platforms, on behalf of the organization's consumer-constituents, to obtain platforms' assent to a set of demanded information privacy protections. The factors affecting labor union bargaining power provide a starting point to analogize how a consumer collective bargaining organization may accumulate bargaining power. Each of these factors, however, must be adapted to reflect platforms' distinct economic and structural characteristics. How much bargaining power will be necessary to countervail platform power is inherently uncertain; the bargaining process will have to bear it out.

a) Strike/Mass Exit and Secondary Boycott

The strike, and the threat of strike, is the chief source of union bargaining power.<sup>183</sup> Through a strike, the union imposes costs on the employer by restricting labor supply and keeping resources idle.<sup>184</sup> The lack of production strains the employer by limiting its ability to cover at least some of its fixed costs and satisfy sale orders, which can cause the employer to lose customers.<sup>185</sup> A threatened strike may also reduce bargaining costs if its potential effect on

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<sup>180</sup> REES, *supra* note 128, at 28.

<sup>181</sup> *Id.* at 30.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 31.

<sup>184</sup> *Id.* at 32.

<sup>185</sup> *Id.* at 35.

profits forces each side to reveal information to avoid a strike and its costs.<sup>186</sup>

In the platform context, a “strike” becomes a mass exit: platform users would abstain from a platform until it accedes to their information privacy demands, thereby impairing the platform’s access to those users’ personal information. Mass exit, unlike a labor strike, also has characteristics of a boycott—abstention from a platform also entails decreased consumption of behavioral advertising on the platform.

In theory, mass exit would impair the supply of personal information to platforms and thereby impede their behavioral algorithms.<sup>187</sup> By acting in concert, platform users would also reduce their substitutability as sources of personal information—recall, much of consumers’ personal information need not be supplied by a consumer herself, because it can be obtained from third-party sources, including socially or demographically proximate consumers.

In practice, however, mass exit encounters a number of difficulties. First, the continued availability of other third-party sources will make it difficult for consumers, regardless whether they use a platform, to obstruct the flow of their personal information to the platform.<sup>188</sup> Google and Facebook, for example, obtain streams of personal information from myriad third-party websites and applications through plug-ins, cookies, and other tracking tools.<sup>189</sup>

Consumers would have to, first, know what websites embed these trackers and, second, abstain from these websites as well to truly restrict these platforms’ access to their personal information. And, if a platform offers multiple consumer products (e.g., Google’s Search, Maps, Gmail, Photos, etc.), its users would ostensibly have to abstain from all of the platform’s products to affect their supply

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<sup>186</sup> See MARTIN, *supra* note 150, at 86; Ashenfelter & Johnson, *supra* note 150, at 36; REES, *supra* note 128, at 34. To a certain extent, unions must actually deploy strikes on occasion to retain the threat of strike as an effective bargaining chit. *Id.*

<sup>187</sup> Cf. JARON LANIER, TEN ARGUMENTS FOR DELETING YOUR SOCIAL MEDIA ACCOUNTS RIGHT NOW 104 (2018); Ibarra et al., *supra* note 9, at 2.

<sup>188</sup> See *supra* note 107 and accompanying text.

<sup>189</sup> *Id.*

of personal information to it.<sup>190</sup> Moreover, if a platform already has comprehensive behavioral profiles about consumers, it may not need additional personal information to continue to target behavioral advertisements.

Second, mass exit's boycott characteristics support only partially its potential efficacy. The platform would incur a cost from decreased advertising consumption, but mass exit only entails a "boycott" of advertising appearing on the platform. For platforms such as Facebook and Google, whose advertisements also appear on innumerable third-party websites,<sup>191</sup> on-platform advertising may prove to be a relatively small revenue stream. Hence, regardless of consumers' abstinence from the platforms, they may nevertheless continue consuming the platforms' advertising on third-party websites.

Third, it may be difficult for users to abstain from a platform whose consumer product (i.e., Facebook's online social network<sup>192</sup>; Amazon's e-commerce hub<sup>193</sup>; and Google's search engine<sup>194</sup>) is ubiquitous. Abstention would impair users' social and economic lives, however temporarily. The network effect that props up online social networks may potentially abate the cost to abstain from them: if a user's social circles agree to exit the platform for a period of time, the individual user faces a lower social cost than she would by exiting individually because the social network service becomes less valuable to her during that time. For e-commerce and search engine platforms, a collective bargaining organization would likely need to

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<sup>190</sup> *Browse All of Google's Products and Services*, GOOGLE, [https://about.google/intl/en\\_us/products/](https://about.google/intl/en_us/products/) [https://perma.cc/T4B4-STXE].

<sup>191</sup> *Introducing Facebook's Audience Network*, FACEBOOK FOR BUS. (Apr. 30, 2014), <https://www.facebook.com/business/news/audience-network> [https://perma.cc/K7PX-87ST]; *Google AdSense*, GOOGLE, <https://www.google.com/adsense/start/> [https://perma.cc/7L38-L9SX?type=image].

<sup>192</sup> FACEBOOK, <https://www.facebook.com/> [https://perma.cc/KF9T-Y8ZF].

<sup>193</sup> AMAZON, <https://www.amazon.com/> [https://perma.cc/8CFT-LDPH].

<sup>194</sup> GOOGLE, <https://www.google.com/> [https://perma.cc/L8KQ-2ARS].

educate consumers about alternatives, such as DuckDuckGo<sup>195</sup> relative to Google Search.<sup>196</sup>

Mass exit may not be especially powerful for a consumer collective bargaining organization, but the prospect of secondary boycott offers some promise. For labor unions, a secondary boycott typically entails a union's coercion of an employer's business partner to stop doing business with the employer or encouragement of the business partner's employees to strike, so as to exert indirect pressure on the employer.<sup>197</sup> Labor law prohibits this conduct, but permits unions to exert indirect pressure on employers by attempting to persuade their partners to cease business with them.<sup>198</sup>

The permissible form of secondary boycott translates well to the platform context: a consumer collective bargaining organization may call on advertisers to cease doing business with a platform until it meets consumers' information privacy demands. An advertising boycott would likely directly affect platform profits, which are often heavily derived from advertising sales. Whether this source of pressure compels a platform to bargain with a private advocacy organization is currently being tested—as of the time of this writing, 800 companies have pulled millions of dollars from advertising on Facebook, demanding that the platform monitor hate speech more aggressively.<sup>199</sup> A coalition of civil rights groups and other advocacy organizations, under the banner of “Stop Hate For Profit,” mounted the campaign by lobbying corporate leaders and shaming a number of companies on social media.<sup>200</sup> The Stop Hate For Profit coalition has demanded that Facebook make a number of changes to

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<sup>195</sup> DUCKDUCKGO, <https://duckduckgo.com/> [<https://perma.cc/W2VJ-YXX2>].

