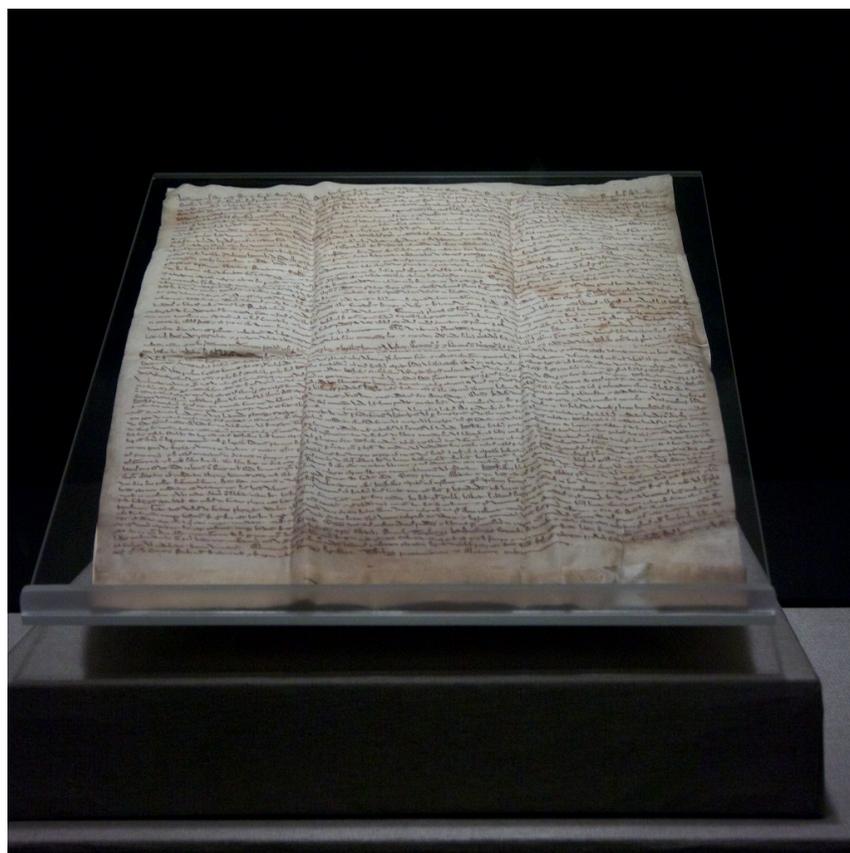


Even Under Kind Masters:  
A Proposal to Require that Dominant  
Platforms Accord Their Users Due Process



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## Table of Contents

Executive Summary .....	1
Background.....	4
<i>The Rise, and Falling Reputation, of Dominant Platforms.....</i>	<i>4</i>
<i>Due Process is Just One Problem to Be Solved .....</i>	<i>6</i>
What Platforms Are .....	8
Why Platforms Can Be a Problem.....	11
Individual Rights in the Private Sphere.....	13
The Relationship Between Dominance and Due Process .....	22
<i>The Process That is Due.....</i>	<i>23</i>
<i>Dominance: An Old Concept in a New Context.....</i>	<i>25</i>
The Requirements of Due Process .....	29
Responses to Common Objections.....	34
Conclusion.....	35

Cover image of the Magna Carta from Flickr user etee, available at <https://www.flickr.com/photos/etee/12603635674>. It was licensed under the Creative Commons Attribution-ShareAlike 2.0 Generic (CC BY-SA 2.0) license which is available at <https://creativecommons.org/licenses/by-sa/2.0>. This paper itself is also released under those terms. The Magna Carta, which is styled as a declaration of King John, stated, as translated from Latin, that “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.” The Text of the Magna Carta, <https://sourcebooks.fordham.edu/source/magnacarta.asp>. This is often cited as an origin of the legal concept of due process. The title of the paper is from a quotation by Woodrow Wilson’s “The New Freedom” which is cited within.

## Executive Summary

Technology platforms have provided users with many benefits. People can access information at their fingertips that once may have taken days of library research. They can communicate with friends and family across the world, in real-time, for free. They can find and apply for jobs, find new housing, and buy goods from around the world. People can connect with niche communities and discover new interests. People in remote areas can feel connected with the wider world.

There is a flip side to this: users who get cut off from technology platforms can find themselves at a disadvantage. Dominant technology platforms in particular can harm users economically and non-economically by acting against them for alleged misconduct—for example, by disabling their accounts or removing or “de-monetizing” posted content. Users may find themselves with no recourse and, because many platform markets are not competitive, no alternatives. Given the scale at which platforms operate, mistakes are inevitable. Yet platforms have little incentive to adopt processes to fix their mistakes, even if this is unfair in individual cases.

The best way to promote fair outcomes in disputes between large institutions and individuals is through due process requirements, ensuring that individuals can challenge actions threatened against them, have their dispute heard by an impartial decisionmaker, and have the ultimate decision be supported by the facts as applied to the controlling rules. As this paper argues, there are ample theoretical as well as practical reasons to demand due process not just from public bodies but from large private institutions as well.

The question of which platforms are “dominant” can best be answered by looking to precedent from communications law—the Federal Communication Commission’s criteria for determining which telecommunications carriers are dominant are quite comprehensive—as well as considering the importance of the platform in question in a broader context, and the seriousness of the harm that the platform can do to a user. In this context, the most straightforward way to determine which platforms should be treated as “dominant” is again to have the decision made by an independent, public body, which would make a multi-factor determination inspired by communications law precedent.

Due process will not solve all of the problems raised by dominant platforms. Other measures to reduce dominance may ultimately be necessary. Substantive, as opposed to procedural, regulation will likely also be required—for example, privacy rules, or prohibitions on favoring vertically-affiliated content or services, as well as vigorous enforcement of antitrust laws. But due process protections are a valuable first step to confront the problems that platforms may cause in the lives of ordinary users.

## Background

### *The Rise, and Falling Reputation, of Dominant Platforms*

An increasingly-concentrated private sphere has come to dominate everyday life. People communicate with their friends and family on Facebook; they access news media via Facebook, Google, and Twitter; they shop on Amazon.

Undoubtedly, digital networked technologies have given people more capabilities than ever, and they can access a greater variety of information, entertainment, viewpoints, services, and products than before. Social networks can give ordinary people a bigger audience than many newspapers once commanded.

However, some large platforms have not lived up to the promises they made to their users. In part, this is because, in the pursuit of growth at all costs, they have let certain problems fester. Issues such as privacy, abuse, harassment, misinformation, and monopoly power require serious attention. One longstanding problem has been the arbitrary and incontestable decisions that platforms often make in individual cases when banning accounts, removing content, or otherwise taking actions prejudicial to users.

From a high level it is apparent that not all of the issues that arise should be conceived of or addressed in the same way. Some of the problems are more economic in character, some more social, and some more informational. Some of them arise mainly because of the concentrated nature of online platforms, where a decision by just one private platform can leave a user or a smaller company with no meaningful alternatives. Issues of content moderation, neutrality, discrimination—and this paper’s topic, due process—fall into this category. Other issues are inherent to digital platforms of any size and would need to be addressed apart from any other issues of competition and market centralization; for example, the protection of consumer privacy and security. To be sure, though, even these kinds of harms are exacerbated by market power and excessive centralization.<sup>1</sup>

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<sup>1</sup> Some issues may not even be native to digital platforms to begin with. Many older kinds of businesses may have violated user privacy or harmed users in various ways. Direct mail marketing and credit agencies have long compiled troubling dossiers on consumer behavior. Yet these kinds of issues may only have become dire, or well-known enough to require a policy response because of digital platforms. Needless to  
*(footnote continued)*

It may be in the platforms' own interest to fix their various problems, of course—and if they do not do so voluntarily, regulators and legislators may and should be ready to step in. But as platforms tackle some of their most difficult challenges—for example, online harassment—users may find themselves subject to even more arbitrary and unchallengeable decisions. Indeed, while policymakers and the public have brought to bear varying degrees of pressure on platforms on privacy, competition, disinformation, viewpoint discrimination, and user safety grounds, they have paid comparatively little attention to whether platforms are currently structured to give individuals who have been (or feel they have been) wronged a means of redress. Addressing due process at the outset will make it easier to proceed on other concerns.

