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FEDERAL RULES OF PLATFORM PROCEDURE

Rory Van Loo*

Tech platforms serve as private courthouses for disputes about speech, lodging, commerce, elections, and reputation. After receiving allegations of defamatory content in top search results, Google must decide between protecting one person’s public image and another’s profits or speech. Amazon adjudicates disputes between consumers and third-party merchants about defective or counterfeit items. For many small businesses, layoffs and bankruptcy hang in the balance. This Article uncovers the processes that these platforms use to resolve disputes, and proposes reforms. Other powerful businesses that intermediate, such as credit card companies ruling on a disputed charge between a merchant and consumer, must by federal law provide timely notice, a reasonable investigation, and other procedural minimums. In contrast, platforms have almost unfettered discretion. Under intense public pressure, Facebook recently began building an independent oversight board that can overrule content moderation decisions. But whether other platforms will follow is unclear, and Facebook’s oversight board has significant limits. If platforms are to continue as the primary arbiters of disputes in the information age, they warrant mandated procedures as did financial institutions before them. The procedures would aim to improve the administration of justice through public accountability and separation of at least one of platforms’ executive, legislative, and judicial powers.

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INTRODUCTION

In the fall of 2017, the world’s largest social network put hundreds of women in “Facebook jail,” indefinitely suspending their accounts for posting “men are scum.”¹ Such incidents have contributed to a growing realization that internet platforms are the “new governors” of speech.² But the societal impact extends beyond speech. By suspending an account, Facebook, Twitter, and other social networks can sever quarantined or vulnerable populations from their support networks.³ Amazon has swiftly destroyed many entrepreneurs’ livelihoods by delisting them.⁴ Despite being the leading referee of reputation, Google usually declines to intervene,⁵ thereby ensuring that one law student’s interviewers saw her through the lens of false accusations that she “slept her way into Yale.”⁶ The platform ecosystem wields devastating sanctions beyond silencing speech.

Additionally, the emphasis on governance obscures another institutional dimension: dispute resolution. The widespread posting of “men are scum” originated as one woman’s response to sexist comments.⁷ Amazon often delists one seller based on another seller’s or a consumer’s accusations, sometimes fabricated for self-serving purposes.⁸ From the perspective of one of these small merchants, “Amazon is the judge, the jury, and the executioner.”⁹ Although scholars analogize platforms to “sovereign states,” the focus is not on how these entities handle disputes.¹⁰ Since a platform is a site “where interactions are materially and

¹ Simon van Zuylen-Wood, “Men Are Scum”: Inside Facebook’s War on Hate Speech, VANITY FAIR (Feb. 26, 2019), <https://www.vanityfair.com/news/2019/02/men-are-scum-inside-facebook-war-on-hate-speech>.

² See, e.g., Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1625-49 (2018) (describing how moderators, acting in “a private self-regulatory system to govern online speech,” enforce the rules they create for their users); Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1357 (2018) (analyzing the constitutional concerns with content moderation by online platforms and advocating for Congressional action to limit the reach of this content moderation); Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L.Q. 235, 278 (2014) (“Digital speech intermediaries possess and exercise a new kind of control over the speech of individuals, associations, groups, and communities.”).

³ See *infra* Section I.B.

⁴ See *infra* Section I.A.

⁵ *Infra* Part I.D. (discussing Google’s role in reputation markets).

⁶ See Caitlin Hall, *Swimming Downstream: Battling Defamatory Online Content via Acquiescence*, 19 YALE J.L. & FEMINISM 287 (2007) (describing how after her acceptance to Yale Law School became known in online admission boards the author was subjected to harassment by strangers that a job interviewer later referenced).

⁷ See van Zuylen-Wood, *supra* note 1.

⁸ Dzieza, *supra* note 9 (describing a fake review setup by a competitor that succeeded in suspension).

⁹ Josh Dzieza, *Prime and Punishment*, THE VERGE (Dec. 19, 2018) <https://www.theverge.com/2018/12/19/18140799/amazon-marketplace-scams-seller-court-appeal-reinstatement> (quoting a small business owner who went through Amazon’s dispute process).

¹⁰ See, e.g., Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 199-201 (2017) (analyzing how platforms’ “role in the international legal order increasingly resembles that of sovereign states”); Klonick, *supra* note 2, 1641-42 (focusing on platforms’ executive and legislative functions, including

algorithmically intermediated,”¹¹ the inattention to dispute resolution has left a vital organ of power in the information age underappreciated.

This Article begins to fill that gap by illuminating the inner workings of what has become society’s most important private judicial system. Drawing on official company policies, unofficial complaint forums, interviews, and other sources, it provides case studies of the dispute processes designed by Airbnb, Amazon, Facebook, and Google.¹² It then offers a framework for reforming those internal civil procedures.

This project builds upon and integrates three remarkably distinct strands of scholarship. The most directly in dialogue is that on platform governance—one of the most vibrant, visible, and vast bodies of literature over the past few decades.¹³ Scholars in this area have emphasized that platforms such as Twitter, Facebook, Google, and Amazon exert quasi-public influence over commerce, speech, elections, and myriad other spheres of activity.¹⁴ Those analogies between platforms and governments provide normative foundations for procedural regulation because the Due Process Clause constrains state actors’ rulings.¹⁵ The comparisons also implicitly show why platform dispute resolution merits greater

promulgating and enforcing rules). A related analogy paints platforms as administrative agencies—which, like states, have executive, legislative, and adjudicatory functions. *See, e.g.*, Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 29 (2019) (arguing that “platforms are acting as regulators” and “are performing quintessentially administrative functions”); Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1272-74 (2017) (discussing platforms’ regulatory and quasi-legislative function); *infra* Part III.E. (discussing the analogy to administrative agencies). These and other scholars discuss dispute resolution by platforms along the way to larger projects. *See sources supra; see also* JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 7, 143 (2019) (exploring “the design of dispute resolution systems and institutions for the era of informational capitalism.”); Aluma Zernik, *The Invisible Hand, the Regulatory Touch, or the Platform’s Iron Grip?*, (work-in-progress) <https://ssrn.com/abstract=3490884>.

¹¹ Cohen, *Law for the Platform Economy*, *supra* note 10, at 136.

¹² Given the limits of interviews and desire of most to remain confidential, wherever possible a publicly available source was used instead.

¹³ For a review and categorization of early works in this vein, see Lawrence B. Solum, *Models of Internet Governance*, in INTERNET GOVERNANCE: INFRASTRUCTURE AND INSTITUTIONS 48, 57-58 (2009); for more recent examples, see, e.g., *supra* note 10.

¹⁴ *See, e.g.*, LAWRENCE LESSIG, CODE 5 (2d ed. 2006) (observing that computer “code is cyberspace’s law.”); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1632 (2018) (observing that platforms can “exercise[] quasi-sovereign authority and influence over not only workers but the economy and society as a whole”); Ganesh Sitaraman, *Regulating Tech Platforms: A Blueprint for Reform*, GREAT DEMOCRACY INITIATIVE 3, 5 (2018), <https://greatdemocracyinitiative.org/wp-content/uploads/2018/03/Regulating-Tech-Platforms-final.pdf> (comparing tech platforms providing “essential services” to public utilities); Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. FORUM 335, 336 (2014) (warning of platforms’ ability to shape elections); *see also supra* note 10.

¹⁵ Danielle Citron’s groundbreaking call for technological due process showed how constitutional principles could broadly be applied to technology. That concept will be explored in greater depth below, although Citron’s original work can be distinguished because it was not focused on tech platforms or dispute resolution and relies on administrative agencies as the government analog. It nonetheless provides valuable foundations on which this Article builds. *See* Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1249 (2008) (arguing that administrative agencies’ use of technology should be subjected to due process); Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 23 (2014) (concluding due process is needed for automated scores produced by those creating credit scores, without discussing dispute resolution function or online platforms). One of the Article’s contributions is extending the due process analysis to platforms’ dispute resolution system. Section III.A.

attention. The U.S. Constitution divides authority among three branches. To focus only on the state as a whole, with passing references to the judicial branch, would insufficiently explicate how the state governs. If the pervasive analogies between platforms and governments are to be taken seriously, platforms' judicial role must be taken seriously as well.

Platform procedure also speaks to a second, far less visible body of scholarship: alternative dispute resolution (“ADR”). ADR scholars have begun to use technology to operationalize procedural justice in businesses—especially cross-border marketplaces like Amazon and eBay.¹⁶ But they have mostly emphasized how companies can voluntarily adopt informal, non-adjudicatory mechanisms for improving dispute resolution—such as online mediation, which allows the parties to work it out.¹⁷ They pay less attention to how the law might require firms to improve formal adjudicatory processes.¹⁸

The ADR literature sits in tension with the third foundational strand of scholarship, procedural privatization. Both strands share a broadly defined goal of access to justice.¹⁹ But whereas ADR scholars embrace alternatives to courts, procedural privatization scholars, mostly from the perspective of civil procedure and contracts, tend to critique the inability to access courts.²⁰ They have filled volumes documenting the problems surrounding a particular type of ADR: mandatory arbitration.²¹ In contrast to ADR scholars' emphasis on confidentiality, privatization scholars decry arbitration's lack of transparency.²² Procedural

¹⁶ See generally TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (summarizing the procedural justice literature suggesting that process heavily influences perception of legitimacy); Orna Rabinovich-Einy & Ethan Katsh, *Technology and the Future of Dispute Systems Design*, 17 HARV. NEGOT. L. REV. 151, 198 (2012) (arguing for “novel approaches” to integrating technology into dispute resolution).

¹⁷ See, e.g., Amy J. Schmitz, *There's an “App” for That: Developing Online Dispute Resolution to Empower Economic Development*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 43 (2018); Heather Scheiwe Kulp & Amanda L. Kool, *You Help Me, He Helps You: Dispute Systems Design in the Sharing Economy*, 48 WASH. U. J.L. & POL'Y 179, 216 (2015). For an early take on online dispute resolution, see David A. Hoffman and Salil K. Mehra, *Wikitruth Through Wikiorder*, 59 EMORY L. J. 151, 170-74 (2009).

¹⁸ But see Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REG. 547, 560 (2016) (describing the internal dispute processes of American Express, Amazon, and other platforms and proposing regulatory oversight).

¹⁹ See, e.g., Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940, 2942, 2992 (2015) (exploring the tensions between ADR proponents and their critics).

²⁰ See, e.g., David Horton, *Arbitration About Arbitration*, 370 STAN. L. REV. 363, 370 (2018) (arguing that the combination of arbitration clauses and delegation clauses, which allow arbitrators to delegate whether arbitration should proceed, has allowed “corporations [to] draft[] around [the] prophylactic layer of judicial review”); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Court, and the Erasure of Rights*, 124 YALE L.J. 2804, 2936 (2015) (arguing that the new reliance on a private, arbitral judicial system works as “an unconstitutional deprivation of litigants' property and court access rights”).

²¹ Mandatory arbitration refers to the practice of businesses inserting clauses into their form contracts that require consumers to use arbitration for any disputes. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (“[C]ourts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.” (internal citations omitted)). There have been numerous symposia and collections on the topic. See, Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593 (2005) (publishing as part of a *Stanford Law Review* symposium emphasizing class actions and arbitration); Kessler, *supra* note 19 (writing as part of a *Yale Law Journal* collection on mandatory arbitration); Roger H. Trangsrud, *Class Actions and Access to Justice*, 82 GEO. WASH. L. REV. 595, 596 (2014) (referring to a symposium at George Washington).

²² See Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of*

privatization scholars have also painted binding arbitration as “a clandestine effort to tilt the scales of justice,”²³ resulting in “an unconstitutional deprivation of litigants’ property and court access rights.”²⁴ As this Article shows, similar critiques can be made of platform procedure.

An integration of those three rich literatures is more than academic. Creating a judicial system with predictable procedures was pivotal to establishing a government built on laws: “The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.”²⁵ Tech platforms have created a judicial system that plays an increasingly centralized role in maintaining public order. In significant contexts where financial platforms serve as gatekeepers for vital participation in society, federal laws regulate dispute resolution.²⁶ For instance, for-profit credit bureaus—whose credit reports determine whether someone can obtain employment, receive a loan, or rent an apartment—must provide timely notice to each party and conduct reasonable investigations.²⁷

The time has come to consider analogous rules for large online platforms (called “platforms” below). A more imaginative legislative agenda would go beyond transparency to consider a broader array of procedures, such as user class actions and an independent appeals board. These mandates would provide an accountability structure for platforms’ formidable power to punish.

Part I surveys how tech platforms resolve disputes. Part II provides reference points by examining existing mandates on platform procedure for credit card companies, credit bureaus, and online publishers. Because the literature has devoted the least attention to designing solutions, Part III comprises the bulk of the Article’s discussion. It begins to sketch a system for platform dispute resolution and provides options for specific rules, such as limitations on platforms’ termination of accounts.

Before turning to the main discussion, several points of clarification are in order. This Article’s core question—how to reform private dispute resolution—requires weighing economic, social, and moral factors. There is no uniformly embraced or rigorous equation for determining whether additional expenditures on an extra layer of procedure are worth the added equity or impartiality. Moreover, markets can pressure businesses to advance procedural justice, as I have argued elsewhere.²⁸ The dynamic nature of platform procedure makes intervention more precarious.

These and other analytic constraints are revisited in greater depth in the final section on objections. They are important and not to be dismissed lightly. The

Civil Procedure at 75, 162 U. PA. L. REV. 1793, 1821 (2014) (“[T]he promise of confidentiality is a linchpin of ADR’s appeal . . .”).

²³ Horton, *supra* note 20, at 440.

²⁴ Resnik, *supra* note 20, at 2936.

²⁵ Cox v. Louisiana, 379 U.S. 536, 554 (1965).

²⁶ *Infra* Part II.B. (outlining the procedures mandated for credit card companies and credit bureaus.).

²⁷ 15 U.S.C. §1681 (2018); *infra* Section II.B.2.

²⁸ See Van Loo, *The Corporation as Courthouse*, *supra* note 18 (arguing that with the right competitive pressures some large companies’ private dispute processes offer people voice, speed, and often better outcomes than the law would provide).

indeterminacy means that readers will, perhaps based on their priors, inevitably come to different defensible conclusions on the best path forward. At the same time, it is valuable to recognize that the reservations to legal action are in many ways universal to the challenge of regulating new industries, faced before in oil, banking, transportation, and elsewhere. And the difficulty in knowing the value of an extra layer of procedure was surely the case at the founding of the U.S. judicial system. This Article aims to highlight some of those similarities and provide a richer institutional account, which will inform the coming construction of a regulatory architecture for platforms. Additionally, although I believe that the law should mandate at least some procedural reforms, platforms could in the alternative adopt them voluntarily. The structures and rules below thus offer a menu of options that both private sector designers and public policy makers can use to build a more effective system of platform justice.