<sup>196</sup> Organizations such as Restore Privacy compile lists of privacy friendly alternatives to large platforms. See Sven Taylor, *Alternatives to Google Products for 2021*, RESTORE PRIVACY (Jan. 6, 2021), <https://restoreprivacy.com/google-alternatives/> [<https://perma.cc/EY2X-G2MV>].

<sup>197</sup> *Secondary Boycotts (Section 8(b)(4))*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/secondary-boycotts-section-8b4> [<https://perma.cc/HDV7-9CGG>].

<sup>198</sup> *Id.*

<sup>199</sup> Nancy Scola, *Inside the Ad Boycott That Has Facebook on the Defensive*, POLITICO (July 3, 2020), <https://www.politico.com/news/magazine/2020/07/03/activists-advertising-boycott-facebook-348528?cid=apn> [<https://perma.cc/QMM5-ER42>].

<sup>200</sup> *Id.*

its internal practices regarding hate speech on its platform. Their demands include accountability measures (e.g., an internal audit of identity-based hate and misinformation), decency measures (e.g., finding and removing public and private hate groups from the platform), and support measures (e.g., enabling users to report hate and harassment).<sup>201</sup> Months into the campaign, Facebook agreed to create a new senior executive role focused on civil rights, participated in an audit of hateful content on the platform, took down a variety of hateful content, and began to revise its algorithm to address systemic bias.<sup>202</sup> Stop Hate for Profit's successes demonstrate that advertisers' purchasing power can sometimes augment consumers' bargaining power relative to platforms.

#### b) Organization Size

A larger union may have greater bargaining power than a smaller union for a number of reasons.<sup>203</sup> The ability to control labor supply to an employer confers a significant bargaining advantage on the union, which may withhold labor unless an employer agrees to a wage increase.<sup>204</sup> A larger union also has a broader fee-paying membership and thus is able to sustain its operations.<sup>205</sup> A smaller union, by contrast, poses less of a threat to an employer because its strike

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<sup>201</sup> *Recommended Next Steps*, STOP HATE FOR PROFIT, <https://www.stophateforprofit.org/productrecommendations> [https://perma.cc/USN9-S32V].

<sup>202</sup> Braktkon Booker, *Facebook Taps Former Obama Official As Vice President Of Civil Rights*, NPR (Jan 11, 2021), <https://www.npr.org/2021/01/11/955750196/facebook-taps-former-obama-official-as-vice-president-of-civil-civil-rights> [https://perma.cc/9GED-384V].

<sup>203</sup> GREENWOOD, *supra* note 7, at 33, 35.

<sup>204</sup> Campbell, *supra* note 159, at 1016. This can be explained in economic terms as reducing the elasticity of labor demand. REES, *supra* note 128, at 70. By unionizing the entire workforce, a union can reduce the substitutability of non-union labor for union labor, and thereby reduce the employer's sensitivity to wage increases. *Id.* at 70–71; Campbell, *supra* note 159, at 1007, 1015–16, 1018 (citation omitted).

<sup>205</sup> Preliminary organization, the provision of participatory procedures, and the hiring of union officers and negotiators, among other things, all require ongoing funding. *See* Andrias, *supra* note 172, at 93–96 (citation omitted). Typically, unions support themselves through member dues payments and, in some jurisdictions, dues payments from all constituent workers regardless of their membership in the union. *Id.* at 93–96 (citation omitted). Under this financing structure, increased funding flows from a larger number of members or dues-payers or, potentially, from fee increases following successful wage hikes.

may not significantly increase production costs and it has a smaller membership from which it collects fees.<sup>206</sup>

Larger unions, however, have certain disadvantages that may impede their functioning. First, a larger union is more likely to have members whose wage, hour, benefit, and workplace-condition preferences diverge, thereby impairing the union's ability to foster cohesion around a common plan of action.<sup>207</sup> Second, the larger the union, the greater the cost to organize in the first instance.<sup>208</sup> Third, large groups face greater difficulty overcoming collective action problems than smaller groups do, in part because each individual's contribution to (and defection from) a large group is less perceptible.<sup>209</sup>

Large groups have certain mechanisms to overcome these difficulties, such as pursuing core, unifying goals, leveraging an organization already in existence to provide the collective good, "federating" such that the large group is composed of many small groups in which individuals more easily hold one another accountable, and providing outside inducements to group members' participation and compliance.<sup>210</sup> Leveraging an existing organization, such as a national union, allows a particular workplace's union to form without incurring large up-front fixed costs. Federation, in turn, improves accountability because individuals may more easily identify one another, police compliance with group actions, and pressure their peers to comply.<sup>211</sup> Outside inducements, including individuated pressure, may be positive or negative—for example, group members may ostracize or humiliate strikebreakers and reward those who comply with camaraderie and friendship.<sup>212</sup> Inducements may also be

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<sup>206</sup> Andrias, *supra* note 172, at 98; Posner, *supra* note 118, at 1008.

<sup>207</sup> Posner, *supra* note 118, at 1008; Campbell, *supra* note 159, at 1016; OLSON, *supra* note 129, at 46, 59–60 (describing a lack of consensus as "inimical to the prospects for group action and group cohesion").

<sup>208</sup> Posner, *supra* note 118, at 1008; OLSON, *supra* note 129, at 47–48.

<sup>209</sup> OLSON, *supra* note 129, at 28, 44–45. *But see* Fairfield & Engel, *supra* note 14, at 441–43 (describing experimental studies which did not support the hypothesis that larger groups are worse at producing public goods and instead suggested they may be more efficient than smaller groups).

<sup>210</sup> OLSON, *supra* note 129, at 44–48, 62–63, 74; GREENWOOD, *supra* note 7, at 33.

<sup>211</sup> OLSON, *supra* note 129, at 60, 62–63.

<sup>212</sup> *See generally id.* at 51, 61.

economic, such as insurance and welfare benefits.<sup>213</sup> In sum, larger unions that employ mechanisms to counteract their potential disadvantages have greater bargaining power than smaller unions that present employers with a less onerous risk of a strike.