The consequences of a dominant platform cutting off a user by mistake can be devastating. Someone living in a rural area might depend on Amazon to buy goods that are not otherwise available. Facebook might be the only way someone has to keep up with friends and family. A reporter might depend on Twitter both for professional networking and just to find out what is happening in the world. An individual might use YouTube, Instagram, and other platforms to distribute independent video content and earn a living. Users who abuse these platforms should of course face consequences, including being cut off when appropriate. But the billion-user scale of online services is not an excuse to deny users a means to challenge actions taken against them, and to correct mistakes. And even users who deserve to be cut off, deserve to know exactly why. The scale and importance of dominant platforms makes it even more important that they provide users with due process—and their resources give them the means to do so.

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say, proposed solutions to issues of this kind should not be restricted to digital platforms if the harms are not.

## ***Due Process is Just One Problem to Be Solved***

This paper proposes that dominant platforms be required to provide due process when they take actions that can be significantly prejudicial to a user. This can mean temporary or permanent account suspensions, de-listing, termination of revenue-sharing agreements, the removal of hosted content, or other punitive and/or restrictive actions targeted at an individual user. The goal is to ensure that platforms treat users fairly and consistently, according to their own stated policies, and to permit users to submit reasons why the action should not be taken, or at least why a different action may be more appropriate.

The precise scope of the problem here is difficult to know. There are many anecdotes.<sup>2</sup> Many platforms have been increasing their transparency

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<sup>2</sup> An open question for this paper was how many specific examples to catalog of platforms abusing their power, or being alleged to. Certainly a common criticism of policy papers is that they are proposing a disproportionate solution to a minor problem. However complaints about platforms abusing their power with due process mooted as a potential solution go back years. *See* Danile Solove, Facebook Banishment and Due Process, Concurring Opinions (March 3, 2008), [https://concurringopinions.com/archives/2008/03/facebook\\_banish.html](https://concurringopinions.com/archives/2008/03/facebook_banish.html); S.M., Arbitrary and Capricious, *The Economist - Democracy in America* (August 28, 2014), <https://www.economist.com/democracy-in-america/2014/08/28/arbitrary-and-capricious>. It is difficult to follow technology news without coming across some example of a platform behaving seemingly arbitrarily or making a mistake almost weekly. *See, e.g.*, Valentina Palladino, Amazon Customers Take To Social Media After Mysterious Account Closures, *Ars Technica* (April 6, 2018), <https://arstechnica.com/information-technology/2018/04/amazon-customers-take-to-social-media-after-mysterious-account-closures/>; Jay Hathaway, This Antifa Joke Got A Popular Leftist Suspended From Twitter, *Daily Dot* (October 30, 2017), <https://www.dailydot.com/unclick/twitter-suspends-krang-t-nelson/>; Tweet from @TheDCSentinel (December 29, 2017) (“Still waiting on the appeal. Twitter never even said what exactly got him suspended.”), <https://goo.gl/6z15ng>; Matthew Sheffield, “Fake News” Or Free Speech: Is Google Cracking Down On Left Media? (October 18, 2017), <https://www.salon.com/2017/10/18/fake-news-or-free-speech-is-google-cracking-down-on-left-media>; Khadeeja Safdar and Laura Stevens, Banned From Amazon: The Shoppers Who Make Too Many Returns, *Wall Street Journal* (May 22, 2018) (“The e-commerce giant bans shoppers from the site for infractions such as returning too many items, sometimes without telling them what they did (footnote continued)

efforts—for example, revealing the number of content removal requests they process, or the amount of content taken down as a violation of their terms of service. At the scale internet platforms operate at, these numbers can be quite intimidating. But these numbers do not necessarily reveal the full scope of the problem that due process is meant to address; namely, errors. The purpose of due process is not to require that platforms convene a full hearing every time they wish to take down spam or disable the account of a harassing user. Rather the purpose is to ensure that users who feel they have been treated unfairly have an appropriate mechanism to be heard, and to require that platforms provide more explanation for actions at their outset—going beyond a bare assertion that content or conduct breaks the rules.

It is important to clarify what this paper does not address. It may be that the best overall solution to the problems of some large platforms is to decrease their importance. After all, one way to ensure that dominant platforms do not abuse their positions is to prevent their dominance in the first place. Users who depend on platforms will usually be better protected if they have alternatives, and/or if the platforms themselves are democratically-accountable.<sup>3</sup> Nothing in this paper should be read as a criticism of such solutions. At the same time platform dominance may be more durable; for instance, in the case of natural monopolies. In those instances, user protections become all the more important. In any case policymakers must consider how to address the real-life problems that dominant platforms can create.

Additionally, while it is possible that a platform can become so dominant that it should be subject to common carrier-like obligations, the circumstances of

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wrong.”), <https://www.wsj.com/articles/banned-from-amazon-the-shoppers-who-make-too-many-returns-1526981401>.

Also, “due process” of some kind or another has now been proposed by various parties. *See* Santa Clara Principles on Transparency and Accountability in Content Moderation, <https://goo.gl/gPxzC6>. With this backdrop this paper elects to take the basic problem as a given, but proposes a perhaps more detailed set of requirements as to what due process entails than has been offered in this context before.

<sup>3</sup> For example, a platform might be organized as a co-op. *See* Platform Cooperativism, <https://platform.coop/about>.

many platforms may demand more moderation of user content, not less. Therefore, the question of what specific substantive rules surrounding content and behavior is left for another time. Finally, this paper does not specify the precise mechanism—legislative, regulatory, or otherwise—for requiring that dominant platforms provide due process. Instead, it focuses on how robust due process protections can, at least in part, lessen the disparities in power that exist between billion-dollar technology companies and their millions and billions of users.

There is reason to attend to due process issues now. As calls for platforms to police harmful content, illegal behavior, and assorted ills increase, there is a danger that platforms may overreact, employing easily-fooled algorithms, crowdsourcing, automated processes, and outsourced and undertrained workers. This could in turn create more problems, as users fall prey to mistakes, context collapse, and even the coordinated abuse of reporting tools. Baking in due process at the outset becomes even more crucial.

### **What Platforms Are**

Companies such as Facebook, Apple, Google, and Twitter operate what are known as “platforms,” a somewhat ambiguous term. One academic definition is that a platform is an “arrangement of components and activities, usually defined by a set of technical standards and procedural norms around which users organize their activities . . . and are usually open in some sense.”<sup>4</sup> This is accurate, but quite broad. Bill Gates is reported to have said that “A platform is when the economic value of everybody that uses it, exceeds the value of the company that creates it. Then it’s a platform.”<sup>5</sup> But while Gates may have accurately intuited what a socially- and economically-beneficial platform is, excluding platforms that manage to capture most economic value for themselves from consideration may also deny protection to those users who need it the most. A different, multi-factor approach may be more practical for policymakers.

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<sup>4</sup> Shane Greenstein, *The Evolving Structure of Commercial Internet Markets*, in *Understanding the Digital Economy* 151, 154 (Erik Brynjolfsson & Brian Kahin eds., 2002).

<sup>5</sup> This is a paraphrase, as reported by Semil Shah. Transcript: @Chamath At StrictlyVC’s Insider Series (September 16, 2015), <https://goo.gl/Rt14Aw>.