I. PUNISHMENT BY PLATFORM

The roots of platform sanctions lie not in public courts, but in private ordering. Even when platforms' arbitration clauses do not block access to courts, the time and expenses involved make the formal legal system "effectively unavailable to all but wealthy individuals and businesses."²⁹ Moreover, courts defer to platforms' internal rules for controlling user conduct.³⁰ Below are case studies of those rules at four leading tech platforms, each representing a category: Amazon and other marketplaces join buyers and sellers, Facebook and other social media companies connect users and followers, Airbnb and other sharing economy enterprises pair customers and servicers, and Google and other search engines link information seekers to publishers.³¹

A. Marketplace Platforms: Amazon

Third-party merchants account for more than half of Amazon's sales.³² Initially, Amazon strove to minimize its involvement in disputes between sellers and consumers. In response to numerous early complaints about offensive book listings, the company announced that "Amazon believes it is censorship not to sell certain books simply because we or others believe their message is objectionable."³³ As another example, when buyers clicked on the link for filing a refund claim or leaving negative feedback, Amazon provided a pop-up notice saying, "You must

²⁹ See Gillian K. Hadfield, *Innovating To Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 DAEDALUS 83, 84 (2014).

³⁰ See, e.g., *Prager Univ. v. Google LLC.*, No. 19CV340667, 2019 LEXIS 2034, at *1 (Cal. Super. Nov. 19, 2019) (concluding that Google had no obligation to provide equal access based on ideology to earning money through YouTube); see also Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807, 1844 (2012) ("United States law permits a large measure of freedom for Facebook to set the terms of Facebookistan.").

³¹ Although platforms are blurring the distinctions between these categories as they expand, the nature of the relationships facilitated informs the disputes they resolve. On the blurring lines, see *infra* note 288 to 290 and accompanying text.

³² Joshua Fruchter, *Amazon Takes Aim at Patent Infringement in its Marketplace*, NAT'L L. REV. (July 12, 2019), <https://www.natlawreview.com/article/amazon-takes-aim-patent-infringement-its-marketplace> (putting the figure at fifty-eight percent).

³³ David Streitfeld, *Amazon Takes on Nazis, Book by Unsold Book*, N.Y. TIMES, Feb. 10, 2020, at A15.

contact the seller before filing a claim.”³⁴ Now, however, book banning by Amazon has become common.³⁵ And Amazon has developed an extensive and largely automated internal adjudicatory system that handles hundreds of millions of disputes annually, more than all U.S. courts combined.³⁶

The stakes can be high for these adjudications. The company’s main sanctions are product bans and account terminations.³⁷ Many merchants have built their entire operations around Amazon’s promise of providing access to mass markets.³⁸ When merchants suddenly lose access, it can leave them scrambling. Three-quarters of Amazon’s third-party sellers have between one and five employees.³⁹ As one former Amazon employee, whose full-time job is now helping merchants navigate the Amazon appeals process, put it, “If they don’t get their Amazon account back, they might be insolvent, laying off 10, 12, 14 people, maybe more. I’ve had people begging me for help. I’ve had people at their wits’ end. I’ve had people crying.”⁴⁰

How are these suspensions and terminations determined? An algorithm typically flags an account for suspension, but a human is often involved later in the process, particularly once someone appeals the suspension. Amazon identifies problematic sellers partly through an algorithm that monitors “defective” orders. An algorithm flags sellers for having a high defective order rate, and Amazon deactivates accounts with defect rates above one percent.⁴¹ The buyer makes an order defective by (1) leaving negative feedback, (2) filing a claim with Amazon, or (3) requesting that the credit card company reverse the transaction.⁴²

For negative feedback, ratings of one or two stars out of five are considered defective.⁴³ Merchants can immediately challenge feedback with a few clicks on Amazon’s Feedback Manager portal.⁴⁴ An Amazon bot then takes the first pass at determining whether to remove the feedback. For instance, the bot erases feedback containing profane language—including, in at least one case, the word “damn.”⁴⁵

³⁴ Tara Johnson, *How to Deal With Amazon A-to-Z Claims*, TINUITI (Aug. 31, 2018), <https://tinuiti.com/blog/amazon/amazon-a-to-z-claims/>.

³⁵ See Streitfeld, *supra* note 33.

³⁶ See, e.g., AMY J. SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION* 9-12 (2017) (comparing dispute volumes).

³⁷ See generally Jane K. Winn, *The Secession of the Successful: The Rise of Amazon as Private Global Consumer Protection Regulator*, 58 ARIZ. L. REV. 200-02 (2016) (providing an overview of enforcement mechanisms at Amazon).

³⁸ Scott Shane, *Amazon’s Expansive, Creeping Influence in an American City*, N.Y. TIMES, Dec. 1, 2019, at A1.

³⁹ Fruchter, *supra* note 32 (putting the figure at seventy-three percent).

⁴⁰ Dzieza, *supra* note 9.

⁴¹ *Order Defect Rate*, AMAZON SELLER CENT. HELP, <https://sellercentral.amazon.com/gp/help/G200285170> (last visited Jan. 15, 2020) (Amazon seller account login required).

⁴² *Id.*

⁴³ *About Feedback Manager*, AMAZON SELLER CENT. HELP, https://sellercentral.amazon.com/gp/help/external/help.html?itemID=761&language=en_US&ref=xx (last visited Jan. 15, 2020) (“Negative feedback: 2 or 1 stars”).

⁴⁴ See *id.* (“In View Current Feedback you can . . . Request removal of incorrect feedback (depending on certain cases).”).

⁴⁵ See *Feedback Removal Win!*, AMAZON SELLER CENT. FS., <https://sellercentral.amazon.com/forums/t/feedback-removal-win/427603> [<https://perma.cc/K8X4-PECE>] (last visited Jan. 15, 2020).

The bot also looks for certain words, such as “defective,” that indicate the review may be valuable, and thus more important to preserve even if a seller complains.⁴⁶ Merchants can respond to the feedback, so that anyone viewing the post will get both sides of the story.⁴⁷ However, merchants’ formal options for removal are overall limited, and the site is plagued by fake reviews.⁴⁸

A separate dispute resolution process unfolds when buyers request a refund. Under its guarantee program, Amazon provides refunds to buyers if an item does not arrive within three days of the expected delivery date, the buyer received the wrong item, or the buyer returned the item to the merchant without receiving a refund.⁴⁹ If the item meets one of these criteria, Amazon deducts the funds from the seller’s account.⁵⁰ The seller receives an email detailing the buyer’s grievance and must respond within three days.⁵¹ Based on a review of this information, Amazon decides whether to rule for the buyer or seller. If the platform decides to uphold the refund request, merchants can appeal within 30 days by providing further evidence.⁵² Although a high “defective order rate” is a primary avenue for account suspension, a seller can file a complaint about another seller by clicking a “Report abuse” link.⁵³ Amazon is notoriously quick to freeze accounts at the first sign of an issue.⁵⁴

That readiness to suspend accounts allows sellers to exploit the dispute resolution process to sabotage competitors. Sellers create fake glowing reviews on competitors’ sites, aiming to trigger Amazon’s automated policing system that continually monitors for suspicious entries.⁵⁵ Even merchants who have recognized the ploy, and attempted to alert Amazon to the presence of such fake positive reviews on their product pages, have still found their accounts suspended.⁵⁶ In one case, Amazon delisted a small seller because its rival, Snuggle Pet Products, alleged that the seller’s puppy sleep aid infringed on patents.⁵⁷ The claim was spurious, based on one unenforceable patent from 1895 and another for an unrelated Japanese

⁴⁶ *Can Amazon Remove Buyer Feedback?*, AMAZON SELLER CENT. HELP, <https://sellercentral.amazon.com/gp/help/20231> (last visited Jan. 15, 2020) (Amazon seller account login required) (noting that Amazon will remove feedback upon merchant request if it is profane, solely about the product rather than the purchase experience, or uses personally identifiable information).

⁴⁷ *See About Feedback Manager*, *supra* note 43.

⁴⁸ Gregory Magana, *Amazon is Beset by False Product Reviews*, BUS. INSIDER (Apr. 17, 2019, 10:26 AM), <https://www.businessinsider.com/amazon-fake-product-review-problem-2019-4> (explaining that Amazon has struggled to reliably automate the identification of fake reviews).

⁴⁹ *About A-to-z Guarantee*, AMAZON HELP & CUSTOMER SERV., <https://www.amazon.com/gp/help/customer/display.html?nodeId=201889410> (last visited Feb. 4, 2020).

⁵⁰ *Id.*

⁵¹ Pooja Vishant, *An Amazon Seller’s Guide to A-to-Z Guarantee Claims*, MEDIUM (Sept. 15, 2016), https://medium.com/@pooja_ios/an-amazon-sellers-guide-to-a-to-z-guarantee-claims-cd61bd48f943.

⁵² *Id.*

⁵³ *Amazon Community Guidelines*, AMAZON, https://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-3?ie=UTF8&nodeId=201929730&qid=1526424694&sr=1-3 (last visited Jan. 18, 2020).

⁵⁴ *See Dzieza*, *supra* note 9 (describing how Amazon’s first move is to freeze a seller’s account with its initial notification of a problem before the appeals process begins).

⁵⁵ *See, e.g.,* Magana, *supra* note 48 (“Amazon has deleted thousands of reviews to minimize fakes.”).

⁵⁶ *See Dzieza*, *supra* note 9.

⁵⁷ Complaint at 2, *Wanna Play Prods. Inc. v. Emery*, No. 00010-AT (N.D. Ga. 2020).

“combustion device.”⁵⁸ But the puppy sleep aid vendor had to go to federal court to make its case, and in the meantime lost considerable sales from the suspension of its best-selling item.⁵⁹ Amazon responded in 2019 by launching a patent adjudication system relying on patent lawyers as third-party adjudicators.⁶⁰

Although some terminations are permanent, sellers have the opportunity to appeal.⁶¹ The burden rests on the suspended account holder to satisfy Amazon regarding the alleged behavior by submitting a “plan of action to reinstate selling privileges.”⁶² To help navigate a bewildering process, law firms and consulting practices have sprung up dedicated to “Amazon reinstatement.”⁶³ For some categories of disputes—such as allegedly fake reviews—the company’s process rewards sellers who admit guilt and explain how they will rectify the behavior moving forward, like a convicted criminal offering a reentry plan.⁶⁴

Amazon is one of many online marketplaces, such as eBay and Alibaba, operating extensive and high-volume dispute processes.⁶⁵ It is difficult to know the truth and representativeness of any particular depiction of an erroneous or unfair outcome. Still, unproven allegations are an almost necessary initial step toward governmental investigation and action in almost any sphere. Either way, these private judicial systems are worthy of attention due to their magnitude, transparency limits, and ruinous sanctions. In the words of one former Amazon employee, “it is a system of guilty until proven innocent.”⁶⁶

B. Social Platforms: Facebook

Suspending accounts and taking down content are everyday events in major social networks. In the 2018 “Grab Them By The Ballot” campaign, organizer Dawn Robertson sought to increase voter turnout by posting untouched images of women of all ages who were nude except for, say, a small balloon covering a private part.⁶⁷ The campaign took off but also received intense criticism and complaints from large numbers of users on Facebook and Instagram.⁶⁸ The networks responded by suspending Robertson’s accounts.⁶⁹ Because Facebook can “engineer” elections

⁵⁸ *Id.* at 26.

⁵⁹ *Id.* at 38.

⁶⁰ Kaity Y. Emerson, *From Amazon’s Domination of E-Commerce to Its Foray into Patent Litigation: Will Amazon Succeed As “The District of Amazon Federal Court”?*, 21 N.C. J. L. & TECH. 71 (2019).

⁶¹ *Create a Plan of Action to Reinstate Selling Privileges*, AMAZON SELLER CENT. HELP, https://sellercentral.amazon.com/gp/help/external/G201623610?language=en_US (last visited Jan. 15, 2020) (Amazon seller account login required).

⁶² *Id.*

⁶³ *See, e.g.*, AMAZON SELLER SUSPENSION ATTORNEYS, <https://www.amazonsellersattorney.com> (last visited Feb. 12, 2020) (describing the firm as “Amazon Seller Suspension Attorneys”).

⁶⁴ Dzieza, *supra* note 9 (describing the defense strategy of admitting guilt even when innocent).

⁶⁵ Rob Enderle, *EBay vs. Amazon: An Interesting Lesson in Customer Care*, IT BUS. EDGE (Jan. 19, 2012), <https://www.itbusinessedge.com/cm/blogs/enderle/ebay-vs-amazon-an-interesting-lesson-in-customer-care/?cs=49557&page=2> (recounting an experience of eBay freezing a buyer’s account).

⁶⁶ Telephone Interview with Former Amazon Employee Chris McCabe (Feb., 2020).

⁶⁷ Barbara Ortutay, *Does the Naked Body Belong on Facebook? It’s Complicated*, ASSOCIATED PRESS (Jan. 15, 2020), <https://apnews.com/135c7643a84fe1916ef6a0fd166e65e2>.

⁶⁸ *Id.*

⁶⁹ *Id.*

and increasingly influences decisions such as whether to vaccinate children,⁷⁰ there are few more pressing tasks for democracy than figuring out access and misinformation on social networks.

In addition to cutting off vital avenues for speech and sharing information, account termination may deprive a user of valuable property. One Facebook user's account was "permanently disabled" after his brother passed away. Because he used his Facebook account to save most of the pictures he had of his brother, he lost access to them.⁷¹ In another case, a writer in New York slowly built the pieces of her book on Instagram only to have her account suspended indefinitely due to an alleged copyright violation for only a tiny portion of her photos.⁷²

In its early days, Facebook—which owns Instagram—relied heavily on users flagging questionable behavior to moderate content and suspend accounts.⁷³ Now it relies heavily on a "classifier," or bot, to flag problematic content and accounts, trained on employees' removal practices.⁷⁴ Once suspended or terminated, the user faces obstacles to rejoining even with a fake account. Facebook has what it calls "advanced detection systems" that swiftly deactivate a new account linked to a previously suspended party even if opened with a different email, on a different computer, and in a different location.⁷⁵

Traditionally, Facebook gave, at best, a vague explanation for suspending an account. It might simply state the reason as "suspicious activity."⁷⁶ However, the company's approach shifted beginning in 2018, as the social network came under intense public and bipartisan congressional criticism for its censorship, election influence, and privacy missteps.⁷⁷ In the wake of those challenges, to improve transparency the company made the unusual decision to publish its content takedown procedures, which it contended had "long been in place."⁷⁸ Facebook committed to publishing any changes in a searchable archive.⁷⁹ Further, Facebook said it would notify the poster of any removed comment.⁸⁰ The poster then has the option of challenging that decision, at which point, within 24 hours, the original decision will be reviewed by a human.⁸¹ For instance, after content moderation algorithms flagged many posts about the coronavirus from legitimate information

⁷⁰ See Zittrain, *supra* note 14, at 336/.

⁷¹ See, e.g., Kashmir Hill, *Locked Out by Facebook, and Pounding on the Door*, N.Y. TIMES, Aug. 25, 2019, at BU5.

⁷² Telephone Interview with Instagram User A.

⁷³ See, e.g., Van Zuylen-Wood, *supra* note 1 (describing how initially takedowns were initiated by consumer complaints).

⁷⁴ Mike Schroepfer, *New Progress in Using AI To Detect Harmful Content*, Nov. 13, 2019, <https://ai.facebook.com/blog/community-standards-report> (explaining classifiers).