Likewise, for a consumer collective bargaining organization, large size would confer a certain advantage. Mass exit of the organization's constituents would impose greater costs on the platform<sup>214</sup> and calls for advertisers to engage in a boycott may be more influential. Large size would, however, hinder constituents from deliberating in a traditional manner—it is difficult to imagine how thousands of consumers could engage in a productive and intelligible conversation about their information privacy. Hence the advantage of large size comes with a tradeoff; a consumer collective bargaining organization would likely have to employ less participatory mechanisms, such as soliciting feedback to a pre-determined set of information privacy demands.

The organization may encounter difficulty in obtaining a large constituent base for a few reasons. Whereas workers may have a basic understanding that they are underpaid or their working conditions are sub-par, consumers largely have only a diffuse notion of their information privacy harms. Those who helm the organizing effort would have to educate consumers about how platforms' practices affect their information privacy to convince consumers to join. Additionally, if consumers have highly idiosyncratic and conflicting information privacy preferences, it will be difficult for a large organization to cohere around a set of information privacy demands. Discussed in greater detail below, an organization can work around this constraint by limiting its representation to a community that already aligns on a set of information privacy demands or by articulating bargaining demands that are faithful to diverse consumers' core, unifying goals.

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<sup>213</sup> *Id.* at 72–73.

<sup>214</sup> *See* Spencer, *supra* note 13, at 901 (citation omitted). As for the effect of large size on labor unions, a large consumer collective bargaining organization can reduce the elasticity of demand for personal information by reducing the substitutability of one consumer's personal information for another's. Large-scale collective bargaining would impede the platform's ability to obtain one consumer's data from third parties to the extent those third parties participate in the collective bargaining.

The grassroots approach has certain benefits with respect to its ability to amass a large number of constituents. Grassroots organizing would be relatively low cost because it presupposes that a smaller, highly motivated group would articulate a set of information privacy demands (that is, bear the upfront fixed costs) to which other consumers would sign on.<sup>215</sup> The organizers would rely on consumers to express publicly their solidarity and petition their social circles to join. Online social networks' "federated" quality support the prospect that such an organizing effort could obtain a large constituent base.<sup>216</sup> Consumers online are not "an undifferentiated mass of strangers, but rather [are in] nested smaller groups with higher frequencies of repeat play"<sup>217</sup> and overlapping connections across groups.<sup>218</sup> Within these small groups, reputational incentives (or sanctions) to motivate cooperation are more salient: individuals are mutually identifiable, their compliance is observable, and reputational repercussions are direct.<sup>219</sup> Moreover, online social networks allow consumers to form and maintain social relationships despite geographic dispersion.<sup>220</sup> This social structure supports both the emergence of a consumer collective bargaining organization and the effectiveness of its call for mass exit or secondary boycott because small groups may provide direct inducements, through individualized reputational incentives, to support the organization's formation and compliance with calls for exit.<sup>221</sup>

An institutional approach likewise has certain advantages to accumulating constituents. A preexisting institution, unlike a

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<sup>215</sup> See Jack M. Balkin, *The First Amendment Is an Information Policy*, 41 HOFSTRA L. REV. 1, 2, 11, 13 (2012).

<sup>216</sup> Strandburg, *supra* note 22, at 1248; Fairfield & Engel, *supra* note 14, at 391.

<sup>217</sup> Fairfield & Engel, *supra* note 14, at 435 (citing Kosinski et al., *supra* note 163, at 5802), 438, 441–42 (citation omitted). Repeat interaction among group members supports compliance with collective goals by amplifying reputational repercussions around compliance. Strandburg, *supra* note 22, at 1248, 1283; Fairfield & Engel, *supra* note 14, at 438.

<sup>218</sup> Hetcher, *supra* note 18, at 121.

<sup>219</sup> *Id.*; Strandburg *supra* note 22, at 1248; Fairfield & Engel, *supra* note 14, at 396, 448, 450–52 (citation omitted).

<sup>220</sup> Hetcher, *supra* note 18, at 120–21.

<sup>221</sup> See Strandburg, *supra* note 22, at 1283, 1284 (citation omitted); Ozer, *supra* note 15, at 272–73 (citation omitted); Fairfield & Engel, *supra* note 14, at 448, 451–53 (citation omitted); Calo, *supra* note 9, at 678.

grassroots movement, may rely on existing sources of public and private funding to support its effort to organize consumers.<sup>222</sup> Additionally, such an institution may already have members or donors who would be particularly interested to participate in and grow a collective bargaining organization. And, as for the grassroots approach, online social networks may support an organization's farther reach.

### c) Constituent Cohesion

A union seeks employer concessions to a set of common demands, but workers may individually hold idiosyncratic or opposing views on what goals the union ought to pursue.<sup>223</sup> Goal heterogeneity may not efface a union's democratic legitimacy as long as all constituents are able to participate in the discourse that informs union decision-making, but it can lead to the formation of de-stabilizing factions.<sup>224</sup> The formation of factions within a union worsens a union's bargaining position by placing the union's continued existence in peril.<sup>225</sup> By contrast, solidarity among union members contributes to the union's bargaining strength by streamlining bargaining demands and allowing for more effective implementation of strikes and threats to strike.<sup>226</sup> A union is able to increase its members' solidarity by pursuing workers' core, unifying goals,<sup>227</sup> disciplining members for shirking from strikes or engaging in

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<sup>222</sup> These organizations already receive public and private financial support, from government grants, *cy pres* funds, foundations, and individual contributors. Ozer, *supra* note 15, at 250–51 (citations omitted). Of course, branching out to consumer collective bargaining will entail additional costs for an organization that would take up the cause, which would require either additional support from existing funding sources or allocating existing funding to this new endeavor.

<sup>223</sup> See REES, *supra* note 128, at 180.

<sup>224</sup> *Id.* at 178.

<sup>225</sup> See Andrias, *supra* note 172, at 30; REES, *supra* note 128, at 178–79. Intra-union factions are typically unstable and end in either the defeat and disappearance of a faction, or the split of the union into two organizations. Healthy union functioning does not require members or leaders to be in unanimous agreement—a union may have a sustainable (and vibrant) two-party system or disagreeing members may nevertheless support the union because of other benefits it provides. REES, *supra* note 128, at 178.

<sup>226</sup> See also GREENWOOD, *supra* note 7, at 15, 32–33.