In its current usage, the term “platforms” is an ambiguous blend of technical, computer-science connotations with an older meaning, of a forum for people to speak. Reviewing these related senses of the term helps narrow down what the term means in practice. The older sense derives from the physical platforms or stages where speakers would debate and address the public,<sup>6</sup> and now means “a place for public discussion”<sup>7</sup>—thus, “a platform for discussion.” The application of this sense of the word to social media networks such as Facebook or Twitter is obvious—and, by extension, just as some platforms may bring users together to communicate, others might bring them together to buy or sell goods. Thus, eBay and Etsy are platforms.

The newer sense derives from the concept of a “computing platform.” The Oxford Dictionary of Computer Science defines this kind of platform as a “computer system whose hardware and software make it sufficiently different from all other computers for it to be necessary to generate unique software versions for it.”<sup>8</sup> Microsoft Windows, Google’s Android, and Apple’s iOS are “platforms” in this sense. More recently, however, computing platforms have changed, and developers now write software that does not run on a typical end-user computer in the traditional sense. Thus, Amazon’s cloud platform AWS is a platform, the web and web browsers constitute a platform, and developers that write applications that interact with Google or Facebook use those services as platforms as well.

Running through both of these senses of “platform” is the idea of some intermediary that brings different parties together. Today, these may be

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<sup>6</sup> The relevant full definition is “A temporary (or sometimes permanent) piece of raised flooring in a hall, or in the open air, from which a speaker addresses his audience, and on which the promoters of a meeting sit; hence, transf. or allusively, in reference to public speaking or discussion on a platform, the making of political or other speeches, platform oratory; also, the body of supporters who appear on a platform, as ‘an influential’ or ‘representative platform.’” Oxford English Dictionary, 2nd Ed. (1989).

<sup>7</sup> Webster’s Third New International Dictionary, Unabridged (1961).

<sup>8</sup> Oxford Dictionary of Computer Science, 7th Edition (Oxford University Press 2016), 414.

speakers and listeners, buyers and sellers, web sites and web searchers, or application developers and users. In economic terms platforms may tend to operate what are known as “two-sided markets,” whose basic purpose is to connect others. This is such a general function that it may not be possible to construct a single exact definition of what a platform is—platforms, like Wittgenstein’s games, may be “a complicated network of similarities overlapping and crisscrossing: sometimes overall similarities, sometimes similarities of detail”<sup>9</sup> that share “family resemblances” but resist being put into a simple category. It may be difficult to do better than Ganesh Sitaraman who, recognizing the difficulty in pinning down with exactitude what a “platform” is, offered a number of factors to consider when determining whether an entity is one:

- *Extent to which the entity serves as an exchange or marketplace for transaction of goods and services.*
- *Extent to which the entity is essential for downstream productive uses.*
- *Extent to which the entity derives value from direct or indirect network effects.*
- *Extent to which the entity serves as basic infrastructure or foundation for customizable applications by third parties.*
- *Extent to which the entity utilizes or could utilize its platform as a competitor, or could deny access or engage in discriminatory access.*<sup>10</sup>

This or some similar multi-factor determination, where no one factor is either necessary or determinative, is most likely to capture those platforms that matter.

The approach proposed by this paper may offer another path out of these initial definitional difficulties, since it proposes only that due process (and potentially other requirements) be provided by *dominant* platforms. The problems that due process is designed to remedy—disparities of power, and severe consequences for users—are more likely to occur in the context of a

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<sup>9</sup> Ludwig Wittgenstein, *Philosophical Investigations* 32 (G.E. Anscombe, trans.) (Basil Blackwell 1986).

<sup>10</sup> Ganesh Sitaraman, *Regulating Tech Platforms: A Blueprint for Reform* 6 (2018), <https://greatdemocracyinitiative.org/document/regulating-tech>.

dominant platform. And practically speaking, dominance may be an easier concept to pin down than “platform,” with this initial criterion also limiting the universe of entities to consider.

### **Why Platforms Can Be a Problem**

Control of platforms can be quite valuable for a technology company—for instance, Apple takes a 30% cut of the price of software sold on its iOS platform, and Google can direct massive amounts of internet traffic, either to independent web sites or to its own. Microsoft’s control of the Windows software platform—and the “applications barrier to entry” this created—was central to the government’s antitrust case against Microsoft in the 1990s. Facebook’s decisions can mean life or death for media companies, and Twitter users drive a large part of the national political conversation.

But the mere fact that platforms can be valuable does not make them special. Many businesses are valuable—but platforms (in particular, dominant platforms) have other characteristics that mark them for special attention.

First, platform markets tend to be highly concentrated. Many exhibit network effects, or virtuous (or vicious, depending on your perspective) cycles. For instance, users may prefer platforms that have active developer support, and developers may prefer to create applications for platforms with many users. Search engines with a lot of users gain usage data which further improves their results, which attracts more users, who generate more data. Social network users want to use the services where their friends are. Sellers want to go to where the buyers are, and vice versa. These dynamics, and other effects such as natural monopoly forces, winner-take-all market structures, the venture capital system, the Pareto principle,<sup>11</sup> consumer preference for known brands, and even lax antitrust enforcement, contribute to the highly concentrated market structure of platforms, where enormous power is centralized in a few private hands.

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<sup>11</sup> Also known as the 80/20 rule, which “states that, for many events, roughly 80% of the effects come from 20% of the causes.” See Pareto principle, [https://en.wikipedia.org/wiki/Pareto\\_principle](https://en.wikipedia.org/wiki/Pareto_principle). This would suggest that internet companies may follow a power law distribution where 20% of firms garner 80% of the activity or users.

Second, dominant platforms are ultimately not of special importance just because they are valuable and often monopolistic, but because the effects of their decisions are so wide-ranging, and can permeate so many areas of life. Apple's decisions don't just affect ordinary users but also the developers who need to reach them. Google or Facebook's decisions can determine which websites and content are successful and which are not, and a user who is locked out of a popular platform might suffer not just inconvenience but being cut off from family or employment. In short, dominant platforms wield and are the locus points of enormous commercial, cultural, and political power.

Well before the Internet era, some services became so important that they have been regulated as utilities or common carriers subject to strict nondiscrimination requirements, where the operator's discretion to make individualized choices about what content to carry, or with whom to deal, is constrained by law. Ultimately this may be the best approach for some technology platforms. But there is reason for caution in applying such a tool to dominant platforms as a whole. Many platforms are a hybrid of communications infrastructure, publishers or broadcasters, and forums for socializing. A rule that the power company, broadband, or telephone cannot cut off power to a KKK Grand Wizard's house may be wise, provided they are using the service lawfully. Decisions about who should have access to essential services of this kind simply should not be made by unaccountable private parties. However, making such essential services available on these terms is unlikely to harm other users. By contrast, much lawful, constitutionally-protected speech and behavior can degrade the utility and attractiveness of online platforms for ordinary users. There are good reasons for certain platforms to forbid the dissemination of pornography, hate speech, or propaganda, or the use of their tools for forms of harassment or stalking that may fall short of outright criminality.<sup>12</sup> It may be that tools can be developed that allow near-unfettered use of platforms while shielding most users from objectionable content and conduct, but they haven't yet emerged.

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<sup>12</sup>To be clear, this paper takes no position on what the proper content moderation policies of platforms should be and whether any current platforms should be operated more like common carriers or more like newspaper opinion pages. It is important at least to realize that certain policies can both be wise, and subject to abuse if not subject to due process and other safeguards.