⁷⁵ See, e.g., Hill, *supra* note 71.

⁷⁶ *Id.*

⁷⁷ See, e.g., Philip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 75-76 (2018) (describing congressional response to Cambridge Analytica's use of social media data to construct voter profiles).

⁷⁸ Monika Bickert, *Publishing Our Internal Enforcement Guideline and Expanding Our Appeals Process*, FACEBOOK NEWSROOM (Apr. 24, 2018), <https://about.fb.com/news/2018/04/comprehensive-community-standards/> [hereinafter *Facebook Enforcement Guidelines*].

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

sources—such as from *USA Today*—a large volume of complaints prompted the company to fix the underlying bug in the code that had caused the problem.⁸² Thus, fourteen years into its existence Facebook began offering an internal appeals system.⁸³

The company similarly resisted addressing misinformation at first, but under pressure pursued a middle ground. Facebook prefers not to remove content, and instead limits the distribution of spurious posts and of all content by accounts repeatedly found to share fake news.⁸⁴ The company is thus the ultimate “arbiter of truth and falsity in the practical sense that it chokes off distribution of purportedly false content.”⁸⁵ But it bears emphasis that it makes those determinations as a third party—not only because users help to identify material in need of a closer look, but also because Facebook has partnered with independent fact checkers, including the Associated Press.⁸⁶ Those fact-checkers reflect court-appointed neutrals allowed in the federal rules.⁸⁷

Facebook acknowledges that its “enforcement isn’t perfect.”⁸⁸ And those subject to the ultimate punishment—expulsion—have often found the processes inadequate. That inadequacy has driven many desperate users to seek alternatives. Another suspended user went to Facebook’s careers website, but instead of submitting a job application, petitioned for account reinstatement.⁸⁹ A human resources employee responded to clarify that job postings were inappropriate for such a request—but the employee still resolved the issue.⁹⁰

Those desperate for a second look at their case now have another option. Originally described by Zuckerberg as a kind of “Supreme Court,” the new Oversight Board has the authority to overrule content moderation decisions by applying the companies’ policies and weighing the “public interest.”⁹¹ Facebook users can request that the Board review other users’ posts, putting the board in a dispute resolution position.⁹² The Board will also issue public explanations for its rulings and value the precedent set by prior decisions.⁹³ Because it remains in its infancy and is the first of its kind, the Board’s ultimate contribution to Facebook’s platform procedure is unknown. But it is one of several reforms that have moved

⁸² Josh Rivera, *Facebook Appears To Be Flagging Coronavirus Posts as ‘Spam’*, USA TODAY, Mar. 17, 2020, <https://www.usatoday.com/story/tech/2020/03/17/facebook-appears-marking-coronavirus-posts-spam/5074787002>.

⁸³ *Id.*

⁸⁴ See, e.g., Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1523 (2019) (summarizing Facebook’s approach to misinformation). It also has begun providing links to alternative perspectives. *Id.*

⁸⁵ Sarah C. Haan, *Facebook’s Alternative Facts*, 105 VA. L. REV. ONLINE 18, 25 (2019).

⁸⁶ *Id.* at 1539.

⁸⁷ FED. R. EVID. 706.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See, e.g., Evelyn Douek, *Facebook’s “Oversight Board:” Move Fast with Stable Infrastructure and Humility*, 21 N.C. J. L. & TECH. 1, 16 (2019).

⁹² OVERSIGHT BOARD CHARTER, FACEBOOK 4-5 (2019), https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf.

⁹³ *Id.* at 6.

Facebook towards procedural justice in the “age of alternate facts.”⁹⁴

C. Sharing Platforms: Airbnb

Airbnb leverages the threat of account suspension to maintain quality control, stating that it suspends accounts if a host rejects too many reservations, responds too slowly, or receives low ratings.⁹⁵ A broader set of foundations for suspension include complaints from guests about specific incidents. For example, one host’s account was blocked after she said to her black guests, “Which monkey is going to stay on the couch?”⁹⁶

Although most cases are not so clear-cut, Airbnb states that it does not need to justify the reasons behind its suspensions.⁹⁷ The lack of explanation frustrates hosts, many of whom have shared their stories on a website for grievances by guests and hosts, *airbnbHELL*.⁹⁸ Sometimes the company mentions a vague rationale for locking an account, such as “security reasons,” without providing further explanation.⁹⁹ Because many people rely on Airbnb income to pay their bills, and some purchase homes depending on that income to pay the mortgage, mistakes can lead to missed payments and even foreclosure.¹⁰⁰ More so than Facebook’s, Airbnb’s adjudications implicate property interests analogous to those in traditional constitutional due process proceedings.¹⁰¹

Airbnb’s sanctions also include marking the host’s account. For instance, users will see a notification on a listing if the host has previously canceled a reservation within 24 hours.¹⁰² These procedures punish the host for conduct assumed to have caused a prospective guest discontentment, even in the absence of a complaint.¹⁰³

Guests have also found their accounts suspended. Cadence Lux, an adult performer who used the site to find a safe place to sleep while traveling, had her account closed unexpectedly.¹⁰⁴ Airbnb also denied her from opening an account

⁹⁴ Cf. Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 219 (2018) (discussing the stakes of and responses to the decline of object facts).

⁹⁵ *Why Was My Listing Paused or Suspended?*, AIRBNB, <https://www.airbnb.com/help/article/1303/why-was-my-listing-paused-or-suspended> (last visited Oct. 17, 2019).

⁹⁶ *Racist Airbnb Host to Black Guests: ‘Which Monkey Is Going to Stay on the Couch?’*, NEWSONE (June 1, 2019), <https://newsone.com/3853562/racist-airbnb-host-slur/>.

⁹⁷ See, e.g., Kelly Kampen, *AirBNB Why Did You Terminate My Account – An Open Letter to AirBNB*, MEDIUM (Aug. 20, 2015), <https://medium.com/@kellykampen/airbnb-why-did-you-terminate-my-account-an-open-letter-to-airbnb-9631213f8a1b>.

⁹⁸ See, e.g., *Account Deleted After Guest Used Dodgy Credit Card*, AIRBNBHELL (May 29, 2019), <https://www.airbnbhell.com/account-deleted-after-guest-used-dodgy-credit-card/>; Rikster, Comment to *Superhost Account Removed for “Security” Reasons*, AIRBNBHELL (June 2, 2019) <https://www.airbnbhell.com/superhost-account-removed-for-security-reasons/> (“I think its [sic] disgusting how they can do this without giving a reason and a chance for us to resolve.”).

⁹⁹ *Id.*

¹⁰⁰ James Dobbins, *Making a Living with Airbnb*, N.Y. TIMES, Apr. 7, 2017, at RE1 (describing New York residents who depend on supplemental income from Airbnb to cover living expenses, home upkeep, and retirement savings).

¹⁰¹ See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 70 (1972) (finding a due process violation for a sheriff’s seizure of consumer goods without a hearing).

¹⁰² See, e.g., *Superhost Account Removed for “Security” Reasons*, *supra* note 98.

¹⁰³ See Violet Blue, *Your Online Activity Is Now Effectively a Social ‘Credit Score.’* ENGADGET (Jan. 17, 2020), <https://www.engadget.com/2020/01/17/your-online-activity-effectively-social-credit-score-airbnb>.

¹⁰⁴ *Id.*

under her legal name, stating that her identity was “associated with activities that pose a risk to the Airbnb community.”¹⁰⁵ Similar interference with people’s ability to travel affordably and safely—if adopted widely in the travel industry—could lessen freedom of movement and equal treatment that many take for granted.

Lux’s termination illustrates a predictive dispute-prevention strategy. An Airbnb patent describes artificially intelligent technology that scans people’s online life to “determine a trustworthiness score or compatibility score of the person based on the behavior and personality trait metrics using a scoring system.”¹⁰⁶ The tool can lower a score if the user has “authored online content with negative language, or has interests that indicate negative personality or behavior traits.”¹⁰⁷ Airbnb explains how it uses this technology on its website, stating, “We use predictive analytics and machine learning to instantly evaluate hundreds of signals that help us flag and investigate suspicious activity before it happens.”¹⁰⁸ Another way of viewing this technology is as a means of preventing others from having negative experiences—or preventing disputes from ever arising. An individual classified as risky has no recourse or even visibility into the grounds for that determination.

D. Search Platforms: Google

The results of search engines such as Google exert a tremendous influence on people’s reputations and speech visibility.¹⁰⁹ That responsibility requires Google to intermediate disputes between seekers, providers, and subjects of information. For instance, fans disgruntled with the final season of *Game of Thrones* manipulated Google search results so the two lead writers’ names would appear first when anyone searched for “bad writers.”¹¹⁰ The tactics used, known as “Google bombing,” have numerous high-profile successes, such as yielding President George W. Bush as the top listing when anyone entered “miserable failure” following his widely criticized disaster-relief response to Hurricane Katrina.¹¹¹ Google admits in its official blog that it sometimes intervenes directly to squash these efforts, although it has not disclosed how it reaches those decisions.¹¹²

Google bombing illustrates a point of differentiation from Amazon, Facebook, and Airbnb. In most instances, only one of the parties has established a contractual relationship with Google related to the dispute. Amazon and Facebook certainly implicate third parties external to their platforms, through the sale of counterfeit

¹⁰⁵ *Id.*

¹⁰⁶ U.S. Patent No. 9,070,088 (filed Sept. 16, 2014).

¹⁰⁷ *Id.*

¹⁰⁸ *What Does it Mean When Someone’s ID Has Been Checked?*, AIRBNB, <https://www.airbnb.com/help/article/2356/what-does-it-mean-when-someones-id-has-been-checked> (last visited Jan. 20, 2020).

¹⁰⁹ See Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115, 127 (2006).

¹¹⁰ Jon Porter, *Angry Redditors Are Trying to Google Bomb Game of Thrones Writers*, VERGE (May 15, 2019), <https://www.theverge.com/2019/5/15/18624480/game-of-thrones-google-bomb-db-weiss-david-benioff>.

¹¹¹ Noam Cohen, *Google Halts ‘Miserable Failure’ Link to President Bush*, N.Y. TIMES, Jan. 29, 2007, at C6.

¹¹² *A Quick Word About Google Bombs*, GOOGLE WEBMASTER CENTRAL BLOG (Jan. 25, 2007), <https://webmasters.googleblog.com/2007/01/quick-word-about-googlebombs.html>.

goods or postings about non-users.¹¹³ But the core conflicts for those other platforms directly result from both parties voluntarily participating in the platform. Inclusion in a Google search requires no such consensual participation. *Game of Thrones* writers cannot exempt themselves from being discussed on web pages and small businesses have no say in whether Google allows users to rate them on a five-point scale.

One of the fundamental tensions giving rise to search disputes is between website publishers seeking prominence and the subjects of those sites wanting privacy—or at least accuracy. Google’s ruling on what to leave prominent determines commercial success, dating prospects, and hiring decisions.¹¹⁴ Its quasi-judicial role is prominent in Europe because lawmakers have created a “right to be forgotten,” requiring search engines to decide whether each request to delist a web page satisfies the statutory conditions.¹¹⁵ Less well understood from a dispute resolution perspective is that even in the U.S. Google similarly intermediates. Upon request, the company delists explicit content and sensitive information, including financial and medical data.¹¹⁶ It also considers petitions to expunge sites that engage in “exploitative removal practices,” such as requiring people to pay to eliminate mugshots.¹¹⁷

Google has made requests to take down approved categories of information relatively easy for users. The user clicks through a series of online forms with straightforward, multiple-choice questions such as, “Have you contacted the site’s webmaster?” and “I want to remove...” followed by a list of categories of information.¹¹⁸

Although filing requests is relatively seamless, the company has also wholly withdrawn itself from adjudicating large categories of disputes. Google does not delist business review websites, such as RipoffReport.com, even if they engage in exploitative behavior.¹¹⁹ Thus, websites can force a mom-and-pop shop to pay to avoid having its reputation tarnished. The search engine has similarly refused to involve itself in disputes related to its ubiquitous Google business review pages, which allow anyone to rate businesses on a five-star scale.¹²⁰

Like with Amazon reviews, competitors and consumers have weaponized Google reviews.¹²¹ Some who are not even customers of the business have

¹¹³ See *infra* Part III.C.1. (offering procedural rules to address harm to non-users).

¹¹⁴ See, e.g., Pasquale, *supra* note 109 (describing the importance of search engines “in a world where dates, employers, and even casual acquaintances ‘google’ the individuals they meet and companies they do business with”).

¹¹⁵ See Eldar Haber, *Privatization of the Judiciary*, 40 SEATTLE U. L. REV. 115, 116 (2016) (showing how in Europe the right to be forgotten has put search engines in a quasi-judicial role).

¹¹⁶ *Remove Information from Google*, GOOGLE SEARCH CONSOLE HELP, <https://support.google.com/webmasters/answer/6332384?hl=en>.

¹¹⁷ *Id.*

¹¹⁸ *Remove Content About Me on Sites with Exploitative Removal Practices from Google*, GOOGLE SEARCH HELP, <https://support.google.com/websearch/answer/9172218> [hereinafter *Exploitative Removal Practices*].

¹¹⁹ *Exploitative Removal Practices*, *supra* note 118.

¹²⁰ Ratings go through an approval process, applying considerations such as use of inappropriate language. *Flag and Fix Inappropriate Content*, MAPS USER CONTRIBUTED CONTENT POLICY, https://support.google.com/contributionpolicy/answer/7445749?hl=en&ref_topic=7422769 (last visited Feb. 21, 2020).

¹²¹ *Supra* Part I.A.

demanded payment to refrain from leaving negative feedback, and many small businesses have found their revenues plummet upon the appearance of allegedly fake Google reviews.¹²² For instance, Gee McCracken built a web-based weight reduction company that grossed over a million dollars in sales annually, but what she insists are inauthentic reviews scared away her customers.¹²³ After contacting Google, she summarized her experience by saying, “I could not get anyone to listen to me.”¹²⁴ Her company dissolved, along with her life savings.¹²⁵ Google’s official policy pages reinforce McCracken’s observation, by announcing that “Google doesn’t get involved when merchants and customers disagree about facts, since there’s no reliable way to discern who’s right about a particular customer experience.”¹²⁶

Shielded by the Communications Decency Act,¹²⁷ the search engine also long declined requests to delist defamatory statements, hate speech, and misinformation.¹²⁸ Google thus has attempted to stay neutral in the face of an emerging “post-truth society” in which “what is true matters less than what we want to be true.”¹²⁹ Following public backlash because the top result “for a search of ‘jew’ was the URL jewwatch.com, a site featuring anti-Semitic content,” Google responded that “it does not ‘remove a page from [its] search results simply because its content is unpopular or because we receive complaints concerning it.’”¹³⁰ The company has softened that stance somewhat in recent years and now demotes hate speech and related content, but still strives to avoid involvement in conflicts among seekers, subjects, and publishers of information.¹³¹ Indeed, even when courts have ordered Google to take down content, the company is as likely to ignore the court order as comply.¹³² Google essentially operates as a higher authority, reviewing *de novo* the accuracy and desirability of state and federal court defamation rulings.¹³³

Notably, Google’s early content architects describe their operations in legal terms. The original takedown policies arose organically, but erred heavily on the side of free speech and accessibility. Over time, users and content moderators—sometimes pressured by the public—flagged issues that challenged existing policies, and the team would then escalate to a set of content decision makers.¹³⁴

¹²² “I’ve Lost Everything”: Small Businesses Claim Fake Online Reviews Killing Them, CURRENT AFFAIR (Dec. 2019), <https://9now.nine.com.au/a-current-affair/online-reviews-crush-businesses-owners-claim-fake-feedback-ruining-lives/5e57ff37-beda-47ca-b8f6-a4c075dcfe24>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ 47 U.S.C. § 230 (2012).