<sup>227</sup> PERLMAN, *supra* note 122, at 202 (quoting A THEORY OF THE LABOR MOVEMENT, *supra* note 122, at 276–77); see also GREENWOOD, *supra* note 7, at 15.

unauthorized strikes,<sup>228</sup> and imposing exit costs on members (such as rescinding voting rights and access to grievance procedures).<sup>229</sup> Moreover, a union's past success may inspire member loyalty that further strengthens the union.<sup>230</sup>

No doubt consumers may hold idiosyncratic or conflicting preferences with respect to their information privacy. These idiosyncrasies would likewise destabilize consumer collective bargaining by hindering a single organization's ability to, first, channel consumers' views into demands for protection that would apply to all consumers under the organization's purview and, second, motivate consumers to participate in a mass exit or call for a secondary boycott if the organization's demands are not met. Moreover, multiple organizations that each represent a subset of consumers holding particular views may make mutually antithetical demands.

A consumer collective bargaining organization has a number of tools to encourage solidarity despite the potential for idiosyncrasy. The organization may limit its representation to those who already align on a set of information privacy protections. This approach has certain benefits and drawbacks. It would ensure the organization faithfully represents its constituents and encourages constituent-consumers to participate in a mass exit or a call for a secondary boycott. It would also limit the number of constituents, potentially to the point where their collective action would not pose a significant threat. Alternatively, the organization can limit its bargaining demands so that they are faithful to constituents' information privacy norms and responsive to their core goals instead of their granular, idiosyncratic preferences. This approach will likely favor standards over rules, so as to align with community norms, and may involve a general allocation of responsibility, such as requiring the platform to act as a fiduciary of the organization's constituents.<sup>231</sup> The organization can also foment solidarity through social sanctions, such as encouraging consumers to reward their social circles with

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<sup>228</sup> See Kroncke, *supra* note 119, at 621, 634, 642.

<sup>229</sup> Levine, *supra* note 130, at 559; Johnsen, *supra* note 132, at 207.

<sup>230</sup> See REES, *supra* note 128, at 30; Kroncke, *supra* note 119, at 643 (citation omitted).

<sup>231</sup> See Balkin, *supra* note 35.

camaraderie for joining the organization and participating in its actions or by punishing defectors with ostracization or humiliation.

#### d) Counterparty Resistance

Labor collective bargaining is characteristically antagonistic. Employers are expected to meet demands for higher wages or improved working conditions with resistance.<sup>232</sup> Intense employer opposition to a union's formation may increase the costs of forming it and thereby impede unionization.<sup>233</sup> An employer may increase costs for a union by limiting the mechanisms or venues through which it can reach workers, such as by preventing union leafletting in a factory or prohibiting workers from engaging in union-related activities on employer Internet networks or email services.

Platforms' ability to impede consumer organization is of a magnitude more profound and pernicious than employers' power over workers.<sup>234</sup> Facebook could block collective bargaining content or bury it in a user's Newsfeed. Google could demote search engine results related to the effort or throttle Gmail traffic to organizers. But, beyond occluding information relevant to consumer organizing, these platforms may have the unique ability to actively manipulate consumer information privacy norms and consumer thought about acting collectively for their information privacy.<sup>235</sup> A consumer collective bargaining organization could provide some workarounds, for instance, by providing a webpage on which consumers may engage but these platforms cannot impose constraints. It can also educate consumers on alternative venues through which they can coordinate and discuss, such as Signal<sup>236</sup> or Reddit.<sup>237</sup>

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<sup>232</sup> MARTIN, *supra* note 150, at 86. However, when the cost of union labor is small relative to the total cost of production, demand for union labor is less elastic, such that an employer would not face significant profit loss from a wage increase. REES, *supra* note 128, at 70, 72. *See also* Posner, *supra* note 125, at 1002.

<sup>233</sup> Andrias, *supra* note 172, at 30; GAIL MCCALLION, CONG. RSCH. SERV., 93-759E, UNION MEMBERSHIP DECLINE: COMPETING THEORIES AND ECONOMIC IMPLICATIONS 5-7 (1993).

<sup>234</sup> Regan, *supra* note 39, at 58-59 (citation omitted) (noting the architecture of platforms shape how groups may form and the rules around their engagement).

<sup>235</sup> *See generally* SHOSHANA ZUBOFF, *supra* note 12.

<sup>236</sup> SIGNAL, <https://signal.org/en/> [<https://perma.cc/W5N9-L8AU>].

<sup>237</sup> REDDIT, <https://www.reddit.com/> [<https://perma.cc/6EVJ-H8G2>].

Notwithstanding platforms' *ability* to impede their consumers' organization, their incentive to do so is debatable. Platforms will incur costs to provide consumers with greater information privacy protections, both to develop relevant technological solutions and to abstain from collecting and using personal information in certain ways.<sup>238</sup> Nevertheless, they may decide that it is in their interest to allow consumers to organize and to bargain with that consumer organization. First, a platform may want to support its consumers' information privacy norms and provide their demanded protections but find it both difficult and costly to do so because it cannot easily obtain the relevant information from unorganized consumers. A collective bargaining organization would streamline relevant information gathering by channeling consumers' demands and representing a body of consumers, thereby reducing the platform's costs to satisfy these consumers. Second, platforms such as Facebook and Google pride themselves on being pro-speech and encouraging civic engagement. These platforms may abstain from interfering with consumers' organization to effectuate these contended values and boost their public image. Third, regardless of whether a platform is motivated by altruism or its public image, entering a collective bargaining agreement with consumers may reduce the platform's risk of FTC enforcement. A successful collective bargaining agreement would be a true instantiation of consumer autonomy because its information privacy protections would not be dictated by the platform.

#### e) Product Market Structure

Some economists contend a union is able to achieve greater gains when the employer with whom it bargains is a monopolist in its product market.<sup>239</sup> This is due to the union's ability to "capture" some of the employer's monopoly profits, as opposed to attempting

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<sup>238</sup> See ZUBOFF, *supra* note 12. Zuboff contends surveillance capitalists depend on the unobstructed ability to collect and use personal information.