Thus, for the foreseeable future, platforms will maintain and enforce policies of one kind or another to govern user conduct. Many commentators have focused on what those policies should be, with opinions varying from the view that platforms should be as hands-off as possible<sup>13</sup> to those who advocate that platforms take a significantly more active role in controlling their use.<sup>14</sup> But whatever a platform's policies may be, they are subject to abuse, mistake, and misunderstanding. Due process requirements mitigate these risks, providing a practical and effective way to ensure that policies are applied fairly.

### **Individual Rights in the Private Sphere**

The private sphere has always played a dominant role in American life. People have long read private newspapers, watched private broadcasters, used the private telephone network, and shopped in private supermarkets. Historically, even when these markets were not robustly competitive, it was rare for a single firm to have nationwide control. (And when there was such a single firm, such as AT&T or national broadcast networks, they were closely regulated as a result.) Significantly, as well, the broadcast, newspapers, and telephony were all regulated by the state in many respects to ensure media diversity, competition, localism, the availability of children's programming, and other public interest factors.

The online world is different, as economies of scale, network effects, and other factors concentrate ever-more power in ever-fewer hands. Modern technology platforms are also, for the most part, unregulated—and are even granted express immunity from some laws of general applicability. Additionally, much of ordinary life is now mediated through digital devices and private platforms. People socialize on Twitter, Facebook, Snapchat, and WhatsApp, and they network professionally on Twitter or LinkedIn more than at cocktail

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<sup>13</sup> *E.g.*, Corynne Mcsherry and India Mckinney, Platform Censorship Won't Fix the Internet, EFF (April 25, 2018), <https://www.eff.org/deeplinks/2018/04/platform-censorship-wont-fix-internet>.

<sup>14</sup> *E.g.*, Elizabeth Weise, Amazon, Google and Apple Under Pressure to Remove NRA Streaming Channel, USA Today (Feb. 23, 2018), <https://www.usatoday.com/story/tech/2018/02/23/amazon-google-and-apple-under-pressure-remove-nratv-their-streaming-services/368894002>.

parties. As private platforms have become more pervasive, larger, and less regulated, all in a relatively short amount of time, a troubling imbalance of power has developed between users and the services they need.

Due process is a long-established principle for protecting individuals against arbitrary exercises of power. In the American legal system, the concept is primarily thought of as a right of individuals against state, not against private actors. As the Supreme Court said in *Shelley v. Kraemer*, the Constitution's due process protections "erect[] no shield against merely private conduct, however discriminatory or wrongful."<sup>15</sup> But the distinction is not always so easy to draw. For example, in that case, the Court found that state enforcement of racially discriminatory private agreements simply *was* state action, grounding its decision in decades of precedent finding that judicial actions no less than those of the other branches constitute state action. The implications of the *Shelley* decision will be discussed below, and a potential resolution proposed.

But to put *Shelley* in context first, it is important to realize that the Court's safeguarding of individual rights against private actors was not aberrant. Under the common law courts have long refused to enforce unconscionable contracts, for instance.<sup>16</sup> Civil rights protections, which forbid discrimination by public accommodations, educational institutions, landlords, and employers based on protected criteria such as race, religion, sex, or disability. Other examples abound.

### ***Public Interest Regulation***

In *Munn v. Illinois*, the Supreme Court articulated principles which still form the conceptual basis for the regulation of private actors to serve the common good. The Court wrote,

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<sup>15</sup> 334 US 1, 13 (1948).

<sup>16</sup> See *Campbell Soup Co. v. Wentz*, 172 F. 2d 80, 83 (3rd Cir. 1948) ("That equity does not enforce unconscionable bargains is too well established to require elaborate citation."); *Williams v. Walker-Thomas Furniture Company*, 350 F. 2d 445, 448-450 (D.C. Cir. 1965) (providing elaborate citations).

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.<sup>17</sup>

Similarly, the Court in *Marsh v. Alabama* wrote,

[t]he more an owner, for his advantage, opens up his property to the use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.<sup>18</sup>

### ***Listener Rights***

In *Red Lion v. FCC*, the Supreme Court explained that due to limited access to spectrum frequencies, the free speech rights of listeners must take precedence over the rights of broadcast licensees. It determined that “the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of viewers and listeners, not the right of broadcasters, which is paramount.”<sup>19</sup> This means that limitations and requirements may be placed on broadcasters to ensure they serve the needs of their communities and not merely their own agendas.

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<sup>17</sup> *Munn v. Illinois*, 94 US 113, 126 (1877).

<sup>18</sup> 326 US 501, 506 (1946).

<sup>19</sup> *Red Lion Broadcasting Company v. Federal Communications Commission*, 395 U.S. 367, 390 (1969)

### ***Common Carriage***

Another example of this sort of promotion of the common good that, like *Red Lion*, is directly applicable to platforms that facilitate speech, is the doctrine of common carriage. This ancient<sup>20</sup> doctrine requires that certain undertakings (such as the shipment of goods, the transportation of persons, or operating an inn) be done in a reasonable and non-discriminatory manner. It was applied to new forms of communication such as telegraphy and telephony shortly after they were developed, and its applicability to broadband has been a subject of legal controversy for many years. While broadband providers have argued that they have a “free speech” interest in discriminating among internet users and content, the common carriage doctrine recognizes that the rights of speakers override any rights the operator of a conduit might have. For this reason many commenters have long argued that regulating broadband providers in the public interest is necessary to protect the rights of users.<sup>21</sup>

### ***The Public Forum Doctrine, Applied to Private Property***

The public forum doctrine can provide another analogue to the regulation of private actors to safeguard individual rights. Public fora are “places which by long tradition or by government fiat have been devoted to assembly and debate,”<sup>22</sup> and where the government typically must allow expressive activity. While public fora are today assumed to be public property, the Court has not always found title to be a determining factor, looking instead to tradition and public expectations.<sup>23</sup> Under the traditional public forum test, private property (including an online platform) could be held, or declared to be one.

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<sup>20</sup> See generally Kevin Werbach, *Only Connect*, 22 Berkeley Tech. L.J. 1233 (2007).

<sup>21</sup> Comments of Public Interest Commenters in Preserving the Open Internet, GN Docket No. 09-191 (January 14, 2010), <https://www.publicknowledge.org/pdf/pic-nn-comments-20100114.pdf>.

<sup>22</sup> *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983).

<sup>23</sup> *Hague v. Committee for Industrial Organization*, 307 US 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for  
(footnote continued)

While the Supreme Court has walked back some of its earlier pronouncements finding that individuals have a First Amendment right to speak or distribute literature in private venues such as shopping malls,<sup>24</sup> it has also held that private venues do not have an unfettered right to exclude such speakers. Thus, under *PruneYard Shopping Center v. Robbins*,<sup>25</sup> a statute (or state constitution) can grant speakers a right to access a public forum even over the objection of its owner. More recently, in *Packingham v. North Carolina*, the Court expanded the public forum doctrine to the internet. It wrote,

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context.... While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the “vast democratic forums of the Internet” in general, and social media in particular.<sup>26</sup>

*Packingham* provides another clear conceptual basis for ensuring that dominant private platforms do not harm individual rights.

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As discussed above, the *Shelley* Court’s determination that individuals may necessarily not call on the state to enforce private instruments does seem to

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purposes of assembly, communicating thoughts between citizens, and discussing public questions.”).

<sup>24</sup> See *Hudgens v. NLRB*, 424 US 507, 513-21 (1976) (finding that *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 US 308 (1968), which had found a First Amendment right to picket within a private shopping center, had been overruled by *Lloyd Corp. v. Tanner*, 407 US 551 (1972)).

<sup>25</sup> 447 US 74, 88 (1980).