¹²⁸ *Bennet v. Google, LLC*, 882 F.3d 1163, 1165-67 (D.C. Cir. 2018) (outlining Google’s policies and legal protections).

¹²⁹ *Cf. Larsen, supra* note 94, at 175 (discussing the post-truth society but not Google’s role as guardian).

¹³⁰ Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship*, 91 B.U.L. REV. 1435, 1471-72 (2011).

¹³¹ Deirdre K. Mulligan & Daniel S. Griffin, *Rescripting Search to Respect the Right to Truth*, 2 GEO. L. TECH. REV. 557, 568-69 (2018) (summarizing Google’s approach to anti-Semitic content).

¹³² *Government Requests to Remove Content*, GOOGLE TRANSPARENCY REPORT, <https://transparencyreport.google.com/government-removals> (last visited Feb. 16, 2020).

¹³³ This follows from the company’s frequent noncompliance with court orders. *Id.*

¹³⁴ Telephone Interview with Former Google Employee A (Feb., 2020).

For instance, by the late 2000s, for YouTube video takedowns the ultimate content determinations went to a committee of three of the company's most senior executives.¹³⁵ That committee would rule on the policy, including opining on specific cases, such as whether videos extolling weed should be allowed.¹³⁶ Although the people have changed and layers were added, that basic internal appeals structure still exists, beginning with front-line content moderators and escalating up through bosses to—in some extreme cases—the CEO.¹³⁷ The rest of the organization “adjudicates” those updated policies aiming for “consistency” and “following precedent.”¹³⁸ The process evokes images of the founding of a legal system.¹³⁹

In at least one other way, however, Google's process is very different from the U.S. court system: limited visibility for those punished. Unlike a merchant on Amazon, a business owner listed in Google's rating pages, or whose website appears in its searches, has no account with Google unless it is an advertiser. But Google has maintained a sharp separation between its search and advertising arms, and thus for purposes of search treats those with advertising accounts no differently.¹⁴⁰ Thus, unlike users subjected to sanctions by other major platform categories, those demoted in search results will not learn about that development upon signing into their account. A business must search for itself to learn of its demotion.¹⁴¹ Moreover, Google's silence makes it impossible for a company that suddenly finds itself on page four of the results instead of page one to know whether it dropped on the merits or out of punishment.

In short, Google is more than a neutral provider of search results. Its status as the world's most important information gatekeeper thrusts it into the middle of disputes. Compared to Amazon, Facebook, and Airbnb, Google more extensively avoids dispute resolution by exempting whole categories of conflict and often cutting accused parties out of the process. Even when refusing to adjudicate, Google is in a courthouse-like role. After all, some courts can refuse to hear cases. When lower-level employees have subject matter jurisdiction, they apply rules established by chief-level executives and clarified by internal case history. The complainant may wait hoping for the demotion of degrading content, unaware that moderators already denied the petition. Those whose speech has disappeared may not know they were even part of a secretive adjudicatory process until after Google renders a verdict.

E. Summary of Platform Adjudication

¹³⁵ See, e.g., *Id.* (describing the committee for YouTube issues as including Zahavah Levine, YouTube General Counsel; Hunter Walk, Director of Product Management, Heather Gillette, Head of User Operations; and Micah Shaffer, of Policy Abuse Legal).

¹³⁶ *Id.* (explaining that lower level employees convinced the committee that YouTube videos involving weed were an important part of the Internet).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Infra* Part III.B.1. (discussing precedent).

¹⁴⁰ *Cf.*, Pasquale, *supra* note 109, at 125-29 (analyzing the structure of Google).

¹⁴¹ Allyson Haynes Stuart, *Google Search Results: Buried If Not Forgotten*, 15 N.C. J. L. & TECH. 463, 503 (2014) (discussing Google decisions to demote material).

Most large platforms have developed intricate and extensive procedures for adjudicating disputes—or for declining to do so. These online systems implicate real-world livelihoods—the ability to work, travel, socialize, speak publicly, and stay reputable. Unlike federal courts’ procedural rules, however, platforms’ rules are influenced by an economic analysis that prioritizes profit. In part for this reason, platforms originally sought to cut costs by letting parties handle disputes themselves—and to the extent possible, continue to prefer that approach today.

From those laissez-faire origins, large online intermediaries have developed organizational tools to act swiftly and decisively, sometimes after only one event. Their sanctions—as with courts—may be either monetary or injunctive. Marketplace platforms choose between these two sanctions, and can immediately debit merchants’ accounts to reflect the outcome of consumer claims. Platforms that do not as routinely process transactions, such as Google and Facebook, have more limited monetary remedies. They and marketplace platforms instead wield the ability to block access to the commercial world or a means of public speech and visibility in the digital age.

There is no guarantee that a human will hear a case. Platforms can adjudicate through algorithmic assessments of current and past behavior—including unrelated behavior from myriad external data points collected by other tech companies, such as social media posts. Akin to an accused criminal receiving notice that a prosecutor has pressed charges, users may suddenly receive initial notifications that they have violated an Amazon, Airbnb, or Facebook rule. In the best-case scenario, the users may then have the opportunity to respond. However, often the first communication is more like a trial court judge’s initial ruling. At that point, often the only avenue is an appeal—whether formal or informal—with an assumption of guilt rather than innocence. The expanded privatization of American justice through platforms’ internal dispute systems deserves scrutiny.

II. EXISTING PLATFORM PROCEDURE

One of the key policy decisions moving forward is the extent to which platform decision-making will remain private. This Part lays the foundations for that inquiry by reviewing the existing federal laws imposing significant procedural oversight for credit card billing errors, credit report mistakes, and copyright violations. These laws’ successes and failures will later inform the template for new platform procedures.

A. Credit Card Companies as Adjudicators

Like Amazon and Airbnb, many financial institutions operate as platforms in that they facilitate transactions between two independent parties. For instance, when Los Angeles resident Elah Feder found a new apartment the landlord asked her to transfer the \$1,500 deposit through Venmo, a mobile payment app.¹⁴² Thirty

¹⁴² Alexi Horowitz-Ghazi, *The Cost Of Getting Your Money Back*, PLANET MONEY, June 26, 2019, <https://www.npr.org/transcripts/736352315>.

minutes later, she received a message: “Pretty sure you have the wrong person.”¹⁴³ Feder had accidentally spelled her landlord’s name as Stephen, instead of Steven.¹⁴⁴ However, Stephen refused to return the money unless instructed to do so by Venmo.¹⁴⁵ Nor would Venmo intervene, despite the written admission from the recipient stating that it was a mistake.¹⁴⁶ Mistaken transfers are common on Venmo, but the company simply tells the transferor to “send a message through the app.”¹⁴⁷ Ultimately, getting money back on Venmo depends on a lawsuit or the kindness of strangers who received an unexpected windfall.¹⁴⁸

Mistakes are also common with credit card purchases. Through the 1960s, credit card companies often ignored consumers’ protests about merchant billing errors or fraud.¹⁴⁹ That response left the consumer simultaneously fending off a credit card company demanding payment and an antagonistic retailer. Now, however, credit card users can fix problems like the one that Feder faced easily and immediately.

The 1974 Fair Credit Billing Act mandated that any consumer who uses a credit card be able to challenge an erroneous charge, for reasons including not receiving the goods, having received goods that did not conform, or being the victim of fraud.¹⁵⁰ Because credit card companies have existed for considerably longer than tech platforms, they provide examples of one type of platform’s developed dispute resolution systems. Normally by pressing a button on the credit card’s website and filling out a few online forms,¹⁵¹ the consumer initiates that process, known as a “chargeback” because the card issuer immediately subtracts the disputed balance from the amount owed by the consumer.¹⁵² The process ultimately requires the credit card issuer to rule for one side.

Before ruling against a consumer, the credit card issuer must at least conduct a “reasonable investigation” within 90 days and explain to the consumer the reasons for rejecting the claim.¹⁵³ Moreover, upon request, the credit card issuer needs to provide documentary evidence for why it rejected the claim.¹⁵⁴ Although mandated, the credit card company’s adjudication gets its authority not from any public law, but from the contract, in which the consumer and merchant agree to subject themselves to the chargeback process.¹⁵⁵

Courts have interpreted the statutory requirements as imposing minimal

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Telis Demos, *It’s Finders Keepers, Losers Weepers on Venmo*, WALL ST. J., July 12, 2018, at A1. The company may also send a message to the transferee on behalf of the transferor. *Id.*

¹⁴⁸ *Cf. id.* (discussing the reliance on goodness of others).

¹⁴⁹ Jan Logemann, *Different Paths to Mass Consumption: Consumer Credit in the United States and Germany During the 1950s and ‘60s*, 41 J. SOC. HIST. 525, 539 (2008) (noting the reasons for growing public desire for industry regulation).

¹⁵⁰ 15 U.S.C. § 1666(b)(2) (2018).

¹⁵¹ *See, e.g.*, Schmitz, *supra* note 17.

¹⁵² 15 U.S.C. § 1666(b)(2) (2018).

¹⁵³ *Id.* (requiring an investigation and notice within the lesser of 90 days or two billing cycles); 12 C.F.R. § 226.13(f) (requiring a reasonable investigation).

¹⁵⁴ 12 C.F.R. § 226.13(f)(2).

¹⁵⁵ 15 U.S.C. § 1666(b) (2018).

burdens on both disputing parties. In *Burnstein v. Saks Fifth Avenue*, the plaintiff submitted a chargeback claim because she believed that Saks had billed her twice for the same jackets and pants.¹⁵⁶ She had flagged the duplicate transactions on the phone to Saks Fifth Avenue, but the credit card issuer argued that she had failed to specify the exact dollar amounts in her formal letter to the company.¹⁵⁷ The court rejected that argument: “The utility of the [statutory] dispute resolution scheme would be greatly diminished if a creditor could simply throw up its hands and opt out of the statutory process upon encountering any ambiguity or lack of specificity in a consumer’s claim.”¹⁵⁸ The ease of triggering the statutory process increases access to dispute resolution for unsophisticated consumers.

Credit card issuers also receive considerable leeway in how they fulfill their requirements. Courts typically decline to second-guess the substantive outcomes of chargeback investigations—or as the *Burnstein* court put it, “There is . . . no penalty for ‘wrong guesses’ made in good faith.”¹⁵⁹ Federal law “establishes only the procedural framework for dispute resolution, and does not concern itself with the substantive outcome of this process.”¹⁶⁰ Following that influential ruling, courts have interpreted the requirement that credit card issuers undertake a “reasonable investigation” as requiring only “a reasonable attempt to investigate.”¹⁶¹

ADR scholars have criticized chargebacks as insufficient because of limited consumer awareness and the lack of opportunity for amicable settlement.¹⁶² Some have also taken issue with the remedies, which do not allow for damages beyond a refund.¹⁶³ There are inevitable abuses in providing consumers with an “undo button,” as demonstrated by one married couple who initiated a chargeback after the wedding because the colors on their wedding cake were too bright.¹⁶⁴ But the baker ultimately received payment after submitting photos of the couple and guests laughing and eating the cake, along with screenshots of guests raving about the dessert.¹⁶⁵ The process thus ensures that both sides have the chance to respond to baseless accusations.

Scholars in fields outside of ADR, especially consumer advocates, view chargebacks more positively. One of the main goals for chargebacks was providing a mechanism for consumer protection.¹⁶⁶ Among consumers who use chargebacks,

¹⁵⁶ 208 F. Supp. 2d 765, 767-68 (E.D. Mich. 2002).

¹⁵⁷ *Id.* at 774.

¹⁵⁸ *Id.* at 775.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See, e.g., *Pierce v. JP Morgan Chase Bank, N.A.*, No. 11-00102-KD-M, 2012 U.S. Dist. LEXIS 118030, at *19-20 (S.D. Ala. Aug. 21, 2012) (“There is . . . no penalty for ‘wrong guesses’ made in good faith . . .”).

¹⁶² See, e.g., Schmitz, *supra* note 17, at 16-19.

¹⁶³ Louis Del Duca et al., *Facilitating Expansion of Cross-Border E-Commerce—Developing A Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems—Work Of The United Nations Commission On International Trade Law)*, 1 PENN ST. J. L. & INT’L AFF. 59, 70-72 (2012).

¹⁶⁴ Horowitz-Ghazi, *supra* note 142.

¹⁶⁵ *Id.*

¹⁶⁶ Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. DISP. RESOL. 675, 691 (2000) (observing that the apparent attractiveness of the chargeback process is that it provides customer protection through leverage with merchants, thereby partially equalizing the otherwise unequal bargaining power).

satisfaction is high—they rarely complain about the process or bring suits.¹⁶⁷ Part of this satisfaction stems from financial institutions’ strong legal incentive to rule in favor of consumers, which allows them to avoid investigating.¹⁶⁸ An estimated eighty to ninety percent of consumers are successful upon bringing a chargeback.¹⁶⁹

Regardless of whether consumers win, however, chargebacks provide them leverage through a dispute resolution mechanism that is free, accessible, and fast.¹⁷⁰ The law prevents questionable practices, such as responding to the chargeback by submitting or threatening to submit a negative report about the consumer’s credit record.¹⁷¹ And the immediate reversion of funds into the consumer’s account serves as a kind of temporary injunction, preventing a cash-strapped borrower from having to pay a crushing and inaccurate debt—or be subject to collection efforts—until resolution of the matter.¹⁷² Chargebacks also give a voice to consumers who otherwise would have no plausible avenue for being heard.¹⁷³

Nor have those benefits to consumers necessarily come at the expense of merchants. Another principal goal of the system was facilitating commerce by fostering trust. Because consumers feel secure in using credit cards, merchants benefit from increased sales, and financial institutions earn revenue from a greater number of transactions.¹⁷⁴ Moreover, issuers automate much of the process of resolving chargeback disputes, using artificial intelligence, which lowered costs compared to the earlier prevailing option of disputing a canceled check.¹⁷⁵

Thus, although chargebacks may fall short of relationship-oriented processes embraced by ADR scholars, they are quick and efficient while still allowing both sides to submit evidence. The case of credit cards illustrates how a category of platforms has successfully implemented a private dispute resolution system because of government directive.

B. Credit Bureaus as Adjudicators

¹⁶⁷ Louis F. Del Duca et al., *Ebay’s De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers*, 6 Y.B. ARB. & MEDIATION 204, 208 (2014) (observing the rarity of consumer complaints); Perritt, *supra* note 166, at 691 (noting that “consumers rarely are motivated to go beyond the chargeback process to more formal forms of dispute resolution”). However, at least one study of National Arbitration Forum cases found that 9% were related to credit card chargebacks. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. DISP. RESOL. 843, 924 (2010).