<sup>239</sup> REES, *supra* note 128, at 82–83; Posner, *supra* note 125, at 1002. An employer's demand for labor is less elastic (such that the employer is more likely to tolerate a wage increase) when demand for the employer's final product is less elastic (i.e., consumer demand for the product is not sensitive to a small increase in price). REES, *supra* note 128, at 70–71; Campbell, *supra* note 159, at 1007–08, 1034. Product demand is typically inelastic where there is no good substitute for the product, as when the employer has a monopoly in that product market. See REES, *supra* note 128, at 71.

to force an employer in a competitive product market to pass on higher wages entirely through higher product prices, which would make it uncompetitive.<sup>240</sup> A profit-maximizing monopoly, by contrast, may instead partially internalize the increased labor cost in the form of lower monopoly profits, rather than pass on the full cost increase to customers.<sup>241</sup>

Consumer collective demands for information privacy protections will involve some costs for platforms, including lost revenue from untapped uses of personal information, constraints on their information sharing, or personal information left unacquired. For platforms that operate in competitive product markets, these costs may make them uncompetitive by, for instance, requiring them to charge consumers for the product while their competitors are able to supply the product for “free.” A consumer collective bargaining organization will likely have greater bargaining power when negotiating against platforms that monopolize their consumer product markets. Unlike competitive platforms, a monopolist platform may be able to internalize information privacy protection costs by reducing its profits, but still remain profitable generally. Alternatively, a consumer collective bargaining organization may have greater bargaining power against a platform with market power in the advertising industry, which may be able to pass these costs on to advertisers who already pay a fee for the platform’s advertising services.<sup>242</sup>

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<sup>240</sup> REES, *supra* note 128, at 82–85; Campbell, *supra* note 159, at 995, 998; *cf.* Spector, *supra* note 118, at 1132. *See also* Johnsen, *supra* note 132, at 196. *But see* REES, *supra* note 128, at 84 (arguing that studies showing higher wages won against monopolists may be of limited explanatory value because unions have also been successful against firms in competitive industries and less successful unions tend to be in declining or only partially organized industries).

<sup>241</sup> REES, *supra* note 128, at 85–86. Moreover, in markets where product demand exceeds supply at the current price, the firm may increase product price, while satisfying consumer demand (i.e., clear market) without suffering any profit loss. *See id.* at 87.

<sup>242</sup> If advertisers have no good substitute for the platform’s advertising product—that is, their demand for advertising services is inelastic—they may take on that additional cost.

## f) External Conditions.

A few conditions external to the union/employer relationship also affect a union's relative bargaining success.<sup>243</sup> First, public opinion in favor of the union, including in the form of a consumer boycott of the employer's product, can buoy a union's bargaining power by making the union's demands seem less unreasonable.<sup>244</sup> A union also achieves greater success in times of sustained economic growth, in part due to an employer's ability to provide higher wages while maintaining high profit.<sup>245</sup> By contrast, an overall shift from production to less unionized non-production jobs and the erosion of traditionally unionized industries has contributed to unions' decline.<sup>246</sup> Finally, government involvement and the promulgation and

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<sup>243</sup> Despite the benefits of unionization, in recent years, union membership has been on the decline. Labor scholars attribute the decline largely to external factors including the "fissured workplace" (i.e., the increase in independent contractor as opposed to employee jobs, subcontracting, and otherwise outsourcing labor), globalization, oppressive or weak labor laws, and employer opposition to organizing. Kroncke, *supra* note 119, at 638 (citation omitted); Andrias, *supra* note 143, at 22 (citation omitted); Andrias, *supra* note 172, at 20, 22, 23, 30. However, there may be a resurgence of worker organization on the horizon: Professor Kate Andrias describes in detail a few emerging worker movements that break from convention and seek to bargain with employers despite the lack of legal recognition and traditional organizational structures. *Id.* at 8, 58, 62, 68 (citation omitted). These movements blend traditional and innovative techniques, such as strikes, protests, organizing via social media, and providing workers educational materials through websites, to bargain for higher wages and seek the passage of beneficial legislation. *Id.* at 8, 46–47, 49–51, 63, 68 (citation omitted). They do not abandon the core project of unionization—to influence workplace conditions through a collective bargaining agreement—but instead seek to strengthen it by bringing more diffuse workers and political actors into the process. *Id.* at 63, 69.

<sup>244</sup> GREENWOOD, *supra* note 7, at 59; *see* REES, *supra* note 128, at 3, 42–43; MCCALLION, *supra* note 233, at CRS 5–6.

<sup>245</sup> Miller, *supra* note 173, at 85; GREENWOOD, *supra* note 7, at 32; MCCALLION, *supra* note 233, at CRS 3–5 (internal citations omitted). *But see id.* at CRS 4 (noting increase worker affluence may make unions less desirable to workers). By contrast, periods of recession are marked by union job loss, hampering unions' ability to organize. *Id.* at CRS 5. This assumes employers are not in a perfectly competitive product market; in perfect competition, employers will earn only zero profit even in the presence of sustained economic growth.

<sup>246</sup> MCCALLION, *supra* note 233, at CRS 4, 8.

enforcement of laws that either support or constrain the union can play a significant role in a union's ability to bargain successfully.<sup>247</sup>

A consumer collective bargaining organization may likewise benefit from some of these external conditions. First, recent public opinion polling suggests a majority of platform users perceive harms to their information privacy.<sup>248</sup> A consumer collective bargaining organization, whether grassroots or institutional, could appeal to these users to promote the benefits of collective action. Second, despite the country's current economic uncertainty, platforms continue to experience economic growth, supporting their ability to incur the additional costs attendant to greater information privacy protections while maintaining high profits.<sup>249</sup> Third, whereas a shift from production to non-production jobs contributed to the decline of labor unions, the data trade continues to proliferate, such that the value of personal information to platforms is unlikely to peter out in the foreseeable future. Finally, consumers' collective bargaining to protect their information privacy is neither supported nor constrained by existing law or other government involvement; a consumer collective bargaining organization would not be subject to the laws regulating labor unions and is otherwise not regulated by statute. New laws could certainly support consumer collective action for information privacy. For instance, in the labor context, laws require employers both to allow union formation and to bargain with the union once formed. Similar laws could support a consumer collective bargaining organization's formation and bargaining efficacy. Congress's stand-still on consumer privacy legislation, however, suggests such legal support is unlikely.

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<sup>247</sup> See *id.* at CRS 5; Andrias, *supra* note 156, at 685, 698. Some labor laws support union bargaining power. For example, employers are required to meet union representatives, put any bargaining agreement in writing and, though not required to make concessions, employers must negotiate beyond refusing all union demands. REES, *supra* note 128, at 29. Other labor laws, such as laws allowing workers to exit from unions and refrain from paying dues, constrain union formation and thereby limit the union's bargaining power. Andrias, *supra* note 156, at 685. Additionally, federal government regulation of unionized industries, for example, that allow employers to sustain high profits in turn allow employers to accede to higher wage demands without significant detriment to the firm. By contrast, industry deregulation may lead to union job losses. MCCALLION, *supra* note 233, at CRS 5.