<sup>26</sup> 582 US \_\_ (2017) (slip op., at 4-5).

erode the distinction between private and state action, while paying it lip service. But it may be more accurate to say that *Shelley* did not erode the difference between state and private action, but simply laid bare an existing tension. As the Court later observed, “[w]hile the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is ‘private,’ on the one hand, or ‘state action,’ on the other, frequently admits of no easy answer.”<sup>27</sup>

In fact, distinguishing between “public” and “private” is, if not actually incoherent,<sup>28</sup> at least more a matter of social convention than a clear principle.<sup>29</sup> Thus, commentators have asked “why infringements of the most basic values—speech, privacy, and equality—should be tolerated just because the violator is a private entity rather than the government.”<sup>30</sup> Today one might ask why society should tolerate major private technology platforms treating users in arbitrary ways.

Paul Schiff Berman has offered a useful summary of the critique of the public/private distinction. He writes that “[T]hose who criticize the distinction between public and private ... argue that the state action doctrine is incoherent because the state always plays a major role, implicitly or explicitly, in any legal relationship. First, they observe that all private actions take place against a background of laws...Second, individual choices are strongly influenced by the context of state-created law....Third, the state plays a role in defining what even counts as a legally cognizable injury....Fourth, even the definition of what constitutes a legally-cognizable person is dependent on law....Finally, scholars have pointed out that the idea of a public sphere is itself a cultural construction, and that what an

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<sup>27</sup> *Jackson v. Metropolitan Edison Co.*, 419 US 345, 349-50 (1974).

<sup>28</sup> See Erwin Chemerinsky, *Rethinking State Action*, 80 NW.U.L.Rev. 503, 505 (1985).

<sup>29</sup> Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided - Some New Answers*, 95 Calif. L. Rev. 451, 471-472 (2007)

<sup>30</sup> Chemerinsky 505.

individual views as ‘public’ will be a projection of his or her own values and assumptions.”<sup>31</sup>

In this view, based on pervasive government involvement in the existence and conduct of private online platforms—from the original funding of the internet, to tax and labor law, the use of courts to enforce private contracts, or any number of factors—the “private” decisions of platforms may be sufficiently “public” in character to subject them to due process requirements under the law. For example, as Professors Horowitz and Karst argued, “state action, in the form of state law, is present in all legal relationships between private persons.”<sup>32</sup> And Senator Frelinghuysen stated in 1871 that “a state denies equal protection whenever it fails to give it. Denying includes inaction as well as action.”<sup>33</sup>

However, Berman argues that “most Americans are likely to resist, on an intuitive level, scholarly attempts to erode the distinction between public and private.”<sup>34</sup> There are other difficulties as well—while some may find it appealing to constitutionally require that large private institutions afford due process protections or respect a right to privacy, the appeal of requiring that Facebook allow hate speech and pornography on its platform seems much more limited. Thus, as Berman suggests, “we could instead focus on the benefits we might derive as a people from using the Constitution to debate fundamental societal values, without relying so heavily on whether the activity is categorized as public or private.”<sup>35</sup>

Constitutional principles have a value beyond their specific legal application that applies wherever one falls on the public / private debate. As

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<sup>31</sup> Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation*, 71 U. Colo. L. Rev. 1263, 1279-1280 (2000).

<sup>32</sup> Harold W. Horowitz and Kenneth L Karst, *The Proposition Fourteen Cases*, 14 UCLA L Rec 37, 45 (1966).

<sup>33</sup> Chemerinsky 523.

<sup>34</sup> Berman 1268.

<sup>35</sup> Berman 1268.

Chemerinsky writes, the Constitution can be viewed “as a code of social morals, not just of government conduct, bestowing individual rights that no entity, public or private, [can] infringe without a compelling justification.”<sup>36</sup> He cites *Franz v. United States*, which states that the “Constitution was designed to embody and celebrate values and to inculcate proper acceptance of them, as much as to compel governments to abide by them.”<sup>37</sup>

Under this approach, is not the nature of government or public power per se that justifies the due process requirement, but the importance and power of government. Other institutions may be equally powerful in people’s lives, and not everything the government does is necessarily of great consequence. As Judge Friendly wrote of certain welfare program decisions:

Good sense would suggest that there must be some floor below which no hearing of any sort is required ... Although the value of even small benefits should not be deprecated, given the precarious financial condition of the recipients of AFDC, the cost of providing an evidentiary hearing in such a case must so far outweigh the likelihood or the value of more accurate determinations that final reliance should be placed on the informed good faith of program administrators.<sup>38</sup>

At the same time, the actions of private institutions—such as a private school expelling a student—may be very consequential. As one commenter put it,

There is no sound basis for the refusal of the courts to investigate any disciplinary proceeding which results in a student’s dismissal from a private university especially since the same courts require procedural fairness for students expelled from a public university. Expulsion from a private school has no less effect upon a student than expulsion from a public school and usually will have at least as much impact upon the student as the decisions of the local, state, or federal government.<sup>39</sup>

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<sup>36</sup> Chemerinsky 507.

<sup>37</sup> Chemerinsky 507 (citing 707 F.2d 582, 594 n.45 (D.C. Cir. 1983)).

<sup>38</sup> Henry J. Friendly, *Some Kind of Hearing*, 23 U. Pa. L. Rev. 1267, 1275-76 (1975).

<sup>39</sup> Note: *An Overview: The Private University and Due Process*, 1970 Duke L. J. 795, 807 (1970).

In Chemerinsky's words,

[T]he concentration of wealth and power in private hands, for example, in large corporations, make the effect of private actions in certain cases virtually indistinguishable from the impact of governmental conduct. Just as people may need protection from government because its power can inflict great injuries, so must there be some shield against infringements of basic rights by private power.<sup>40</sup>

A local government denying someone a picnic permit is unlikely to have the same devastating effects on someone's well-being as an insurance company denying coverage for a medical procedure. The question should not be *whose* power poses a threat, but *whether* there is power that poses a threat. There are distinctions between public and state power that come into play in many situations, but the practical harms that result from the abuse of private power can be quite severe.

A more robust approach, then, justifies the need for due process from dominant platforms, not in slippery public/private distinctions, but in Americans' suspicion of concentrated power of any kind. It is this suspicion that largely motivated antitrust laws, the regulatory state, and even progressive taxation. As Senator Sherman stated, in support of the nation's first antitrust laws, "if we will not endure a king as a political power, we should not endure a king over the production, transportation and sale of any of the necessaries of life."<sup>41</sup> Economist J.M. Clark wrote that "the public will not tolerate the mere fact of being dependent upon the good will of a private monopolist to use his power humanely."<sup>42</sup> And Woodrow Wilson proclaimed,

I do not want to see the special interests of the United States take care of the workingmen, women, and children. I want to see justice,

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<sup>40</sup> Chemerinsky 510-511.

<sup>41</sup> 21 Congr. Rec. 2457 (Mar. 21, 1890), [http://www.appliedantitrust.com/02\\_early\\_foundations/3\\_sherman\\_act/cong\\_rec/21\\_cong\\_rec\\_2455\\_2474.pdf](http://www.appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf).

<sup>42</sup> J.M. Clark, *Social Control of Business* (McGraw Hill, 2nd Ed. 1939) 126

righteousness, fairness and humanity displayed in all the laws of the United States, and I do not want any power to intervene between the people and their government. Justice is what we want, not patronage and condescension and pitiful helpfulness. The trusts are our masters now, but I for one do not care to live in a country called free even under kind masters. I prefer to live under no masters at all.<sup>43</sup>

In sum, the primary justification for due process is to protect individuals from arbitrary exercises of power. There is little reason to limit this concern to arbitrary exercises of *government* power, even if this is all the Constitution formally protects against. Some would simply interpret the Constitution in a way that eliminates the “state action” requirement, and others would find state action to be pervasive in most private conduct. These approaches have some appeal but are likely impractical, if for no other reason than that they would encounter significant resistance. A less controversial yet still appealing approach is to use the constitutional due process as a kind of exemplar, and to apply due process requirements to non-state actors through some other means. This approach has ample precedent.