¹⁶⁸ 15 U.S.C. 1666(b).

¹⁶⁹ Gregory Karp, *Consumers Have Powerful Tool in Credit Card Chargebacks*, NERDWALLET (Feb. 16, 2017), <https://www.nerdwallet.com/blog/credit-cards/credit-card-chargebacks> (putting the figure at 90 percent in the U.S.); SRAVAN KUMAR, *The Murky World of Chargebacks*, CHARGE BEE BLOG (Aug. 4, 2019), <https://www.chargebee.com/blog/murky-world-chargebacks> (putting the figure at 79 percent globally).

¹⁷⁰ *Id.* at 691-92.

¹⁷¹ 12 CFR § 226.13(d)(2).

¹⁷² § 226.13(d)(1).

¹⁷³ Perritt, *supra* note 166, at 692.

¹⁷⁴ John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 IND. L.J. 893, 977 (1999) (arguing that the chargeback process facilitates e-commerce by enhancing consumers’ willingness to enter these transactions).

¹⁷⁵ VISA, VISA CLAIMS RESOLUTION: EFFICIENT DISPUTE PROCESSING FOR MERCHANTS 6 (2017), <https://usa.visa.com/dam/VCOM/download/merchants/visa-claims-resolution-efficient-dispute-processing-for-merchants-VBS-14.APR.16.pdf> (stating that Visa will use artificial intelligence to “identify and block disputes that do not meet the necessary criteria for the selected dispute category”).

The big three credit bureaus, Equifax, Experian, and TransUnion, make decisions about disputes between third parties.¹⁷⁶ These three companies provide credit reports, accompanied by a FICO score, for almost every American adult. The reports consist of information mostly from financial institutions, including credit card companies' details about late payments or maxed out card limits—either of which would drive someone's credit score down.¹⁷⁷ The bureaus mediate conflicts when the third party reports information that the consumer believes is inaccurate, and wants removed from the record. The subjects of their disputes most closely resemble those of search engines: misinformation and reputation.¹⁷⁸

The stakes of these disputes are immense. Credit reports inform decisions including whether someone qualifies for loans, credit cards, and bank accounts.¹⁷⁹ About half of employers also pull credit reports before hiring someone, and landlords check them before renting to a tenant.¹⁸⁰ For these reasons, observers have remarked that someone who has lost their good credit navigates society with a Scarlet Letter and is “dead to the world.”¹⁸¹ That characterization is sometimes literally true. In one case, the court upheld James McKeown's lawsuit against Equifax for failing to adequately process his dispute about information on his record provided by the department store Sears.¹⁸² Sears had reported McKeown as deceased, which made it difficult for him to obtain a loan.¹⁸³

In part to ensure that such disputes “function fairly, accurately, and efficiently,”¹⁸⁴ Congress passed the Fair Credit Reporting Act of 1970.¹⁸⁵ Under the Act, consumers have the right to inspect their reports.¹⁸⁶ Upon request, credit bureaus must disclose “key factors” that may have negatively affected a consumer's score,¹⁸⁷ essentially requiring an explanation of the potential reasons for any credit denial. Upon receiving a consumer complaint, they also must “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”¹⁸⁸ The statute thus sets in motion a compulsory dispute resolution process with the credit bureau as an intermediary between the consumer and the furnisher of credit information, such as a bank reporting the non-payment of a loan.

Once the consumer has produced information contradicting the credit bureau, courts have interpreted the statutory investigation mandate as necessitating

¹⁷⁶ See, e.g., Stephen Gardner, *Credit Reports: Basic Rights and Responsibilities of Creditors and Consumers*, 59 CONSUMER FIN. L.Q. REP. 248, 253-55 (2005).

¹⁷⁷ *Id.* at 262.

¹⁷⁸ *Supra* Part I.D.

¹⁷⁹ JOHN R. FONSECA, *HANDLING CONSUMER CREDIT CASES* 445 (3d ed. 1986).

¹⁸⁰ *Id.* at 448-50.

¹⁸¹ Gardner, *supra* note 176, at 249.

¹⁸² *McKeown v. Sears Roebuck & Co.*, 335 F. Supp. 2d 917, 924 (W.D. Wis. 2004).

¹⁸³ *Id.* at 925.

¹⁸⁴ Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Finance and Urban Affairs, 102d Cong. 20 (1991) (statement of David Medine, Associate Director for Credit Practices, FTC).

¹⁸⁵ 15 U.S.C. § 1681 (2018).

¹⁸⁶ § 1681i(a)(2)(B) (mandating access to “all relevant information regarding the dispute”).

¹⁸⁷ § 1681g(f)(1)(C).

¹⁸⁸ § 1681e(b). The rating agency is expected to notify the consumer of the results of the investigation within thirty days. § 1681s-2(a)(8)(E)(iii).

additional verification beyond the original source.¹⁸⁹ In *Dennis v. BEH-1*, Experian listed in a credit report a prior debt collection lawsuit against Jason Dennis by his landlord as successful.¹⁹⁰ That description matched the court register's erroneous initial description of the case, but the court clerk later correctly filed the final entry as "Dismissal Without Prejudice."¹⁹¹ Dennis informed Experian that its listing was incorrect, and Experian obtained the final stipulation between Dennis and his landlord through a contractor who described Experian's information as accurate.¹⁹² The court held that Experian fell "far short" of reasonable diligence because instead of looking at the file in its possession, it relied on the top-level mistaken assertion of the contractor.¹⁹³ When consumers take the unusual step of filing a lawsuit, courts have proven willing to uphold claims of unreasonable procedures.¹⁹⁴

The resulting system is far from perfect. A high number of consumers' files—25% in one study—have material errors that could influence the credit score.¹⁹⁵ Furthermore, observers have argued that the procedures required of credit bureaus provide inadequate transparency and fail to impose liability sufficient to discourage bureaus from conducting a rubber stamp investigation.¹⁹⁶

Despite these flaws, the procedural mandates may still be helping if the error rate and procedural injustices would otherwise be even higher. Moreover, credit bureaus have different incentives than do credit card companies and most tech platforms. Most notably, whereas users can leave most online networks,¹⁹⁷ they cannot opt out of having credit reports collected about them. As a result, like Google, credit bureaus have weaker incentives than either credit card companies or Amazon, Airbnb, and Facebook to design dispute resolution processes that appeal to consumers.

Notwithstanding these differences, the case of credit bureaus is instructive in weighing analogous mandates for online platforms. The discussion below draws on shortcomings in the credit bureau system to improve the proposed design for online intermediaries.¹⁹⁸ Additionally, credit bureaus provide another example of congressional willingness to impose procedures on platforms that play a central role in many spheres of human activity. The FCRA's legislative history reveals that the act's drafters intended "to protect an individual from inaccurate or arbitrary

¹⁸⁹ See, e.g., *Pinner v. Schmidt*, 805 F.2d 1258, 1262 (5th Cir. 1986) (finding it unreasonable to re-verify only by contacting the same person who submitted the contested information); *Bryant v. TRW, Inc.*, 689 F.2d 72, 75, 79 (6th Cir. 1982) (concluding that making two phone calls to reconfirm the original information was inadequate).

¹⁹⁰ *Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1068 (9th Cir. 2008).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 1070-71.

¹⁹⁴ See *Miller v. Wells Fargo & Co.*, No. 3:05-CV-42-S, 2008 WL 793683, at *6 (W.D. Ky. Mar. 24, 2008) (holding that a long delay in removing information "may indicate a failure to employ reasonable procedures to assure maximum possible accuracy").

¹⁹⁵ Mary Spector, *Where the FCRA Meets the FDCPA: The Impact of Unfair Collection Practices on the Credit Report*, 20 GEO. J. ON POVERTY L. & POL'Y 479, 485-86 (2013).

¹⁹⁶ See, e.g., *id.* at 486-88.

¹⁹⁷ The ease of exit should not be exaggerated. Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1199 (2018) (arguing that "exit from a platform may be costly because of network effects").

¹⁹⁸ See *infra* Part III. (drawing on credit rating legislation to design platform procedure).

information.”¹⁹⁹ Online platforms are susceptible to related challenges.²⁰⁰ Congress was particularly concerned about the increasing speed of information transfer—already, in 1970—raising the potential for injustice and significant injuries. Credit bureau regulations demonstrate that an information gatekeeper’s harsh mistakes can drive procedural legislation.

C. Platforms as Copyright Adjudicators

Businesses lose billions of dollars annually because websites share copyrighted materials without payment.²⁰¹ Congress did not want the fear of copyright violations to have a chilling effect on the internet, so instead of punishing a platform when a third party posts illegal content, the Digital Millennium Copyright Act of 1998 (DMCA) established a detailed process to resolve disputes between the alleged copyright holder and alleged copyright infringer.²⁰²

When a platform, or other online publisher of third-party information, receives a compliance notice that material on its site violates copyright law, to be protected from liability it must remove the material “expeditiously.”²⁰³ Disney sent out a barrage of these takedown requests to Etsy, Vulture, and other sites for wildly popular Baby Yoda merchandise listed shortly after the beloved character’s initial appearance in *Mandalorian*.²⁰⁴ After receiving these takedown notices, the platform is instructed to notify the alleged infringer of the takedown and send any “counter notice” from that party to the alleged copyright holder.²⁰⁵ The online service provider then can place the material back on the Internet and still avoid liability if the accuser does not file a lawsuit within ten days.²⁰⁶ The DMCA thus puts online service providers into the role of a private adjudicatory system, coordinating communications between the two parties and ultimately administering a ruling on whether to delete the content and terminate accounts for repeat infringement.²⁰⁷

The law has had the intended effect of shielding publishers from litigation, as “the vast majority of [takedown] notices likely are never subject to the scrutiny of a court.”²⁰⁸ Instead, the system emphasizes efficiency.²⁰⁹ Most large companies

¹⁹⁹ Pinner v. Schmidt, 805 F.2d 1258, 1261 (5th Cir. 1986).

²⁰⁰ *Infra* Part III.A.

²⁰¹ Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”?* Takedown Notices Under Section 512 of the Digital Millennium Copyright Act, 22 SANTA CLARA COMPUT. & HIGH TECH. L.J. 621, 622 (2006).

²⁰² *Id.*

²⁰³ 17 U.S.C. § 512(g)(2)(B) (2018).

²⁰⁴ See Chaim Gartenberg, *Disney is Hunting Down the Most Popular Baby Yoda Toys on Etsy*, VERGE (Jan. 17, 2020), <https://www.theverge.com/2020/1/17/21069124/baby-yoda-dolls-etsy-disney-mandalorian-copyright-takedown-enforcement> (explaining the popularity resulting from Disney’s holding back of releasing its own merchandise to avoid spoiling the character’s appearance).

²⁰⁵ 17 U.S.C. § 512(g)(2)(C).

²⁰⁶ *Id.*

²⁰⁷ § 512(i).

²⁰⁸ Urban & Quilter, *supra* note 201, at 631.

²⁰⁹ See Peter S. Menell & Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 J. LEGAL ANALYSIS 1, 25 (2013) (concluding that the DMCA “provides copyright owners with relatively efficient means for blocking dissemination of infringing copies”).

automate the takedown process, creating chaotic “algorithmic law enforcement.”²¹⁰ Online publishers must respond to large numbers of automated notices by other companies, with Google alone receiving half a billion takedown requests in 2015.²¹¹ Companies holding significant copyrights also often err on the side of challenging content, such as one movie studio’s automated system sending a takedown request for a school student’s book report about Harry Potter posted online.²¹²

From a dispute resolution standpoint, the copyright regime is flawed.²¹³ The online publisher’s default response is to take down content to avoid liability, without, for example, stopping to analyze whether it should instead leave up an original 45-second stop-action Lego movie produced by a 10-year-old boy.²¹⁴ This has encouraged the internet’s growth by lessening the likelihood that online content publishers will be sued for third-party copyright violations. But empirical evidence indicates that large companies abuse the takedown process, often causing the removal of perfectly legal content.²¹⁵

One of the DMCA’s major shortcomings is the counter notice provision, which aims to protect the content poster by allowing it to respond to the takedown request.²¹⁶ A large-scale survey found that parties rarely send counter notices, in part because “the typical target of a DMCA complaint has little or no knowledge of copyright law, and little capacity to make informed estimates of the risks attendant on filing a counter notice.”²¹⁷ The few who do use the counter notice provision may be copyright pirates, from locations such as Russia and the Ukraine, who know the copyright holder will not file a lawsuit in their foreign jurisdiction.²¹⁸

Like with credit card chargebacks,²¹⁹ the DMCA incentivizes a particular outcome. Specifically, to qualify for safe harbor liability protection, the platform should resolve the dispute in favor of the last party to comply with the statutory sequence of back-and-forth communications.²²⁰ The copyright holder has the last shot because if it files a lawsuit, the platform must take down the material to benefit from the liability shield.²²¹ The platform could decide to leave the material up if it thought the case was invalid, but it would be taking a risk in doing so.

Although flawed, obligatory copyright dispute resolution expands the sphere of

²¹⁰ Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 479, 506 (2016).

²¹¹ Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 VA. J.L. & TECH. 369, 460-61 (2014).

²¹² Dineen Wasylik, *Take Down Abuse: From Harry Potter to LEGOs*, DPW LEGAL: INTELL. PROP. & APPEALS (Feb. 7, 2014), <http://ip-appeals.com/take-down-abuse-from-harry-potter-to-legos>.

²¹³ See Jennifer M. Urban et al., *Notice and Takedown in Everyday Practice* 9-13 (UC Berkeley Pub. Law Research Paper No. 2755628, 2017), <https://ssrn.com/abstract=2755628> (describing studies concerning copyright notice and takedown processes).

²¹⁴ *Id.*

²¹⁵ Sharon Bar-Ziv & Niva Elkin-Koren, *Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown*, 50 CONN. L. REV. 339, 344, 376 (2018) (reviewing the literature and providing new data on copyright takedown misuse).

²¹⁶ Urban et al., *supra* note 213, at 44.

²¹⁷ *Id.* at 45.

²¹⁸ *Id.* at 46.

²¹⁹ *Supra* note 168 and accompanying text.

²²⁰ 17 U.S.C. § 512(g)(2) (2018).

²²¹ § 512(g)(2)(C) (requiring also that the copyright holder notify of the lawsuit).

mandated procedures beyond financial institutions. The DMCA demonstrates that large online platforms already must comply with a complex, federally mandated procedural system for at least one type of dispute. The Act also indicates how a failure to consider power and information asymmetries—particularly how wealthy firms might coopt the system—can undermine the ideals of balanced dispute resolution.

Procedural directives are not limited to the contexts discussed in this Part. Laws also require insurers, and non-intermediaries such as airlines, to take specific steps in resolving conflicts with their customers.²²² The array of examples normalizes a policy intervention that might otherwise seem strange and extreme: treating a private company like a public entity forced to follow detailed compulsory procedures in resolving customer disputes. The discussion below will draw on these examples in exploring the design and normative foundations for a broader set of federal rules.