<sup>248</sup> PEW RESEARCH CENTER, *supra* note 39, at 2.

<sup>249</sup> See *supra* note 133.

### 3. Relational Contract

Bargaining democracy is an essential component of industrial democracy, insofar as it enables worker voice and influence over the terms of their labor to countervail employer bargaining power. A collective bargaining agreement consummates democratic bargaining. Labor unions' ultimate marker of success is an increase in wages and the improvement of working conditions enforceable against employers through collective bargaining agreements.<sup>250</sup> By entering such an agreement, a union is able to formalize and entrench a relationship of accountability and trust between workers and their employer.<sup>251</sup> The collective bargaining agreement solidifies the employer's accountability to its workers by encouraging the employer to factor worker welfare into its workplace decision-making.<sup>252</sup> Employer accountability benefits the employer, as well, because it engenders trust from workers and encourages their general compliance with an employer's unilateral workplace decisions.<sup>253</sup>

Collective bargaining agreements support an ongoing democratic relationship between an employer and workers. They are a species of relational contract that contain both contract-like and fiduciary like terms. They are also construed according to a *sui generis* body of law with both contract and fiduciary characteristics.<sup>254</sup>

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<sup>250</sup> OLSON, *supra* note 125, at 7–8. GREENWOOD, *supra* note 7, at 43; PERLMAN, *supra* note 122, at 150–51. Scholars have debated the relative merit of collective bargaining agreements and legislation. Andrias, *supra* note 156, at 648. Those preferring collective bargaining agreements tout their immediacy, flexibility, and informality. PERLMAN, *supra* note 122, at 151. Those favoring legislation note that it promotes uniformity and insulates the subject of the law from erosive private negotiation. GREENWOOD, *supra* note 7, at 60.

<sup>251</sup> Kroncke, *supra* note 119, at 649; Moore, *supra* note 119, at 424, 426.

<sup>252</sup> Kroncke, *supra* note 119, at 649; Moore, *supra* note 119, at 424.

<sup>253</sup> Moore, *supra* note 119, at 424, 426.

<sup>254</sup> Kroncke, *supra* note 119, at 647–48 (citation omitted); Posner, *supra* note 118, at 999 (citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456–57 (1957)); SELZNICK, *supra* note 92, at 139. Despite a popular inclination to regard collective bargaining agreements as contracts, the aim and operation of these agreements defy some precepts underlying contract law while satisfying others. *Id.* at 139, 141, 150. Philip Selznick describes the appeal of applying contract law to collective bargaining agreements as attributable to the “celebration of voluntarism and bargaining as foundations of labor policy.” *Id.* at 139. The law of collective bargaining was to be similar to traditional contract law in that its chief aim was to facilitate private arrangements and transactions. *Id.* The parties were to remain free and autonomous. *Id.* They were to settle for themselves the

Rather than simply define the terms of an exchange of services for payment, collective bargaining agreements restructure workplace decision-making;<sup>255</sup> within a certain sphere, the employer and the union cooperate and share authority.<sup>256</sup> Hence, the parties become committed to an ongoing relationship with one another that eludes the voluntaristic, limited commitment, and bounded character of contract.<sup>257</sup> Moreover, akin to a fiduciary agreement, a collective bargaining agreement requires the dialogic communication of both parties—an employer may not dictate its terms.<sup>258</sup> And, like a fiduciary agreement, law, rather than private agreement, determines many aspects of the employment relationship and collective bargaining.<sup>259</sup> Akin to contract, these agreements contain a number of specific terms, such as wage rates, paid holidays, safety measures, and grievance procedures, while other terms come close to fiduciary obligations, such as those that state the parties' respective rights and commitments.<sup>260</sup> Additionally, though collective bargaining agreements require mutual consent, akin to contracts, they are interpreted under the rubric of the parties' relationship, much like fiduciary obligations.<sup>261</sup>

A collective bargaining agreement is a similarly attractive device to formalize and entrench platform democracy with respect to information privacy. Such an agreement—between a consumer collective bargaining organization and a platform—can promote platform accountability and provide consumers a set of concrete privacy

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exact terms of their cooperation. *Id.* Moreover, from the standpoint of the unions, the idea of contract offered a convenient way of formalizing the recognition won and concessions extracted. *Id.* The union was recognized when it became a party to a written agreement, and the terms of that agreement could stand as evidence of what the employer had granted. *Id.* The rhetoric of the times cared little for the difference between a contract proper, meeting determinate legal criteria, and other forms of agreement. *Id.* See REES, *supra* note 128, at 30; PERLMAN, *supra* note 122, at 151 (citation omitted).

<sup>255</sup> SELZNICK, *supra* note 92, at 141, 152. Selznick describes this restructuring as forming a “social contract” for a kind of political community. *Id.* at 152.

<sup>256</sup> *Id.* at 145.

<sup>257</sup> *Id.* at 145, 146, 151, 152.

<sup>258</sup> PERLMAN, *supra* note 122, at 151 (citation omitted).

<sup>259</sup> SELZNICK, *supra* note 92, at 144–45; Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations*, in *THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 218 (Andrew Gold & Paul Miller eds., 2014).

<sup>260</sup> SELZNICK, *supra* note 92, at 145; Markovits, *supra* note 259, at 215.

<sup>261</sup> SELZNICK, *supra* note 92, at 146; Markovits, *supra* note 259, at 216–17.

rights and protections through a mix of contract and fiduciary terms. For example, a collective bargaining agreement may call on the platform to take on broad fiduciary obligations to act in consumers' best interest with respect to their personal information,<sup>262</sup> while prohibiting the collection and use of certain types of information, such as information related to health and medical conditions. Fiduciary terms allow a collective bargaining agreement to remain flexible while requiring the platform to provide more than a bare legal minimum of information privacy protections. They also support the interpretation of consumers' rights and the platform's responsibilities based on the parties' relationship, rather than consumers' blanket consent. Additionally, a collective bargaining agreement can empower consumers to hold a platform accountable by including mechanisms that enable the collective bargaining organization to verify its ongoing compliance.