Practical questions remain: first, how do you define a “dominant” platform? And how do you actually determine whether the criteria of due process should apply in a given circumstance? The next section will attempt to answer those questions.

## **The Relationship Between Dominance and Due Process**

Certain principles should apply universally to all platforms in some way or another. Like with health and safety regulation, or laws against pollution, we should not exempt any category of business (though the method, and necessary expense of compliance, might vary). Similarly, there are principles of platform regulation that ought to be applied universally. Standards around privacy and data protection, duties of care with respect to the safety of users, and transparency should likely be universal, or nearly so. This is not to suggest that there should not be flexibility and attendance to specific facts

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<sup>43</sup> Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* 216 (Doubleday, Page 1921).

when it comes to applying these principles, just that the principles themselves are universal.

But there are other principles that should apply only to certain kinds of undertakings, either due to their size, importance, market power, or position in the economy. For example, some kinds of businesses are required to behave in a nondiscriminatory way as common carriers. Others are regulated as public utilities. Certain actions by monopolists might constitute illegal monopolization even though smaller companies are free to engage in the same sorts of behavior.

The important point here is not that we burden larger platforms or companies with extra responsibilities simply because they can afford them more easily or as a means of discouraging bigness. Scale and centrality may be necessary and inevitable in some circumstances, or even desirable. However, to the extent that certain harms actually flow *from* bigness or *from* importance or centrality it is logical to address them head-on. The question is whether “due process” is a universal principle that should apply equally to all firms offering a comparable service, or whether it only “kicks in” for particular platforms after a certain threshold? While the requirements of due process will be set out in more detail in a section below, a brief look at the *purpose* of due process will help inform this paper’s contention that it should apply primarily to dominant platforms. In short, due process is designed to ensure fairness when there is a risk of serious loss and to guard against power imbalances. Both of these concerns are significantly higher when individuals are dealing with dominant platforms.

### **The Process That is Due**

For some rather unhelpful definitions of due process it is easy enough to just say the principle applies to all undertakings and all platforms, dominant or not. For example, the Court of Criminal Appeals of Oklahoma once observed that “Due Process is the process that is due in a particular situation.”<sup>44</sup> Like all tautologies, this is true but unhelpful. Justice Frankfurter once wrote, more eloquently but perhaps not more helpfully:

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<sup>44</sup> Barnett v. Moon, 852 P. 2d 161, 162 (Okla. Court of Criminal Appeals 1993).

“[D]ue process,” unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, “due process” cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, “due process” is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.<sup>45</sup>

Looked at this way, due process may as well simply be a universal principle, with the question in each circumstance being simply what process is due—if anything a harder question than we started with. However elsewhere in the same concurrence Frankfurter offers a more practical précis of due process:

No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling... that justice has been done.<sup>46</sup>

This concise statement grounds due process where it belongs—not as a laborious set of procedures that all institutions of any size must follow at all times, but as a series of safeguards that ensure fair outcomes when there is risk of serious loss.

Many analyses of due process also highlight imbalances of power. In the early case *Bank of Columbia v. Okely*, the Supreme Court wrote that:

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<sup>45</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63 (Frankfurter, J., concurring).

<sup>46</sup> 341 U.S. at 171-72.

after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that [due process protections] were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.<sup>47</sup>

More prosaically, some commenters have observed that “due process standards should be even more stringent in asymmetric relationships as they can counteract the advantages enjoyed by the stronger party.”<sup>48</sup> While “serious loss” is a possibility even with respect to a non-dominant platform, due process can at least guard against unfair serious losses when there is an “asymmetric relationship” or a serious imbalance of power between the platform and the user. This seems most likely to occur in the case of a dominant platform.

### ***Dominance: An Old Concept in a New Context***

While all platforms and undertakings of any kind should probably strive towards some level of fairness, once a platform has become so singularly important for at least a certain set of users that being able to access it is nearly as important as being able to access electricity or employment, then it is important to ensure that they do not take actions, through malice, indifference, or incompetence, that can have devastating effects on individuals. This paper therefore concludes that only *dominant* platforms should be expected to accord their users<sup>49</sup> due process. The question then is how to define dominance, and how to determine whether the threshold is met.

One starting point for determining “dominance” can simply be “market power”—an antitrust-like analysis that looks to market definition, concentration, and the availability of alternatives. In the antitrust context,

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<sup>47</sup> 17 U.S. 235 (1819).

<sup>48</sup> Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market* 181 (Cambridge University Press 2017).

<sup>49</sup> Another question is who counts as a “user.” Typical end-users would obviously count, and in the case of two-sided markets, both sides should count as users. Thus, for instance, both buyers and sellers on Amazon are “users.”

plaintiffs typically bear the burden of proving market definition, market power, and other factors, and such a determination is not necessarily applicable to future cases. While such case-by-case analysis of particular facts may produce a good outcome in an individual case, it may be of little help to users here and now, who find themselves at the mercy of a platform that may be dominant in fact but has not been adjudicated as such. A user should not be required to make such a fact-intensive showing to bring a case.

Another approach is to have a bright-line rule—some clearly articulated standard that a particular platform meets or does not, that can be determined without an antitrust-like fact-finding. However, even assuming such a rule can be crafted, even with bright-line rules there can be imperfections; for instance, a business might structure itself to fall just short of the line. Additionally, while it may be clear whether a business meets a certain threshold for dominance in a given market, it still may be difficult to determine what the relevant markets may be. Thus, a bright-line approach may simply become a case-by-case approach in practice.

Yet another method is to have some sort of body that makes determinations with respect to particular platforms—determinations that may change, but which are binding until they do. Examples include the Financial Stability Oversight Council’s inquiry into which banks are “systemically important,” or FCC proceedings that determine whether a particular telephone carrier is “dominant” and thus subject to extra requirements. The latter is instructive both as to process and to the underlying standard. In a 1980 order,<sup>50</sup> the FCC described its plan to “distinguish between carriers on the basis of their dominance or power in the marketplace and apply different regulatory rules to each.”<sup>51</sup> It described the distinction between a dominant and a non-dominant carrier, writing,

[A] firm without market power does not have the ability or incentive to price its services unreasonably, to discriminate among customers unjustly, to terminate or reduce service unreasonably ...[w]e define a

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<sup>50</sup> Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor, First Report and Order, 85 F.C.C.2d 1 (1980).

<sup>51</sup> 85 F.C.C.2d 1, ¶ 15.

dominant carrier as a carrier that possess market power... A firm with market power is able to engage in conduct that may be anticompetitive or otherwise inconsistent with the public interest. This may entail setting price above competitive costs in order to earn supranormal profits, or setting price below competitive costs to forestall entry by new competitors or to eliminate existing competitors....

We have focused on certain clearly identifiable market features in order to determine whether a firm can exercise market power. Among these are the number and size distribution of competing firms, the nature of barriers to entry, and the availability of reasonably substitutable services. The presence of certain features, such as barriers to entry, may allow a firm to exercise market power.

An important structural characteristic of the marketplace that confers market power upon a firm is the control of bottleneck facilities. A firm controlling bottleneck facilities has the ability to impede access of its competitors to those facilities.... We treat control of bottleneck facilities as prima facie evidence of market power requiring detailed regulatory scrutiny.