III. ENHANCED PLATFORM PROCEDURE

The challenges posed by platform dispute resolution demand a rethinking of the absence of procedural oversight in the tech sector other than for copyright issues. Two main questions frame the path forward. First, what are the normative foundations for new mandates? Second, what might such mandates entail?

A. Normative Foundations for Mandating Platform Procedure

The discussion so far offers normative foundations by analogy. In response to preliminary evidence of flawed dispute resolution in other important platform contexts, lawmakers have imposed procedural minimums.²²³ With their opacity, provocation of discontent, and crushing sanctions, Amazon, Facebook, Google, and other online platforms arguably offer insufficient dispute resolution.²²⁴ In light of the similarities to financial platforms, Congress could decide to impose procedural mandates on tech platforms.

Although the policy case could rest on that analogy, the decision on whether to intervene would benefit from a deeper normative framework. Constitutional law offers a relevant lens through due process.²²⁵ To be clear, as a matter of constitutional law, due process protections do not apply because platforms are not

²²² Daniel Schwarcz, *Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict*, 83 TUL. L. REV. 735, 761 (2009) (“[M]ost states mandate relatively well-developed internal grievance processes for health insurers.”); 14 C.F.R. § 250.9 (requiring airlines to provide written explanations for denying a passenger from boarding).

²²³ See *supra* Part II.

²²⁴ See *supra* Part I.

²²⁵ For examples of applying due process to related issues other than the type of platform dispute resolution that is the focus of this Article, other than the early work of Danielle Citron mentioned *supra* note 15, see, e.g., Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework To Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93, 93 (2014) (applying due process to predictive privacy analytics); Kristen E. Eichensehr, *Digital Switzerlands*, U. PA. L. REV. 665, 722-23 (2019) (asking whether technology companies should be held to similar standards as governments, such as due process); Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 196 (2000) (applying due process to the Digital Millennium Copyright Act).

public actors.²²⁶ The doctrine nonetheless supplies a framework for providing minimum procedural safeguards before depriving someone of liberty or property.²²⁷ Specifically, the Supreme Court has established three factors to weigh in such instances:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²²⁸

In terms of the first factor, commercial platforms serve as gatekeepers to markets, deciding which companies gain or maintain access.²²⁹ To be delisted by Google is to become “invisible to the general public.”²³⁰ The Court has elsewhere acknowledged that social networks function as the “modern public square” because they “are perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”²³¹ Platform procedure clearly implicates substantial private interests.

The second factor in the due process framework is the risk of erroneous decisions.²³² Given the private nature of platform conflicts, inadequate information exists about the overall performance of these dispute resolution processes. However, anecdotal, judicial, and empirical information paints a bleak picture of arbitrariness and discrimination.²³³ Academics have demonstrated that Google systematically shows lower-paying job advertisements to women than men,²³⁴ and based on similar evidence Facebook settled lawsuits by the American Civil Liberties Union and others.²³⁵ As one former Amazon employee describes the

²²⁶ See, e.g., *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 U.S. Dist. LEXIS 51000, at *8 (N.D. Cal. Mar. 26, 2018) (rejecting argument that private social media corporations are state actors); *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30, 40 (D.D.C. 2019) (finding that social networks “do not become state actors based solely on the provision of their social media networks to the public”).

²²⁷ *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (requiring minimum procedural safeguards before termination of welfare benefits); *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974) (Powell, J., concurring) (“Governmental deprivation of such a [] [property or liberty] interest must be accompanied by minimum procedural safeguards.”).

²²⁸ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²²⁹ Van Loo, *Rise of the Digital Regulator*, *supra* note 10, at 1321.

²³⁰ See Dawn Carla Nunziato, *The Fourth Year of Forgetting: The Troubling Expansion of the Right To Be Forgotten*, 39 U. PA. J. INT'L L. 1011, 1024 (2018) (discussing the consequences when Google's search engine cannot index information).

²³¹ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017); see also Amélie Pia Heldt, *Merging the 'Social' and the 'Public': How Social Media Platforms Could Be a New Public Forum* (Mitchell Hamline Law Review, forthcoming, 2020).

²³² *Id.*

²³³ See, e.g., *supra* Part I (summarizing platform procedure); Bloch-Wehba, *supra* note 10, at 75 (“platforms routinely reach opposite conclusions about specific instances of online content”).

²³⁴ See Amit Datta, Anupam Datta, Jael Makagon, Deirdre K. Mulligan & Michael Carl Tschantz, *Discrimination in Online Advertising: A Multidisciplinary Inquiry*, 81 PROC. MACHINE LEARNING RES. 1, 14 (2018).

²³⁵ Galen Sherwin & Esha Bhandari, *Facebook Settles Civil Rights Cases by Making Sweeping Changes to Its Online Ad Platform*, ACLU BLOG (Mar. 19, 2019), <https://www.aclu.org/blog/womens-rights/womens->

company's dispute resolution process, the result is "very inconsistent and hit or miss. You're at the mercy of a different person each time. And that person's performance assessment is based on the number of cases completed, not the quality or consistency of the decision."²³⁶ There is a sensible basis for concluding that platforms' erroneous decisions are unacceptably high.

The motivation for mandating credit report procedures speaks to the first two due process factors. According to a congressional sponsor of the Fair Credit Reporting Act, which imposed dispute resolution on credit reporting companies: "We certainly would not tolerate a government agency depriving a citizen of his livelihood or freedom on the basis of unsubstantiated gossip without an opportunity to present his case. And yet this is entirely possible on the part of a credit reporting agency."²³⁷ In the platform context, Amazon and Uber deprive some small business owners of their livelihoods by delisting them without allowing them to present their cases.²³⁸ A modern form of "unsubstantiated gossip"—product reviews and driver ratings—often drives these suspensions.²³⁹ Processes designed to minimize this unsubstantiated gossip would decrease the likelihood of error.

The final factor, the platform's interests, infuses the due process analysis with a practical limitation. It would be unrealistic to require a full trial for every account suspension, even if the risk of error would decrease. We must therefore examine what the burden would be of imposing a given procedure.

Costs to the platform are not solely monetary. If the law prohibited Amazon from suspending the account of a merchant selling defective products, consumers and the platform could be harmed from the procedural delay—and thus from the imposition of additional procedures. This third prong may limit mandates that unreasonably restrict the platform's interest in acting expediently against harmful users.

The more straightforward application of this third prong, however, is the cost of administering additional procedures. As a starting point, platforms already have extensive systems in place.²⁴⁰ Depending on the new procedures that would be adopted, the costs could range from minimal to substantial. A rule requiring extensive discovery would be costly. But since most of these processes are already automated, allowing a party to submit information in an online form to be provided to the adjudicator would be low-cost.²⁴¹ Again, the cases of credit agencies, credit card chargebacks, and copyright takedowns speak to the third factor. Financial institutions and online platforms have thrived despite the costs of compulsory procedures for large-volume disputes.²⁴²

rights-workplace/facebook-settles-civil-rights-cases-making-sweeping (summarizing lawsuits filed).

²³⁶ Interview with McCabe, *supra* note 66.

²³⁷ 115 Cong. Rec. 2412 (1969) (statement of Sen. William Proxmire).

²³⁸ See *supra* Section I.A.

²³⁹ *Supra* note 55 and accompanying text (describing the role of reputation at Amazon).

²⁴⁰ See *supra* Part I.

²⁴¹ SCHMITZ & RULE, *supra* note 36, at 52 (identifying how online dispute resolution can reduce these costs by automating certain processes).

²⁴² For example, many of the top twenty firms are financial institutions and technology companies that would be required to comply with both copyright and chargeback processes. See *Fortune 500*, FORTUNE, <https://fortune.com/fortune500/> (last visited Jan. 29, 2020).

Additionally, there is strong evidence that the added trust and legitimacy gained from effective dispute resolution systems improves a company's profitability due to better customer retention and increased customer engagement.²⁴³ Yet businesses sometimes focus so excessively on the short term, growth, or their core products that they ignore the importance of dispute resolution.²⁴⁴ The monetary gains from improved dispute resolution lessen the costs in the due process analysis. Thus, while the final factor helps determine which procedures to adopt, it does not defeat a proposal for mandating at least some.

Again, a due process analysis is unnecessary for lawmakers to order platforms to change their behavior. As mentioned above, the state has ordered financial and online platforms to play the role of courthouse in other contexts, without relying on a due process justification.²⁴⁵ The necessity of solving an important problem thus typically dictates the policy, rather than an explicit normative framework.²⁴⁶ Nonetheless, the due process analysis provides support for legislation mandating minimum platform procedures and informs the harder question of which specific mandates to adopt.

B. *New Structural Checks and Balances*

This section begins to sketch the blueprint for federal rules of platform procedure ("Platform Rules"). A threshold issue is how to define success. The Supreme Court's due process doctrine provides guidance by emphasizing that the extent of the procedures should grow with the gravity of the potential injustice—as long as the corresponding burden for implementing those procedures is not too high.²⁴⁷ However, due process sets the constitutionally acceptable floor,²⁴⁸ and thus has lower ambitions than a designer seeking to build a platform dispute system that maximizes either effectiveness or legitimacy. For instance, due process allows an administrative agency to use an adjudicator upon appeal who is the peer of the original adjudicator in the same office.²⁴⁹ This arrangement would be unacceptable for a designer wanting a more neutral arbiter to maximize procedural justice, which consists of voice, respect, speed, trustworthiness, and neutrality.²⁵⁰

²⁴³ See, e.g., Van Loo, *The Corporation as Courthouse*, *supra* note 18 (summarizing the literature and concluding that better dispute resolution has tended to improve a firm's stock market value). Of course, there would be diminishing returns for such investments, and at a certain point negative returns.

²⁴⁴ See *id.*

²⁴⁵ See *supra* Part II.

²⁴⁶ See Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. (forthcoming, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3498042 (discussing the origins of ordering platforms to regulate third parties); 115 Cong. Rec. 2412 (1969) (statement of Sen. Proxmire) (explaining reasons for credit report dispute resolution).

²⁴⁷ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) ("[T]he Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

²⁴⁸ *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974) (Powell, J., concurring) (describing "minimum procedural safeguards" established by due process).

²⁴⁹ See, e.g., Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 432-33 (2019) (describing appeals processes in large regulators).

²⁵⁰ See Van Loo, *The Corporation as Courthouse*, *supra* note 18, at 560 (applying procedural justice to consumer dispute resolution).

Instead of using the constitutional floor as the standard, the policy prescriptions below assume the goal is to create the most socially beneficial platform judicial system possible. That high aspiration will inevitably leave many questions unanswered. Yet it flows from the consensus among law and technology scholars that in the face of networked harms in large numbers, if “dispute resolution is to yield institutions for the production of *justice*, a more comprehensive process of institutional reinvention will be necessary.”²⁵¹

In light of that objective, this Article’s procedural references go beyond due process to draw on two projects that are closer to those facing tech intermediaries in the upcoming years. The first is the federal effort to build a judicial system. The second is ADR scholars’ efforts to create an entirely privatized system of online dispute resolution.²⁵² Of course, it would be a mistake to impose a private version of the cumbersome Federal Rules on platforms. It would also be a mistake to adopt perfection as the standard for a privately mandated system, since every existing judicial system has shortcomings. Ultimately, the goal is to balance efficiency, innovation, and procedural justice to *improve* the mass dispute resolution process for the information age, whose construction is already well underway.

Ideally, some of the design features below would be required, based on the normative case outlined above. But they offer a variety of possibilities regardless of the path forward. Policy makers can choose from them whether the goal is to impose minimums or aim higher. Alternatively, tech executives could use this set of ideas to adopt voluntary dispute resolution, a possibility that is not as far-fetched as it may appear.²⁵³

1. Platform Common Law

Some, if not all, platforms already value precedent. Facebook has taken a step toward building a common law for content moderation. The founding documents for its Oversight Board specify that “any prior board decisions will have precedential value and should be viewed as highly persuasive when the facts, applicable policies, or other factors are substantially similar.”²⁵⁴ Other platforms would also benefit from moving toward greater consistency in the application of their internal policies. After all, precedent adds predictability and fairness to the law, while lessening the arbitrariness of excessive adjudicatory discretion.²⁵⁵ Since

²⁵¹ JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* 169 (2019).

²⁵² *See, e.g.*, ETHAN KATSH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES* 21-22 (2017) (pushing for truly virtual dispute resolution that improves efficiency and fairness); SCHMITZ & RULE, *supra* note 36, at 52 (explaining how entire dispute resolution processes can rely heavily on algorithms to the benefit of both consumers and businesses).

²⁵³ *Infra* Part III.E. (discussing the appeal to industry of robust dispute resolution).

²⁵⁴ OVERSIGHT BOARD CHARTER, *supra* note 92, at 5; *see also* Molly K. Land, *The Problem of Platform Law: Pluralistic Legal Ordering on Social Media* (forthcoming), <https://ssrn.com/abstract=3454222> (expanding on existing notions of platform law).

²⁵⁵ OLIVER WENDELL HOLMES JR., *THE COMMON LAW*, LITTLE, BROWN, & Co. 1 (1881). It is debatable whether “highly persuasive” is the right standard, as opposed to seeing prior decisions as something closer to binding, as do the Supreme Court and circuit courts in many contexts. On prior court decisions as binding, *see generally*, for example, Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 *GEO. WASH. L. REV.* 2 (2005). Most circuit courts have adopted “law of the circuit” rules that bind subsequent circuit court

large platforms today can deliver divergent rulings faced with the same set of facts,²⁵⁶ anchoring verdicts in prior cases would improve the administration of justice. Of course, some level of transparency would be essential for users to be able to predict likely outcomes and argue their cases based on prior decisions.²⁵⁷

A more difficult question is how different platforms' decisions should influence one another. Should Twitter's resolution of an identical content moderation question have any bearing on how Facebook decides a given case? Clearly, different categories of platforms—marketplaces and social networks—will generally require different platform laws. Therefore, they must have some leeway to adopt context-specific decrees and tailored procedures. That need for customized substantive rules does not, however, prevent interconnections.

If greater precedence across platforms is desirable, common law courts offer a model. Decisions in the same jurisdiction on the same topic carry the greatest weight, but other jurisdictions' cases on the same topic can be influential. By analogy, like states, platforms may adopt their own substantive rules. Twitter may then consider the decisions of another platform, such as Facebook, in making its own decision, without having its autonomy infringed. The degree of relevance should be influenced by the similarity of the platform and the particular issue being decided.²⁵⁸

2. Platform Courts of Appeals

Pushing platforms toward greater internal consistency, and facilitating the use of other companies' related decisions as persuasive authority, is valuable but leaves open the possibility that a platform will perpetuate its own unsound decisions. TripAdvisor's recent missteps illustrate the potential downsides. The company has long been the leading source of online travel information.²⁵⁹ It hosts reviews of hotels, restaurants, and other travel services through a user-generated five-star rating system, accompanied by written reviews.²⁶⁰ But the company takes down reviews without public disclosure or notification to the reviews' authors.²⁶¹ In many instances, users posted about being the victims of crimes only to have their reviews removed.²⁶² For one resort, multiple guests reported that after having a single drink at the pool, they became incapacitated and awoke later in their hotel room, assaulted and robbed.²⁶³ Because TripAdvisor erased the reviews, the resort remained the highest rated in its category, causing subsequent travelers to choose it and meet a

decisions. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 794-95 (2012).

