

A LAW REVIEW ARTICLE, IN PLAIN LANGUAGE

Phantom Consent

Why clicking Accept does not always form a contract, and what the law already requires.

THE HOOK

13.9%

of U.S. adults have a cognitive disability: serious difficulty concentrating, remembering, or making decisions. It is the single most common type.

Some 28.7% of U.S. adults live with a disability of one kind or another. The platforms know this class sits inside their user base; several market to it directly, as cognitive assistance, as mental-health support, as company for the isolated.

Source. Ctrs. for Disease Control & Prevention, *Disability Impacts All of Us* (updated July 15, 2024).

A CRITIQUE WITHOUT A PLAINTIFF

"No plaintiff walks into federal court as a person subject to the human condition."

For more than a decade, scholars proved that digital consent is a fiction for everyone. Professor Solove calls it murky consent. But a harm to everyone is a policy problem, not a lawsuit. The critique circled the courthouse for years without finding the door.

Sources. Daniel J. Solove, *Murky Consent*, 104 B.U. L. Rev. 593 (2024); Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 Wash. U. L. Rev. 1461 (2019).

THE CORE CLAIM

**For a definable class of disabled users,
the click that looks like agreement
never formed a contract.**

PHANTOM CONSENT, THE TERM

The population-scale operation of platforms under apparent contracts that were never legally formed as to a protected class of users. The consent appeared to exist. The operator acted as though it did. It never came into being.

Source. Restatement (Second) of Contracts §§ 17, 19 (1981) (mutual assent requires a meeting of the minds).

THE STRUCTURE OF THE ARGUMENT

WHAT EVERY USER MEETS FIRST

An inaccessible consent gate

ROUTE ONE · THE SHIELD

Contract law

No contract formed, so every clause that leans on it falls. A win frees one case at a time.

ROUTE TWO · THE SWORD

Disability law

The gate itself breaks the law, so a court can order it rebuilt for everyone who follows.



The Shield

No contract was formed, so the clauses fall.

Contract law contains everything needed to reach the conclusion. The question is simply whether a meeting of the minds was ever achieved.

MUTUAL ASSENT

The law of online agreement was always asking a question about the mind.

A click binds only where the screen gave clear notice and the user did something that unmistakably meant yes. The standing question: given this screen, could this mind fairly be charged with knowing and agreeing? Courts standardized the mind and varied only the screen.

2002

Specht v. Netscape

Terms hidden below a download button. A prudent user would not know.

2014

Nguyen v. Barnes & Noble

A bare link to terms, without more, is not notice.

2017

Meyer v. Uber

The standard bends to a reasonably prudent smartphone user.

2022

Berman v. Freedom Fin.

Notice that is buried or camouflaged does not bind.

Sources. Specht v. Netscape, 306 F.3d 17 (2d Cir. 2002); Nguyen v. Barnes & Noble, 763 F.3d 1171 (9th Cir. 2014); Meyer v. Uber, 868 F.3d 66 (2d Cir. 2017); Berman v. Freedom Fin. Network, 30 F.4th 849 (9th Cir. 2022).

THE INTERFACE

The consent screen is engineered against comprehension, then shown at the worst possible moment.

BY DESIGN

Five thousand to fifteen thousand words. A postgraduate reading level. Material terms buried in cross-references. A single button, no negotiation.

DARK PATTERNS, BY DEFINITION

False urgency, obstruction, visual interference. These are interfaces built to impair decision-making, and they fall hardest on users whose decision-making is already impaired.

The wall appears after the user has committed to the service and just before it begins: maximum pressure, minimum capacity, and both are choices.

Sources. Cal. Civ. Code § 1798.140(l) (defining dark patterns by effect); Fed. Trade Comm'n, *Bringing Dark Patterns to Light* (Sept. 2022).

THREE DOCTRINAL ROUTES

Three strands of first-year contract law, pleaded in a deliberate order.

1 Failure of mutual assent · **primary** · §§ 17, 19

No meeting of the minds, so no contract ever formed. Formation is the one question the Supreme Court reserves to a judge, not an arbitrator.

2 Capacity · **secondary** · § 15

A user may understand the terms perfectly and still be unable to act reasonably on that understanding. This route can be sent to the arbitrator, so it follows the first.

3 Unconscionability · **cumulative** · § 208

A take-it-or-leave-it screen against one-sided terms. It supports the first two rather than leading.

Sources. Restatement (Second) of Contracts; Granite Rock Co. v. Teamsters, 561 U.S. 287 (2010); Buckeye Check Cashing v. Cardegna, 546 U.S. 440 (2006).

THE PROOF OF CONCEPT

"A party cannot enter into a contract to arbitrate when it does not know or have reason to know the basic terms of the offer."