Control of bottleneck facilities is present when a firm or group of firms has sufficient command over some essential commodity or facility in its industry or trade to be able to impede new entrants. Thus bottleneck control describes the structural characteristic of a market that new entrants must either be allowed to share the bottleneck facility or fail.<sup>52</sup>

Similar criteria—looking to market power not just on the basis of market share, but on barriers to entry, industry structure, and the control of bottlenecks—should inform the determination of whether a platform is dominant. A relevant “bottleneck” in the platform context might be access to data, an app store, or some other factor. Another criterion that should be considered is the social, economic, or political *importance* of a particular platform, which is distinct from a purely economic analysis. This includes whether cutting off a user a platform would constitute a serious loss, but may

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<sup>52</sup> 85 F.C.C.2d 1, ¶¶ 55-59.

include other considerations as well. For example, Twitter has shown itself to be *important* in ways that go beyond its market power, due to its ability to affect global affairs and political debate and its particular importance for certain professions. This may weigh into a determination of whether it is dominant.

There are some important distinction between the FCC context and the platform context. First, there are many kinds of platforms, and they each operate under different competitive conditions. Some currently-dominant platforms may find their dominance to be short-lived, while others might be more durable—natural monopolies because of network effects, high costs of entry, or other reasons. In yet other cases it may be possible to create competition through regulatory means (analogous to telecommunications line-sharing) or through antitrust. But dominant platforms should provide due process regardless of the reasons for their dominance, or how durable their dominance might be. Also, there are more different kinds of platforms than there are types of telecommunications carriers. Because the world of telecommunications carriers is comparatively small, the FCC was able to make initial classifications of various carriers and then revisit these decisions later, as circumstances change.<sup>53</sup> Such an approach may not be workable in the platform context, given the multiplicity of platforms and the different markets they serve. While it may be fairly clear at the outset that platforms such as Facebook, Google search, and the Apple app store are “dominant,” the number of platforms might make preemptive determinations for all of them quite difficult.<sup>54</sup>

The best approach that takes into account these considerations might be a hybrid one. Like antitrust, it would be complaint-driven, where a user would bring her complaint to an impartial decisionmaker. The process would involve a fact-specific analysis that permits a platform to make its case that it should not be considered “dominant” (or to concede that it is). But like some

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<sup>53</sup> 85 F.C.C.2d 1, ¶ 26.

<sup>54</sup> It is important to recall that the number of different platforms does not mean that the “platform market” is competitive. There is no platform market, and while platforms share may general characteristics they can be quite different from each other and not “substitutes” in an economic sense.

regulatory approaches, this determination, once made, would be binding,<sup>55</sup> and future users would be able to rely on it, and proceed directly to their specific claims.<sup>56</sup> This hybrid approach has the case-by-case approach's virtue of attention to specific facts, and the bright-line approach's virtue of prospective certainty.

## The Requirements of Due Process

Due process doesn't just mean that entities have to follow the procedural rules,<sup>57</sup> whatever they happen to be. Such a minimal form of protection would

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<sup>55</sup> Judicial doctrines of collateral estoppel and its cousins are no longer as strict as they once were, and non-parties can in many circumstances take advantage of final adjudications on the merits of particular claims or issues. The idea here goes beyond that, however, and a determination of "dominance" would not merely be one that could be invoked in future adversarial proceedings but one that creates affirmative obligations on the platform.

<sup>56</sup> If circumstances change sufficiently such that a platform is no longer dominant, it should also have the opportunity to make that case; also, a previous finding of non-dominance does not preclude a different user from attempting to demonstrate dominance due to changed circumstances or a different analysis.

<sup>57</sup> "Due process" comes in two flavors—procedural and substantive. Both have the same end—to protect individuals against the arbitrary action of the state. "Substantive" due process seeks to prevent governments from engaging in certain kinds of action even if all the legal formalisms are strictly followed—essentially, it is a way of ruling out government involvement in certain spheres of life, outside the scope of more explicit Constitutional rights. Decisions recognizing certain substantive due process rights remain the law of the land, but in general the doctrine is not popular today, as it is seen as a somewhat amorphous doctrine that permits judges to substitute their own policy preferences and notions of "fairness" for those of democratically-elected legislatures. Indeed, substantive due process is most notorious for providing the doctrinal means for the pre-New Deal Supreme Court to strike down various forms of economic regulation that offended its laissez-faire sensibilities. More recently this line of reasoning was used to protect BMW from having to pay punitive damages for its fraudulent behavior. *BMW of North America v. Gore*, 517 U.S. 559 (1996). At the same time the doctrine has been put to good use, for example to uphold "the liberty of parents and guardians to direct the upbringing and education of children," *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and as one ground for striking down laws against mixed race marriages in *Loving v. Virginia*, 388 U.S. 1 (1967). Most of the good applications of the doctrine of *(footnote continued)*

be no protection at all, since even the most authoritarian regimes can follow a minimum of procedural niceties (such as reading a declaration of guilt) before meting out a punishment. Instead, procedural due process specifies a number of requirements that must be met in each case to be considered fair. While procedural due process cannot guarantee a correct outcome, it can at least try to ensure a fair outcome by establishing fair procedures.

In establishing what those procedures and standards are, few authorities are clearer than Judge Friendly, already cited here extensively. In a 1975 law review article, he proposed a number of criteria that should be met to satisfy “due process.”<sup>58</sup> These will be discussed here, somewhat out of order, and sometimes paraphrased.<sup>59</sup> The question of what form this process takes (e.g., a public body, an independent non-profit, or some sort of industry-backed process) will be discussed at the end of this section.

- **Notice of proposed action and the grounds asserted for it.**

Whether a platform should give a user the opportunity to challenge a proposed action before or after it is taken depends on the nature of the alleged harm. A user who appears to be actively harming other users, for instance, may be suspended right away, but if a user is not causing an immediate and direct harm (for example, a developer who may have violated technical guidance on an app platform by using an undocumented API), the platform should probably give notice and an opportunity to challenge in advance. In both cases, however, the platform must clearly identify the alleged violations and explain with specificity how they violate the platform’s policies. Merely referring a

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substantive due process can easily be justified in terms of other constitutional provisions, but then so could the bad ones. Given this morass it is a better approach to ground the positive, substantive responsibilities of platforms in clearer terms (for example, explicit privacy requirements) while using the doctrine of due process in the platform context in its procedural variety.

<sup>58</sup> Henry J. Friendly, *Some Kind of Hearing*, 23 U. Pa. L. Rev. 1267, 1279-95 (1975).

<sup>59</sup> While Judge Friendly’s framing supposes some sort of in-person tribunal, nothing about these factors would prevent the use of an electronic or non-real time process. Thus, Friendly’s discussion of “public attendance” may not be germane and the question of judicial review depends on the nature of the tribunal, discussed below.

user to those policies or providing a formulaic notice would be insufficient.

This requirement also implies that a platform's policies be public and available to users beforehand—there can only be a “violation” of a properly-promulgated rule, not of the whim of a content moderator or platform employee.

- **Unbiased tribunal.** When a user appeals a decision, the appeal must be heard by a truly disinterested party—ideally, an independent party who is not employed by or dependent on the platform in any way. Most “arbitration” arrangements—where the arbitrator is paid by one side and depends on it for repeat business—fail this fundamental criterion. The question of what form this tribunal takes, as mentioned before, will be discussed below.
- **Opportunity to present reasons for the proposed action not to be taken.** Users must be able to argue why the proposed action to be taken against them is incorrect or disproportionate, including by reference to precedent and analogous situations.
- **The right to present evidence, including the right to call witnesses.** Users must not only have the opportunity to challenge the “four corners” of the case against them, but to introduce new evidence, context, or other material that would tend to benefit their case, and is reasonable and proportional under the circumstances.
- **The right to cross-examine adverse witnesses and the right to know the opposing evidence.** To the extent that the case against a user relies on either the judgments of a platform employee or third-party testimony of any kind, the user should be entitled to present questions to such persons, to establish their reasoning and the basis of their claims. The tribunal may be able to pre-screen questions to ensure that they are relevant and appropriate, and adopt other procedures to protect a witness when going forward with testimony might be dangerous.