Collective bargaining agreements' limited duration also supports platform democracy; every so often, the consumer collective bargaining organization and the platform will have to return to the bargaining table to re-negotiate the agreement's terms. This ongoing, iterative process allows the agreement to reflect society's fluctuating information privacy norms and adapt to new technologies as they are developed. And, practically, collective bargaining agreements offer certain advantages over law—they may be entered more quickly than a law is promulgated, they are unlikely to attract First Amendment scrutiny because they are agreements between private parties,<sup>263</sup> and they may be much more finely tailored to the parties.

A collective bargaining agreement between a platform and a consumer bargaining organization would be characteristically different than one between an employer and a labor union. In the labor context, the agreement affords both the employer and its workers

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<sup>262</sup> See generally Balkin, *supra* note 35. Bamberger & Mulligan, *supra* note 38, at 298 (citation omitted) (suggesting decisions at the corporate level may provide the best way to avoid privacy harms).

<sup>263</sup> Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000) (arguing contracts that enforce privacy rights are unlikely to warrant First Amendment scrutiny because they are private, voluntary agreements).

rights and responsibilities.<sup>264</sup> For example, the employer agrees to pay a certain wage and it retains the right to make unilateral hiring and firing decisions. The worker agrees to refrain from engaging in unauthorized (“wildcat”) strikes but retains the right to engage in union-authorized strikes. In the platform context, the agreement would likely tilt in favor of consumers—it would afford consumers a set of rights and oblige the platform to a set of responsibilities. A consumer collective bargaining agreement is unlikely to require consumers to use a platform or provide it certain personal information. Additionally, whereas a labor collective bargaining agreement covers a fairly limited set of interests (e.g., wages, workplace safety, seniority rights, and grievance procedures), it may be difficult for a consumer collective bargaining agreement to cover what may be extensive, context-dependent, and nuanced privacy interests. Multi-service platforms may exacerbate this problem; each service (e.g., Google’s Search, Maps, Gmail, and Photos) would likely warrant its own set of terms. Hence, a consumer collective bargaining agreement may need to rely more heavily on fiduciary like terms that allocate responsibility broadly and somewhat generally, but it may nevertheless include specific protections when they are ascertainable.

### *C. Potential Limitations to Consumer Collective Bargaining*

Consumer organization and collective bargaining will confront various challenges. First, there is the prospect consumers will not cohere sufficiently to support a bargaining organization if consumers’ information privacy preferences are thoroughly idiosyncratic or conflicting. Second, there is a risk that platforms will not bargain with consumers collectively absent a legal compulsion to do so. Third, there is a question of scalability—will a consumer collective bargaining organization have to negotiate with each platform individually and, if so, how can it influence information privacy protections in the platform political economy more generally? Finally, there is the risk consumers may be held liable under antitrust law for engaging in a “mass exit” from a platform as a bargaining chit.

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<sup>264</sup> SELZNICK, *supra* note 92, at 151–52.

What if individuals' information privacy preferences are so idiosyncratic that it is impossible to articulate a set of information privacy protections, whether by statute or some other legal mechanism? In the context of consumer collective bargaining, extensive idiosyncrasy would thwart consumers' incentives and abilities to cohere, first, to form a collective bargaining organization and, second, to generate information privacy norms and articulate actionable demands for their protection. These concerns lurked behind labor union organizing as well and, as such, industrial democracy may inform a preliminary response. In the labor context, organizational coherence depends on a set of shared common, core goals despite divergent preferences.<sup>265</sup> Individual workers may have different preferences with respect to, for instance, seniority benefits or wage increases versus fringe benefits, but the degree of their differences ought not impede their desire to join a union and support its decided course of action as long as the individual workers cohere on underlying, core principles.

In the information privacy context, idiosyncratic preferences for protection may yield to core, unifying goals and values. Survey evidence lends empirical support to the presence of general accord on information privacy values.<sup>266</sup> Consumers have also demonstrated their ability to cohere and mobilize around information privacy when incited by a perceived injustice. For example, in 2006, when Facebook unrolled its "News Feed," within 24 hours hundreds of thousands of users organized themselves (on Facebook, no less) to protest the new feature.<sup>267</sup> And in 2009, when Facebook made a number of changes that decreased the amount of personal information that could be kept private, 80,000 concerned users signed an American Civil Liberties Union petition that influenced Facebook to reverse some of its actions.<sup>268</sup> 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.

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<sup>265</sup> See *supra* note 227 and accompanying text.

<sup>266</sup> PEW RESEARCH CENTER, *supra* note 39, at 5.

<sup>267</sup> William McGeeveran, *Friending the Privacy Regulators*, 58 ARIZ. L. REV. 959, 1004 (2016).

<sup>268</sup> Ozer, *supra* note 15, at 239 (citations omitted).

Another potential limitation to consumers' collective bargaining success is the risk platforms will not come to the bargaining table absent legal compulsion.<sup>269</sup> The effect of collective bargaining on profits will influence the likelihood platforms will engage. A number of factors will determine the effect of collective bargaining on profits. If platforms agree, through collective bargaining agreements, to adopt additional information privacy protections, implementing these protections will involve both production costs to develop and deploy relevant technical measures and opportunity costs in the form of profits these privacy protections would impede. These costs ought to be balanced against a few ascertainable benefits: first, platforms would avoid losses from consumers' mass exit or advertisers' secondary boycott; second, platforms would likely have a lower risk of costly FTC enforcement action because a negotiated collective bargaining agreement would truly instantiate consumers' consent; third, platforms' public image may improve and thereby foment greater consumer engagement; and fourth, platforms that already offer individuals information privacy controls may reduce costs by implementing overarching, rather than individuated, protections. Whether these factors will tip in favor of or against platform engagement in consumer collective bargaining over information privacy remains to be seen.

Third, a consumer collective bargaining organization working toward greater information privacy may find it difficult to scale. If the organization's members are users of a particular platform, whether the organization could successfully bargain with a second or third platform, or an entire industry, will depend on the degree of overlap in consumers across these platforms and their coherence around information privacy norms. Regardless whether the organization can bargain successfully with one or a few platforms, the information privacy protections that result risk being limited in scale

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<sup>269</sup> I acknowledge that the promulgation of laws and regulations could support a collective bargaining approach to privacy, for instance, by requiring platforms to bargain with duly organized intermediaries. As explained in Part I.D., rules affecting society ordinarily obtain democratic legitimacy when promulgated by the government; as such, I would call for direct government regulation of privacy rather than the passage of laws that support collective bargaining alone. My proposal for collective bargaining presumes direct, public regulation of privacy is not forthcoming.

to those platforms alone. Whereas with legislation or in tort or property law, duties apply broadly to a set of covered entities, in a bargaining setting, the duties adopted apply only to the parties to the bargain. Moreover, consumers may not be inclined to join multiple, separate collective bargaining organizations for each individual platform due to governance fatigue and other limits on participation.