National Federation of the Blind v. Container Store (1st Cir. 2018)

Blind customers enrolled in a loyalty program through a store touchscreen they could not perceive. No associate read the hidden terms aloud. When the retailer later moved to force arbitration, the court refused: no knowledge, no formation, no agreement to compel. A federal court of appeals has already taken this step for a sensory disability.

THE EXTENSION

The touchstone was never eyesight. It was a fair chance to know and to act.

DEFEATS PERCEPTION

A blind customer at a touchscreen receives a signal the body cannot turn into information.

DEFEATS PROCESSING

A user with a cognitive disability at a wall of dense text receives information the mind, under these conditions, cannot turn into understanding.

Same result: no reason to know the terms, so no contract forms. And the second screen, unlike the world, was built that way on purpose.

II The Sword

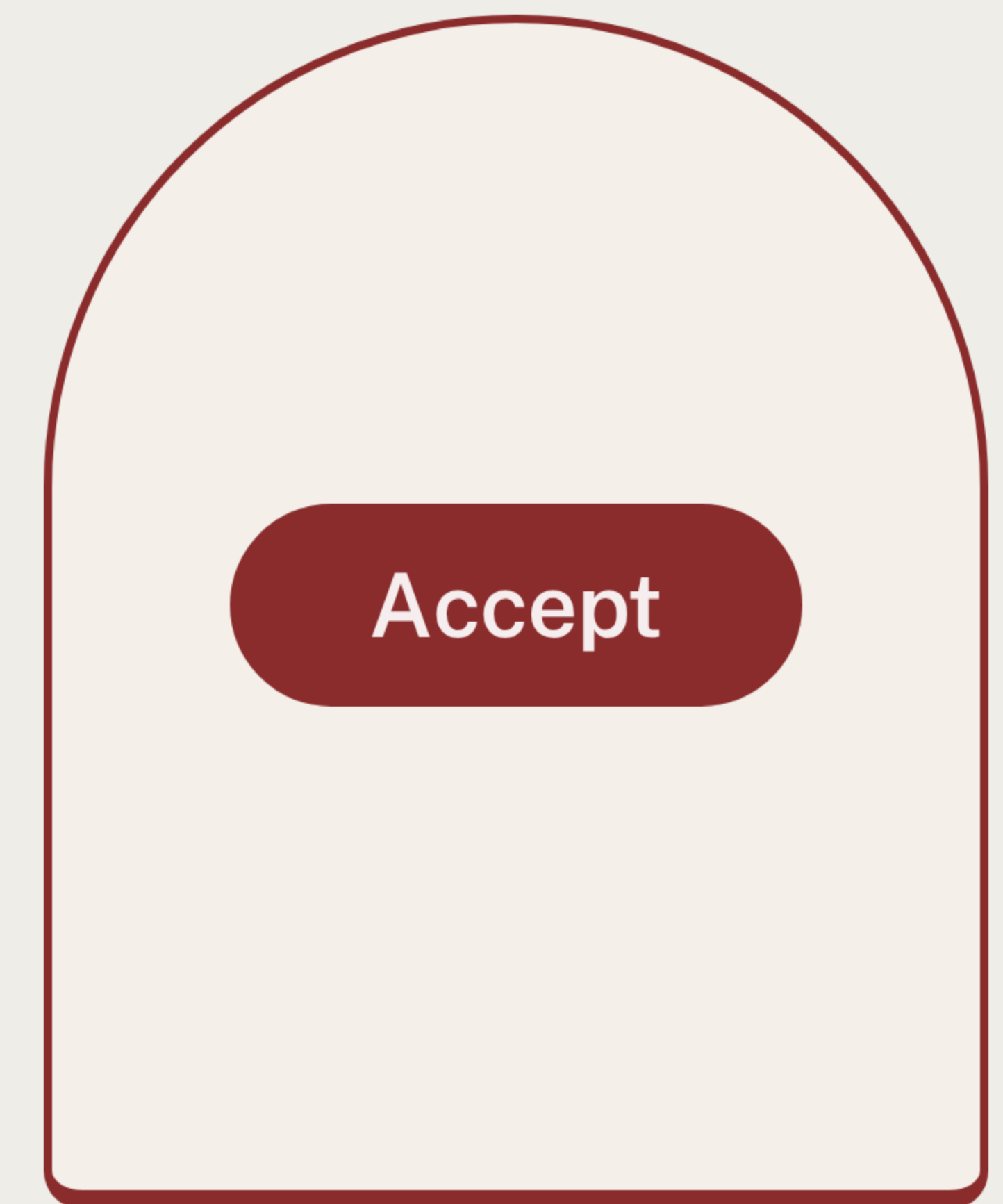
Rebuild the gate for everyone.

The same defect, raised affirmatively under disability law, is not a one-time escape. It is an order to rebuild the front door.

PUBLIC ACCOMMODATION

The consent screen is not paperwork beside the service. It is the first service.