Any documentary evidence that is used against a user must be made available to the user, and users must have the right to ensure that decisions against them are ultimately taken or ratified by humans.

Algorithmic decisions that cannot be adequately justified with respect to an individual user in an individual case must be discarded.

- **Opportunity to be represented by counsel—or not.** While this tribunal is not necessarily a “legal” proceeding, requirements that users represent themselves directly can be unfair and burdensome. Many users may not be versed in the particulars of advocacy in such settings, and will be at a significant disadvantage when arguing against experienced parties who work for a platform. Therefore, users should be able to designate someone to advocate on their behalf. However, users should not be required to do so, and users should be able to avail themselves of the challenge process on a *pro se* basis and without cost.
- **A decision based only on the evidence presented, with an available record of such evidence.** All of the grounds for decision must be available to the user. These requirements ensure that unspoken or assumed facts are not used to prejudice a user’s case. While the initial notice itself should spell out the facts of an alleged violation with specificity, a decision after a challenge must go further, and must not simply reiterate the initial charge. For instance, it must take account of substantial evidence or arguments the user offered and explain why they are or are not availing.
- **The tribunal to prepare written findings of fact and the reason for its decision.** Whatever decision the tribunal reaches should be written and provide the basis of its decision, including findings of fact in contested areas. Tribunals should be empowered to negate a platform’s proposed action entirely, or to impose alternative sanctions on a user if what the platform has proposed is disproportionate. Decisions can be made public with personally-identifiable or other confidential information redacted. Other users could then use such records in their own specific cases. Developing a body of precedent will help to clarify policies for both platforms and to users.

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There are many possible ways of putting these principles of due process into operation. This is closely tied with the question of whether due process requirements should be imposed by law on platforms or through other means.

At the outset, it should be noted that platforms are unlikely to fulfill the independence and impartiality requirements of due process if they run their own internal “appeal” processes.<sup>60</sup> Nor is it clear how voluntary measures could be adopted by all dominant platforms and for the full range of actions they may take that a user may wish to appeal. Voluntary industry self-regulation or multi-stakeholder governance processes may lack both the means of compelling compliance and the necessary independence and impartiality. In the American context, independent Article III courts set the gold standard for due process protections, with Article I administrative law judges and independent regulatory agencies close behind. As the great legal commenter James Kent wrote, “[t]he better and larger definition of due process of law is, that it means law in its regular course of administration through courts of justice.”<sup>61</sup> It may be that a public body with legal authority and an independent funding source may be the best way to ensure not only that dominant platform users enjoy procedural protections, but to set out baselines of substantive protection as well. Such a body would also be best positioned to issue binding judgments about which platforms meet the necessary criteria of dominance. Some mix of public authority and private implementation may also be possible, perhaps informed by the European model of co-regulation.<sup>62</sup> However, this paper does not call for any specific legislation, focusing instead on the need, justification, and requirements of due process. Proponents of various models for the implementation of due process protections need to demonstrate not only that their proposals guarantee users all the procedural protections that due process has traditionally afforded, but that their model will properly encompass the range of platforms that can cause user harms.

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<sup>60</sup> *E.g.*, Facebook’s recent announcement, discussed here: <https://newsroom.fb.com/news/2018/04/comprehensive-community-standards>.

<sup>61</sup> James Kent, *Commentaries on American Law*, Volume I, 621-22 (9th Ed. Little, Brown 1859).

<sup>62</sup> The European approach to the “right to be forgotten” is one such approach. Platforms must comply with the requirement, and if they fail to, are subject to fines. At the same time determinations of what content should be covered is up to the platforms in the first instance to decide. This approach, however, could run the risk of being over- or under-inclusive, depending on the incentive of the platform, and requires that users duplicate their effort across various platforms.

## Responses to Common Objections

As the debates over the roles of platforms in society have grown, a number of common objections to various reform proposals arise time and again. It is worth offering brief responses to these points.

- *This proposal does not benefit incumbents.*

Some may claim that regulation and consumer protection raises costs, which locks in incumbents and makes new entry more difficult. But this paper proposes that dominant platforms be subject to certain extra requirements. This does not raise costs at all for new entrants, who are not dominant. Furthermore, the requirements themselves are not specifically intended to raise costs on dominant platforms. At the same time, a dominant/non-dominant regulatory structure both creates incentives for new entry and a slight disincentive to becoming dominant, both of which are pro-competitive effects.

- *Common objections to the concept of platform dominance fail.*

Some may claim that platform markets are inherently dynamic and competitive, and that new platforms displace platforms that once seemed unassailable. This common objection fails. First, much of the progress of technology markets was driven not just by business and technology trends, but by express government intervention. Antitrust enforcement actions taken by the United States against IBM, Microsoft, and AT&T were vital in clearing the way for new competition, including “regulatory” measures such as line-of-business prohibitions and patent licensing requirements. Without these antitrust actions incumbent firms would have been able to slow or stop much of the progress that in retrospect seems inevitable.

Second, the fact that new, larger technology markets sometimes come about does not change the competitive dynamics of existing markets. Google’s Android and Apple’s iOS together are much larger than Microsoft Windows, but these are new markets, and Microsoft’s dominance of the PC operating system marketplace is as strong as ever, especially for certain types of customers. Additionally, in the online world, the growth in the number of broadband subscribers once made it relatively easy for new platforms to arise—they simply had to capture more of the growth than their competitors. Facebook did not grow primarily by taking subscribers away from Myspace, rather, it was able to eclipse Myspace by getting more new users faster. As

the number of broadband subscribers and smartphone users becomes saturated this kind of new entry becomes more difficult and competition in platform markets is more of a zero-sum game.

Third, some dominant platforms today may be natural monopolies. New entrants may face impossible economics in trying to compete, and efforts to create new competition through one-time interventions may be ineffective. Regulatory measures of one kind or another are necessary in the case of natural monopolies, either to protect consumers directly or to create competition through regulatory means (e.g., through line-sharing requirements in the telecommunications market).

Finally, even if the dominance of some platforms is short-lived, they should protect their users during the time that they are dominant.

- *Due process is complementary to, not a substitute for other policy approaches.*

Some may claim that regulation of these platforms is beside the point; they should be broken up. But as this paper has explained in numerous places, requiring that platforms afford their users due process protections is not an alternative to other remedies, but a complement to them. Likewise, antitrust action should not be viewed as an alternative to other consumer protection measures, including measures applied only to dominant providers. This is especially true given the multivariate nature of the platforms under discussion. Some platform markets may benefit from antitrust enforcement, while others may require some kind of regulation to either to promote competition or to protect consumers in its absence. It is important for policymakers to consider all the tools at their disposal and not view different approaches as in conflict with each other, since the complex nature of platforms may mean that different tools are called for in different circumstances.

## **Conclusion**

Dominant platforms can do serious harm to individual users, and given the imbalance of power between platforms and users, due process requirements—which can be quite exacting—are a way to ensure fair outcomes. The question of which platforms are “dominant” can best be answered by looking to precedent from communications law, as well as considering the importance of

the platform in question in a broader context, and the seriousness of the harm that the platform can cause to a user.

Due process, however, is not a comprehensive solution to all of the problems that dominant platforms can create. Measures to reduce dominance more generally may be one way to benefit users. Policymakers should consider how to create more competition when possible, adopting interoperability and technical standards to promote competition, and should tighten merger review. More substantive measures on privacy, data protection, and data portability should possibly be required for certain services, including dominant platforms. But when considering the problems that platforms may cause in the lives of ordinary users, the procedural protections of due process are a promising first step.