In the information privacy context, there are mechanisms that can support the diffusion of information privacy protections beyond an individual collective bargaining agreement. If a collective bargaining organization represents a fairly large consumer base, the information privacy norms and protections the organization establishes and demands may influence a greater expectation of information privacy among the general public. This augmented consumer expectation may support causes of action in tort and impel the FTC to enforce a higher standard of information privacy by finding “unfair” data-handling practices that do not meet these expectations. Collective bargaining agreements with one or a few large platforms may have “spillover” effects on smaller businesses. For example, in the early 2000s when the FTC began to expect websites to provide privacy notices, large websites encouraged compliance among smaller websites by threatening to withdraw advertising from websites that failed to provide minimum protections.<sup>270</sup> A platform-consumer collective bargaining agreement can require the platform to guarantee its business partners’ compliance with prescribed information privacy protections.

Fourth, there is a risk consumers’ “mass exit” from a platform to incent the platform to provide greater information privacy protections may be a restraint on trade that violates the Sherman Act. Consumers’ collective agreement to make certain demands on platforms for information privacy protections and to exit if those demands are not met may constitute a “combination . . . or conspiracy[] in restraint of trade”<sup>271</sup> in a technical sense, insofar as consumers’ mass exit restrains their supply of personal information to a platform—their trade in data—or their advertising consumption. However, for such an argument to be successful, consumers’ mass exit must have

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<sup>270</sup> Hetcher, *supra* note 18, at 105.

<sup>271</sup> 15 U.S.C. § 1.

an anticompetitive effect or an unlawful purpose.<sup>272</sup> This will be a high bar for platforms that are in concentrated markets. And it is relatively unlikely that consumers' mass exit from a dominant platform would dampen competition among consumers as suppliers of personal information, if consumers could be conceived as competing suppliers in the first instance.<sup>273</sup> Moreover, Supreme Court precedent in *N.A.A.C.P. v. Claiborne Hardware Co.* held the First Amendment protects consumer boycotts of businesses for political purposes and thus exempts them from potential antitrust liability.<sup>274</sup> In that case, the NAACP organized a boycott of white merchants with the purpose of securing civic and business leaders' compliance with a list of demands for equality and racial justice.<sup>275</sup> A group of white merchants sued, arguing the boycott (alleged as a conspiracy) maliciously interfered with their businesses in violation of state law.<sup>276</sup> The Court held the First Amendment protected the non-violent elements of the boycotters' activities and thus state law could not penalize them as an unlawful boycott, even though the boycotters foresaw and intended the merchants would sustain economic injury.<sup>277</sup> Consumer collective action for information privacy likewise may constitute protected First Amendment activity, insofar as it seeks a political aim—greater information privacy protections for consumers as a sector of society. Economic demands, such as seeking compensation for the value of their personal information to the business, likely would not benefit from *Claiborne's* holding; rather,

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<sup>272</sup> Comment, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131, 1154 (1980).

<sup>273</sup> *Id.* at 1149 (“[P]rotest boycotts can escape antitrust liability if . . . when examined under the rule of reason they are found to lack significant anticompetitive effects, thus qualifying as reasonable restraints of trade.”); *id.* at 1153 (citations omitted) (“In most instances [protest boycotts] will lack both the purpose and effect of inhibiting competition. By definition, protest boycotters do not have traditional commercial objectives, so there is no danger that concerted pressure might be exerted for the purpose of accomplishing an anticompetitive end, such as excluding a competitor or monopolizing a market. In many cases the purpose of a protest boycott will be to further a public policy. . . . The effect of a protest boycott on competitive conditions will almost always be incidental, and even that assumes the boycott can muster sizeable public support for a long enough period of time.”).

<sup>274</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

<sup>275</sup> *Id.* at 889.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 914–15.

they may indicate a “desire to . . . reap economic benefits” by making it difficult for the platform to compete.<sup>278</sup>

#### CONCLUSION

Mainstream legal scholarship on information privacy has largely focused on its economic contours and breakdowns. Information privacy has been viewed as a set of individual preferences and actions that market forces may optimize. This individualist paradigm, however, obscures the social foundations of information privacy that suggest information privacy ought to be legitimated politically. The platform political economy, in which online platforms determine hegemonically consumers’ information privacy protections and override their information privacy norms, is anything but politically legitimate by American-democratic standards. We traditionally base political legitimacy on governmental or judicial intervention—insofar as they represent the will of the people. Likewise, in the realm of information privacy, government ought to protect information privacy norms that reflect popular will. However, current law and bills under consideration delegate privacy decision-making to the private sector by relying on self-regulation in the form of notice and choice and, in effect, ratify platforms’ hegemony.

The democratic determination of information privacy is still possible—private governance may become democratic if consumers are able to determine their information privacy norms and the protections that ought to safeguard them. Industrial democracy theory provides an analogy that can help inform the information privacy’s democratic legitimation within its system of private governance. The labor political economy of the late nineteenth and early twentieth centuries bears numerous similarities to today’s platform political economy and industrial democracy theory emerged to propose worker collective bargaining as a private counterforce. Industrial democracy attempted to introduce democratic governance into workplace decision-making through unionization, with the union serving as a forum for deliberative democracy, consolidating worker bargaining power to countervail that of employers, and entering a collective bargaining agreement that entrenches workers’ role in

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<sup>278</sup> *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508–09 (1988).

workplace decision-making. The mechanics of these democratic structures will look different in the online platform context, due to the magnitude of platforms' bargaining power over information privacy and the structure of social life online. Even so, their application to the platform political economy suggests democratizing platform privacy may be possible.

Democratizing platform privacy, based on a model inspired by industrial democracy, may be a first effort among many to reform private governance through democratic procedure. Numerous other rights and civil liberties are affected by platform hegemony, free speech not least of all. This Article focuses on online information privacy, both because of the government's failure to protect online information privacy through law and because of the striking parallels between the platform political economy and the labor political economy. To the extent consumers are able to organize, bargain, and bind platforms successfully, the collective bargaining organization they form could prove useful to democratize private governance of myriad other rights as well.