²⁵⁶ See, e.g., *supra* Part I.A. (discussing Amazon's great variance in outcomes).

²⁵⁷ *Infra* Part III.C.2.

²⁵⁸ How much it matters that a platform is different is debatable, but as long as the business models vary greatly the institution's set of interests to be weighed may merit divergent approaches. See *infra* Part III.B.3.

²⁵⁹ Raquel Rutledge, *Tourists: TripAdvisor Removed Mexico Resort Warnings*, MILWAUKEE J. SENTINEL (Nov. 1, 2017), at A1.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* (relaying the experience of a couple who met with the journalist and showed receipts and medical documentation of an incident where they were drugged and assaulted or injured).

similar fate.²⁶⁴

The assaulted users who had their posts removed were not without alternatives. Upon exhausting platforms' internal dispute processes, many users look to informal avenues. Amazon buyers ask their credit card to cancel the purchase,²⁶⁵ and emails to Amazon CEO Jeff Bezos have yielded refunds for buyers and reinstatement for sellers.²⁶⁶ Facebook users take to Twitter to complain, or leave "profane comments" on CEO Mark Zuckerberg's Instagram account.²⁶⁷

Although those options sometimes produce results, they have limits. An assault victim should not have to take to social media and reveal a very private and painful event to the world to get a response. Moreover, users with few followers have less social media influence. Appealing to the CEO may go nowhere. Like many platforms, TripAdvisor has perverse incentives to keep the ratings attractive, because it depends on advertising revenue.²⁶⁸ No hotel would pay to advertise so that people can learn about recent assaults on its premises.

In the face of such misaligned incentives, internal precedent and persuasive authority are insufficient. An independent appeals process, staffed by judges with sufficient salaries, was crucial for the development of American common law.²⁶⁹ An independent party would be more likely to overturn a platform's profitable but misguided precedent.

Congress should thus consider mandating that each large platform fund an external appeals structure comprised of salaried judges. However, to minimize the risks that industry would capture the appeals body, the platform must not control either the level of funding or selection of judges. In some ways, a company-specific appellate body would simply be a more independent version of what credit card companies and credit bureaus are required to do for dispute resolution—since those processes require firms to pay a group of employees to adjudicate chargebacks.²⁷⁰

An alternative would be industry-specific appeals bodies, funded in proportion to each large platform's share of industry revenues. A single private board could hear appeals for all social media companies, such as Facebook, Twitter, and TikTok; another for all marketplaces, and so on. Under this model, by analogy, the district court would be the platform's internal adjudicatory process, with the appeals board serving as a circuit court.

Weighting in favor of a circuit model is the similarity of issues across multiple

²⁶⁴ *Id.* (providing the experiences of three women who reported that they were sexually assaulted at the same hotel after posts were removed).

²⁶⁵ Order Defect Rate, *supra* note 41.

²⁶⁶ See, e.g., *Amazon A-Z Claim Denied - Any Recourse?*, REDDIT (Jan. 25, 2017), https://www.reddit.com/r/personalfinance/comments/5q40ae/amazon_az_claim_denied_any_recourse (last visited Jan. 8, 2020); Khadeeja Safdar & Laura Stevens, *Banned From Amazon: The Shoppers Who Make Too Many Returns*, WALL ST. J., May 22, 2018, at A1 (discussing buyer refunds).

²⁶⁷ See, e.g., Hill, *supra* note 71.

²⁶⁸ See Rutledge, *supra* note 259.

²⁶⁹ See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1705 (2012) (explaining the importance of tenure and sufficient salaries for judges); Gregory M. Dyer, *Criminal Defendants' Waiver of the Right to Appeal—an Unacceptable Condition of a Negotiated Sentence or Plea Bargain*, 65 NOTRE DAME L. REV. 649, 662 (1990) (asserting an important function of appeals is "the development of the common law").

²⁷⁰ See *supra* Part II.

content sharing networks, such as harassment and misinformation.²⁷¹ Additionally, these platforms are expanding users' ability to link their accounts and posts across platforms.²⁷² Finally, grouping multiple platforms' appeals within a single court improves economies of scale, adjudicator expertise, and platform law consistency.

Under either model, appeals courts would be required to overturn a platform's decision when it is either inconsistent with that platform's precedent, or when the platform's precedent is inconsistent with the broader set of cross-platform policies and laws.²⁷³ In this regard, the mandated appeals process would differ from Facebook's Oversight Board, which must apply Facebook's policies.²⁷⁴ Returning to the example of TripAdvisor, in deciding an appeal by users posting about crimes, the appeals court might look to other platforms' policies about removing reported crimes, or prior cases on that subject. If the case is one of first impression, the court could look to related cases about removing non-crime information, as well as broader societal norms of advertisement accuracy, informational completeness, and public safety.

The appeals board's status as a nongovernmental organization would enable it to adopt more streamlined and innovative processes than the public court system.²⁷⁵ However, checks are appropriate to avoid the extreme "process privatization" created by arbitration.²⁷⁶ Public courts could provide a check by preserving parties' ability to challenge a given platform court of appeals' decision.²⁷⁷ The interface between these public and private courts deserves further attention, but by default only a small percentage would appeal to public courts, given the existing obstacles. That option could be encouraged, or in the interests of promoting efficiency and subject-matter expertise, public courts may defer to platform appeals courts, similar to public courts' deference to administrative agency adjudication.²⁷⁸

The task of building a private appeals structure for billions of disputes is daunting. But tech platforms already handle that high volume annually.²⁷⁹ Moreover, governments have successfully developed high-volume online appeals systems. Israeli insurers, for instance, successfully use an online system, Benoam, to handle appeals by customers of "fender-bender" property claims.²⁸⁰ Benoam is

²⁷¹ See Klonick, *supra* note 2, at 1600-1601 (comparing Facebook, YouTube, and Twitter).

²⁷² *Facebook to Integrate Whatsapp, Instagram, and Messenger*, BBC (Jan. 25, 2019), <https://www.bbc.com/news/technology-47001460>.

²⁷³ The design of a sensible standard for precedence is, in itself, a complicated undertaking. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 36-42 (2019) (describing forms of precedent from founding to modern era).

²⁷⁴ OVERSIGHT BOARD CHARTER, *supra* note 92, at 3 (explaining the Oversight Board's powers and stating that while the Board can provide policy guidance it does not have any authority to modify Facebook's content policies).

²⁷⁵ Cf. KATSH & RABINOVICH-EINY, *supra* note 252, at 51 (arguing for automated processes used by the private sector to advance both efficiency and access).

²⁷⁶ Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure* at 75, 162 U. PA. L. REV. 1793, 1821 (2014).

²⁷⁷ This possibility is discussed in greater depth below. *Infra* Part III.D.2.

²⁷⁸ *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996) (explaining court deference to agencies as reflecting the intent of Congress).

²⁷⁹ KATSH & RABINOVICH-EINY, *supra* note 252 (estimating that commercial platform disputes would soon exceed one billion).

²⁸⁰ Rabinovich-Einy & Katsh, *supra* note 16, at 186.

private, but it has implemented some jurisprudential norms by publicly posting (anonymized) major decisions and clarifying rules.²⁸¹

Facebook’s decision to staff its Oversight Board with at most forty judges is informative. Over six months in 2019, Facebook alone removed 11.4 million hate speech posts and more than 3.2 billion fake accounts.²⁸² The size of its Oversight Board indicates that at least one large-scale platform believes it can operate with a lean external judicial force.²⁸³ Nor is the scale of federal circuit courts particularly vast, with a typical court of appeals consisting of about 14 judges.²⁸⁴

Like the federal system, the platform system would need to emphasize settlement, negotiation, and mediation.²⁸⁵ Users would only be able to externally adjudicate the most significant and novel cases. A sensible rule, already applied in other mandated dispute resolution contexts, would be to require parties to exhaust direct negotiation and internal procedures before initiating an external appeal.²⁸⁶ Only a small subset would appeal, and the platform appeals board would only take an in-depth review of a fraction of those appeals. Nonetheless, the few precedential decisions would reverberate throughout the rest of the disputes handled by platforms, ideally aided by algorithms that identify similar cases to which the ruling is relevant.²⁸⁷ As a result, even randomly selecting a portion of the appeals petitions for a hearing could improve legitimacy, encourage the development of platform common law, and increase the likelihood of socially beneficial outcomes.

3. A Platform Supreme Court

A major design choice is whether there should be a central platform adjudicator above the appeals boards. One reason to prefer a centralized court is the remedies available in a world in which one user’s case may implicate many different platforms. By way of example, pediatrician Nicole Baldwin produced a playful TikTok dance music video to “Cupid Shuffle” about how vaccines prevent measles, polio, influenza, and other viruses, ending with a punchline of “Vaccines DON’T CAUSE AUTISM.”²⁸⁸ The video went viral across multiple platforms, including Twitter.²⁸⁹ She was subsequently barraged not only by death threats and other attacks on social media, but also by fake Yelp and Google reviews accusing her,

²⁸¹ *Id.*

²⁸² *Community Standards Enforcement Report*, FACEBOOK TRANSPARENCY (Nov. 2019), <https://transparency.facebook.com/community-standards-enforcement>.

²⁸³ *See* Van Zuylen-Wood, *supra* note 1 (providing staffing figures).

²⁸⁴ U.S. COURTS, CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS IN U.S. COURTS OF APPEALS 1-14 (2009), <https://www.uscourts.gov/sites/default/files/appealschronol.pdf> (reporting that Congress has authorized a total of 167 appellate level judgeships, ranging from 6 positions in the First Circuit to 29 in the Ninth Circuit).

²⁸⁵ Resnik, *supra* note 22, at 1802 (describing federal court shift towards “promot[ing] alternative dispute resolution”).

²⁸⁶ *See, e.g.*, Schwarcz, *supra* note 222, at 761 (summarizing the law related to insurance policyholder grievances).

²⁸⁷ *See infra* Part III.C.3. (discussing aggregation mechanisms).

²⁸⁸ Dr. Nicole Baldwin (@drnicolebaldwin), TIKTOK (Jan. 10, 2020), <https://www.tiktok.com/@drnicolebaldwin/video/6780375204574055685>.

²⁸⁹ Brooke Sjoberg, *Pediatrician Gets Death Threats After Pro-Vaccine TikTok Video*, THE DAILY DOT (Jan. 20, 2020), <https://www.dailydot.com/irl/tiktok-anti-vaxxers-pediatrician>.

among other things, of “drugging injured autistic boys with transgenic pills.”²⁹⁰ When a single incident requires intervention across multiple platforms, a harassment victim would ideally not need to go to multiple platforms for redress.

Additionally, the functional distinctions across categories are beginning to blur. Google’s search foundations buttress its fast-growing shopping marketplace and its recent piloting of a social network called Shoelace.²⁹¹ Facebook facilitates many commercial transactions, allows users to link a bank account, and has taken steps to open a currency.²⁹² Amazon regulates speech by increasingly banning “offensive” books²⁹³ and filtering which reviews it will allow on its product review sites—reviews that are sometimes viewed by millions.²⁹⁴ If Dr. Baldwin had written a book prior to the vaccination video, reviews on Amazon could have easily been weaponized against her, as has happened to other authors.²⁹⁵ A single incident could therefore implicate similar adjudicatory issues across all large platforms.

Thus, a central appeals court—a platform supreme court—may make sense. Indeed, although this terminal platform court would hear mostly appeals of the toughest and most novel cases, it or lower appeals courts should have original jurisdiction for pressing cross-platform cases requiring immediate injunctive relief.

There are myriad ways to staff and implement a platform supreme court. The judges could be selected with inter-sectoral input, possibly allowing users, a regulator, and platforms to each select a subset of judges. Public oversight into the judge appointment process would help, such as an independent administrative agency signing off on the structure and staffing. An alternative proposal, made in the context of content moderation, is for the platform to “create a process that relies on a community, either of regional experts or the serious users.”²⁹⁶ Alibaba and eBay have experimented with similar crowd-sourced adjudication.²⁹⁷ In its early years, eBay established a “Community Court” of twenty-one randomly selected users to whom sellers could appeal if they disagreed with buyer feedback.²⁹⁸ A majority vote by the platform supreme court’s judges would remove the challenged feedback.²⁹⁹

²⁹⁰ Renee DiResta (@noUpside), TWITTER (Jan. 19, 2020, 12:09 PM), <https://twitter.com/noUpside/status/1218943537653280768>.

²⁹¹ Cat Ellis, *Google Is Building a New Social Network* (July 12, 2019), <https://www.techradar.com/news/google-is-building-a-new-social-network> (describing a pilot project in New York for a regionally based social network).

²⁹² Annie Lowrey, Opinion, *Don’t Trust Facebook*, THE ATLANTIC (Oct. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/dont-trust-facebook/600598/> (commenting on Facebook’s Libra cryptocurrency project and other financial intermediation steps).

²⁹³ Streitfeld, *supra* note 33.

²⁹⁴ See Magana, *supra* note 48.

²⁹⁵ See, e.g., Jay Greene, *Amazon Reviews Hijacked by Causes, Conspiracies, Rage*, SEATTLE TIMES (Oct. 31, 2015), <https://www.seattletimes.com/business/amazon/amazon-reviews-hijacked-by-causes-conspiracies-rage/> (describing attacks by conspiracy theorists made in the reviews of a book written by a mother of one of the Sandy Hook shooting victims).

²⁹⁶ Tim Wu, *When Censorship Makes Sense: How YouTube Should Police Hate Speech*, NEW REPUBLIC (Sept. 18, 2012), <https://newrepublic.com/article/107404/when-censorship-makes-sense-how-youtube-should-police-hate-speech>.

²⁹⁷ Anjanette H. Raymond & Abbey Stemler, *Trusting Strangers: Dispute Resolution in the Crowd*, 16 CARDOZO J. CONFLICT RESOL. 357, 382 (2015).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

The concentration of such great power in the hands of so few is a fraught undertaking. But greater power is in the hands of even fewer today—a handful of CEOs. They currently control the executive, legislative, and judicial functions in state-like platforms. Mandating a nongovernmental appeals system would provide a separation of at least one of those great powers.

Many difficult details remain to be determined, like the standard of review for the private appeals hearings—whether deferential, *de novo*, or some other standard. It would be worthwhile to determine how, beyond the salary and the appointment process, to insulate the appeals bodies from undue influence by industry or a self-serving President. The linkage of multiple public and private courts would also require more nuanced connective arrangements. However, the goal is not complete harmonization. Nor is complete insulation from influence realistic, or even desirable, in any system of governance. The platform supreme court would reflect what is in fact the norm in governance: polycentricism, defined as a system “characterized by multiple governing authorities,” both public and private, in which “each unit exercises considerable independence to make norms and rules within a specific domain.”³⁰⁰ With an independent appeals structure in place, most platform disputes would continue to unfold internally, shaped by localized community norms. Those internal processes would, however, become imbedded in a robust public and private accountability structure rather than left to autocracy.