Title III of the ADA forbids denying disabled people full and equal enjoyment of a public accommodation, and courts already apply it to a company's website and app. The consent screen is the threshold every user must clear to reach anything else, and the operator controls its design as completely as a store controls its entrance.



THE FIRST SERVICE

EFFECTIVE COMMUNICATION

Communication is effective only when the meaning actually arrives in the reader's mind.

Plain-language summaries	Layered disclosure	Comprehension checkpoints	Pressure-free review
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These are the cognitive equal of the ramp and the screen reader, and the standards already exist. California agrees from outside disability law: accepting broad terms of use is not consent, and agreement obtained through dark patterns is not consent.

Sources. 28 C.F.R. § 36.303(c); W3C, *Making Content Usable for People with Cognitive and Learning Disabilities* (2021); Cal. Civ. Code § 1798.140(h).

THE REMEDY

One route frees a case. The other changes the interface for everyone.

THE SHIELD

Defensive

Raised one defendant at a time. A win frees that single case. Individual arbitration cannot change a design.

THE SWORD

Affirmative

A class injunction under Rule 23(b)(2) orders the gate rebuilt. The fix reaches every user who comes after.

WHAT COLLAPSES

If the contract was never formed, every clause that leans on it falls together.

Arbitration clause	nothing to compel
Class action waiver	the class survives
Data and AI-training license	rights never acquired
Liability caps and indemnification	exposure uncapped

Sources. 9 U.S.C. § 2; AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), and Epic Sys. Corp. v. Lewis, 584 U.S. 497 (2018), both distinguished.

OBJECTIONS AND LIMITS

The limits are built in, and they answer the obvious objections.

<i>Floodgates?</i>	The doctrine runs only for a statutory protected class, not for the merely hurried.
<i>Commercial certainty?</i>	Courts have policed this exact line for twenty years without collapse.
<i>Capacity is individual.</i>	The class claim targets the operator's one uniform screen, not each separate mind.
<i>Users who understood?</i>	The operator may still prove real agreement, case by case. The burden simply returns to where contract law always placed it. An accessible screen builds the very conditions that defeat the claim.

Source. 42 U.S.C. § 12102(1)(A), (2)(A) (reading, concentrating, and thinking among the major life activities).

THE STANDPOINT

Paternalism removes choices. This approach manufactures the conditions for choice.

The target is the interface, never the user's agency. The deepest autonomy violation is the current one: a click engineered to be uninformed, then wielded for years as the user's own voice, against her. The disability movement's principle is the same one, support real decisions, never pretend that whatever happened was a decision.

CONCLUSION

The first claim wins a case. The second changes the interface for everyone who comes after.

The consent critique was right, and it was stuck, because a defect belonging to everyone belongs, in court, to no one. Naming the class changes that. A closing caution: new safety statutes that gate protection on a single consent act will route that protection away from the very people who cannot operate it.

No contract was formed, so the shields fall. The gate is inaccessible, so the gate gets rebuilt.

SOURCES

Travis Gilly, *Phantom Consent: Formation Failure, Inaccessible Interfaces, and the Collapse of the Clickwrap Shield* (working draft v0.3, 2026). Real Safety AI Foundation.

CASES

Nat'l Fed'n of the Blind v. Container Store, 904 F.3d 70 (1st Cir. 2018); Specht v. Netscape, 306 F.3d 17 (2d Cir. 2002); Meyer v. Uber, 868 F.3d 66 (2d Cir. 2017); Nguyen v. Barnes & Noble, 763 F.3d 1171 (9th Cir. 2014); Berman v. Freedom Fin. Network, 30 F.4th 849 (9th Cir. 2022); Robles v. Domino's Pizza, 913 F.3d 898 (9th Cir. 2019); Granite Rock Co. v. Teamsters, 561 U.S. 287 (2010); Buckeye Check Cashing v. Cardegna, 546 U.S. 440 (2006); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Epic Sys. Corp. v. Lewis, 584 U.S. 497 (2018); Wal-Mart Stores v. Dukes, 564 U.S. 338 (2011).

STATUTES, RULES & STANDARDS

42 U.S.C. §§ 12102, 12182 (ADA Title III); 9 U.S.C. § 2 (FAA); 28 C.F.R. § 36.303; Fed. R. Civ. P. 23(b)(2); Restatement (Second) of Contracts §§ 15, 17, 19, 208; Cal. Civ. Code § 1798.140(h), (l); W3C, Making Content Usable (2021).

SCHOLARSHIP & REPORTS

Daniel J. Solove, Murky Consent, 104 B.U. L. Rev. 593 (2024); Neil Richards & Woodrow Hartzog, The Pathologies of Digital Consent, 96 Wash. U. L. Rev. 1461 (2019); Fed. Trade Comm'n, Bringing Dark Patterns to Light (2022); CDC, Disability Impacts All of Us (2024).