C. New Platform Federal Rules

With or without an independent appeals structure, mandated internal procedures close to those required of financial platforms could improve adjudication. The size of the platforms subject to such decrees would need to be set to avoid unduly burdening smaller or emerging platforms before they have the chance to establish themselves. Also, not all disputes will merit the same legal protections. For instance, it would be hard to justify procedural safeguards that might slow down Facebook and Twitter’s termination of Russian operatives’ election-oriented fake accounts.

The public court system and administrative agencies have developed means of addressing these and other challenges of resolving heterogeneous claims, rooted in the Federal Rules of Civil Procedure (“Federal Rules”).³⁰¹ As characterized by the Supreme Court, “The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals.”³⁰² Over eighty Federal Rules of Civil Procedure (“Federal Rules”) exist, many with intricate sub-sections.³⁰³ It would be impractical to enumerate all of the possible corresponding rules of

³⁰⁰ The concept comes from Nobel-prize winning economist Elinor Ostrom. See Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 GLOBAL ENVTL. CHANGE 550, 552 (2010).

³⁰¹ See FED. R. CIV. P.; *infra* notes 405 to 407 and accompanying text (explaining how the Administrative Procedure Act and related agency rules are modeled after the Federal Rules).

³⁰² *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); see also Maria J. Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1715 (2012) (describing the goal of the Federal Rules as facilitating “truth-seeking” and “the resolution of cases on their merits”).

³⁰³ See FED. R. CIV. P.

platform procedure here, and many would be unwise to adopt. Instead, the discussion below highlights several promising ways to merge the formality of the Federal Rules with ADR principles of procedural justice.

1. Standing and Equal Access to Human Adjudicators

Access to justice is fundamental to democracy. As platforms plant themselves at the center of public discourse, access to their justice becomes integral to democracy. Two components are particularly important: a procedurally level playing field and standing for non-users.

One of the necessary principles in platform procedure, and indeed a driving force behind many of the Federal Rules, is equal access.³⁰⁴ Public support for legal aid services, as well as procedural reforms such as class actions, aimed to expand access.³⁰⁵ However, even with these and other mechanisms, reliance on courts still meant “the haves come out ahead.”³⁰⁶ Initiating a lawsuit typically requires a lawyer, or at least the ability to pay court fees and navigate a labyrinth of procedural and substantive rules.³⁰⁷

Left unregulated, platform justice risks exacerbating that considerable access inequality. Firms generally prioritize higher profit customers in resolving disputes, as demonstrated by a Bank of America patent for software allowing it to gauge whether to waive a fee depending, in part, on the amount of money a customer’s family has in their bank accounts.³⁰⁸ Similarly, credit reporting agencies provide VIP treatment to complaints about inaccurate records from a “judge, senator, congressman, government official, attorney, paralegal, professional athlete, actor, director, member of the media or a celebrity.”³⁰⁹ Like other businesses, some platforms prioritize their most valuable users, and can relegate the least valuable to justice by algorithm.³¹⁰

Equal access is also relevant to external parties harmed by platforms. Social networks and search engines can, for instance, determine election results or tarnish a non-user’s reputation. Online marketplaces can sell counterfeit goods, thereby harming the original producers even if they do not sell online.³¹¹

³⁰⁴ See, e.g., David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1007 (2017) (“Devices such as notice pleading, liberal discovery, and liberal joinder seek to equalize litigants’ ability to prove their claims and defenses.”).

³⁰⁵ MAURO CAPPELLETTI & BRYANT GARTH, *ACCESS TO JUSTICE: A WORLD SURVEY* (Mauro Cappelletti ed., 1978).

³⁰⁶ Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

³⁰⁷ *Id.* at 119-20.

³⁰⁸ See, e.g., Van Loo, *The Corporation as Courthouse*, *supra* note 18, at 566-68.

³⁰⁹ Michael R. Guerrero, *Disputing the Dispute Process: Questioning the Fairness of S1681s-2(a)(8) and S1681j(a)(1)(a) of the Fair and Accurate Credit Reporting Act*, 47 CAL. W. L. REV. 437, 450 (2011).

³¹⁰ See, e.g., Van Loo, *The Corporation as Courthouse*, *supra* note 18 (describing technological advances broadly spreading companies’ abilities to identify higher-value users); Sofia Ranchordas, *Online Reputation and the Regulation of Information Asymmetries in the Platform Economy*, 5 CRITICAL ANALYSIS L. 127 (2018) (describing how platforms use scores to prioritize influencers).

³¹¹ See Jon Emont, *Amazon’s Heavy Recruitment of Chinese Sellers Puts Consumers at Risk*, WALL STREET J. (Nov. 11, 2019), <https://www.wsj.com/articles/amazons-heavy-recruitment-of-chinese-sellers-puts-consumers-at-risk-11573489075> (detailing a small cleaning products manufacturer who was forced to lay off most of its staff after cheap counterfeits of its product were sold on Amazon).

Those external parties may have little if any influence because platforms prioritize their own users' complaints. For instance, many publishers and authors have found counterfeits of their books sold on Amazon, which accounts for over half of all books sold in the United States.³¹² In one case, Amazon sold thousands of counterfeit copies of "The Sanford Guide to Antimicrobial Therapy," which provides formulations for drugs used to combat pneumonia and other infections.³¹³ Besides the considerable lost revenues for the author and publisher, the copies posed a health risk: the poor copies' formulas obscured minor print distinctions like that between a "7" and a "1" in the dosage.³¹⁴ The publisher wanted to remain independent of Amazon, but the pirated books became so pervasive that its only viable solution was to allow Amazon to become its wholesaler—thereby giving the platform an incentive to police the counterfeits.³¹⁵

To address these access barriers, the dispute resolution system should be easy to navigate, free for individuals and small businesses, and afford all litigants comparable procedures. Credit card companies are also required to offer chargebacks free. Comparable procedures include the ability to have a human adjudicator at some point in the process for sufficiently important or nuanced cases. Something akin to the appointment of neutral experts or special masters, as federal rules allow in courts,³¹⁶ could help address imbalances in users' ability to navigate platform procedures. A navigable process, with straightforward explanations, will broaden access regardless of party sophistication. Equal access also means prohibiting favoritism based on status as a social media "influencer" or number of followers. Furthermore, non-users harmed by platforms should have standing in these private dispute processes—or at least the external appeals boards over them. Particularly in an age in which platforms tend toward monopoly power and dominate speech and markets,³¹⁷ people should not have to join a platform to stop the harm.

2. Timeliness and Transparency

Two of the most fundamental dispute resolution characteristics are speed and transparency. When eBay analyzed why most buyers and sellers continued using the platform after entering its dispute resolution process, the surprising answer was not whether they won or lost.³¹⁸ Instead, it was having the conflict resolved in a timely manner.³¹⁹ Those findings have encouraged ADR scholars focusing on online dispute resolution to embrace reliance "on the intelligence and capabilities

³¹² Streitfeld, *supra* note 33.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ FED. R. EVID. 706 (providing for court-appointed experts); FED. R. CIV. P. 53 (providing for special masters).

³¹⁷ *See, e.g.,* Balkin, *supra* note 197, at 1199.

³¹⁸ Colin Rule, *Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution*, 34 U. ARK. LITTLE ROCK L. REV. 767, 776 (2012) (finding buyers who reached amicable dispute resolutions were more likely to return than buyers who simply achieved a full refund in their dispute).

³¹⁹ *See id.*

of machines.”³²⁰ Mandated dispute resolution systems for credit reports, credit card chargebacks, and online copyright takedown impose time constraints, such as ninety days to investigate and correct the credit card billing error.³²¹

Platforms should similarly have time limits imposed, in light of the value of speed to participants—particularly for suspended accounts and content moderation. But those limits would need to be adjustable based on the procedural complexity of the case and appeals level. If a case affects many users—for example because it is a class action or a precedent-setting higher court ruling—it could call for a longer timetable.

In terms of transparency, an irony of platform justice is that the companies epitomizing the information age often provide almost no information upon adjudicating user disagreements or suspending privileges. The general opacity of algorithms and platforms is a common source of concern among scholars.³²² Transparency in dispute resolution, however, is not explored in those discussions.³²³

To be clear, platforms communicate many substantive rules for what constitutes a violation. Amazon, Apple, and Facebook provide thousands of pages on their expectations for community standards and app developer conduct.³²⁴ However, those rules sometimes omit key details. There is no list of books banned by Amazon.³²⁵ Nor does Airbnb publish all of the reasons why accounts may be suspended.³²⁶ More importantly, the reasoning for a decision remains largely secretive. Sellers shuttered by Amazon may never know what accusations were made against them or whether those accusations were falsely leveled by another merchant seeking a competitive edge.³²⁷ Nor do users know how or why the platform suspended their account.³²⁸ The platform has access to considerable information, but often the parties do not.

The drafters of the Federal Rules prioritized information exchange.³²⁹ Platforms should at least be required to provide what credit agencies must: an inspection of the case for wrongful action.³³⁰ Automation can significantly lower the costs of this information exchange through online forms, as used for credit card chargebacks.³³¹

³²⁰ Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. REV. 329, 330 (2016).

³²¹ 15 U.S.C. § 1666(b); *supra* Part II.

³²² *See, e.g.*, Citron & Pasquale, *supra* note 15, at 28.

³²³ In contrast, the ADR literature emphasizes online dispute resolution, but emphasizes confidentiality—a core tenet of ADR. *See* Katsh & Rule, *supra* note 320, at 330-31.

³²⁴ *See Documentation, FACEBOOK FOR DEVELOPERS*, <https://developers.facebook.com/docs> (last visited Jan. 20, 2020); *Legal Policies, AMAZON*, https://www.amazon.com/gp/help/customer/display.html/ref=hp_bc_nav?ie=UTF8&nodeId=201909250 (last visited Jan. 20, 2020); *Terms of Service, FACEBOOK* (July 31, 2019), <https://www.facebook.com/terms.php>.

³²⁵ Streitfeld, *supra* note 33.

³²⁶ *See* Kampen, *supra* note 97.

³²⁷ *Supra* Part I.A..

³²⁸ *Id.*

³²⁹ *See, e.g.*, Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 501, 504 (1986) (explaining how the drafters sought “to require information exchange”).

³³⁰ *See* 15 U.S.C. § 1681i (2018) (laying out procedures for disputing credit report accuracy); *supra* note 186 and accompanying text (describing credit bureau transparency mandates).

³³¹ VISA, *supra* note 175 (outlining Visa’s automated online process for handling chargebacks and

Transparency is not a cure-all, and those with power can abuse it.³³² Information-sharing requirements would need to be relaxed in some contexts—particularly cases involving harassment. And the visibility must reckon with inevitable resistance to revealing trade secrets.³³³ But transparency plays a crucial role in both individual disputes and at a systems level. Besides due process rationales, requiring the publication of some decisions—at least in an anonymized, summarized format—ensures that future parties benefit from past cases at that same platform.³³⁴ Parties can use prior rulings to plead their case to Amazon decision makers who lack the time or motivation to review past cases. Publicly available rulings thereby contribute to closer scrutiny of legal principles that might otherwise remain stagnant.³³⁵ Transparency thus would improve not only the quality of individual adjudications within a platform, but also the development of a platform common law.

3. User Class Actions

Many small harms may not be worth individuals' time even if collectively they amount to societally harmful transfers of rights or resources from individuals to platforms.³³⁶ To address this problem, the Federal Rules provide for class actions.³³⁷ Recently, multi-district litigation—which combines cases from different jurisdictions—has become the tool of choice for aggregation.³³⁸ ADR scholars have begun to lay the foundations for leveraging automation to make aggregate online dispute resolution more feasible for private companies, with a leading motivator being to lower costs.³³⁹ When a user systematically harms others—or when the platform does so itself—an outlet for initiating collective grievances deserves consideration. Rather than a class action, it would be a user action.

There are many possible ways to aggregate claims among users, and space does not allow for exploring them all or addressing their many critiques. Briefly, aggregation is another area where a special master or neutral party as the users'

chargeback disputes).

³³² David Pozen, *Transparency's Ideological Drift*, 128 *YALE L.J.* 100, 156 (2018) (discussing how corporations utilize transparency to access valuable information). For a further discussion of how transparency can fail consumers, see, e.g., generally Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 *U. PA. L. REV.* 647 (2011).

³³³ It should be feasible to design the process so as to protect trade secrets and enhance visibility. *Cf.* Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 *STAN. L. REV.* 1343 (2018) (“A criminal trade secret privilege is ahistorical, harmful to defendants, and unnecessary to protect the interests of the secret holder.”).

³³⁴ On the value of transparency to precedent, see, for example, Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 *WM. & MARY L. REV.* 507, 540 (2011).

³³⁵ *Cf.* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 *YALE L.J.* 2052 (2015) (discussing how arbitration and the Court's jurisprudence has prevented the vindication and continued evolution of substantive law, particularly areas that rely on so-called private attorneys general).

³³⁶ On the potential for small consumer harms to contribute to large issues such as economic inequality, see generally Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 *NOTRE DAME L. REV.* 211 (2019).

³³⁷ *See* FED. R. CIV. P. 23.

³³⁸ 28 U.S.C. § 1407.

³³⁹ Cooper et al., *From Lex Mercatoria to Online Dispute Resolution: Lessons From History in Building Cross-Border Redress Systems*, 43 *UCC L. J.* 3 (2011).

representative could further procedural justice. Some of the biggest obstacles in courts have been locating all class members, collecting relevant information, and processing distinctions among mass consumers.³⁴⁰ Because platforms would have such information readily available through their extensive monitoring, communications, and analytic tools, they could automate aggregation in ways not possible through traditional court actions.³⁴¹ User actions could even relax the requirement in the Federal Rules that members be similarly situated, if the platform's artificial intelligence can create ways to both group and tailor claim adjudication.³⁴²

4. Injunctions and Bans

Facebook, Amazon, and Airbnb are quick to suspend or terminate accounts at the first sign of an issue, sometimes with severe consequences for small businesses, property ownership, and participation in democracy.³⁴³ The Supreme Court has applied the Due Process Clause to analogous contexts. In *Fuentes v. Shevin*, a Florida resident challenged a state law that allowed the retailer Firestone—without any hearing—to enlist the sheriff to seize her gas stove purchased on credit.³⁴⁴ The Court held that “the possessory interest in the goods, dearly bought and protected by contract, was sufficient to invoke the protection of the Due Process Clause.”³⁴⁵ Even when acting on behalf of a business, the state could seize property without a hearing only under “truly unusual” circumstances.³⁴⁶

To address platforms' analogous account deprivations prior to hearings, federal rules could establish boundaries for suspending a legitimate personal or small business account until the dispute is resolved. The more essential the platform service, the more procedural protections are relevant before cutting off access. Whatever the boundaries, it is imperative that platforms have some ability to limit the disruption of problematic users.³⁴⁷ Additionally, platforms must have the flexibility to act quickly in unusual circumstances. For instance, when harassment, hate speech, or other abusive behavior is involved, the immediate blocking of the accused from interacting with the accuser and deletion of posts makes sense. Similarly, when a product sold on Amazon threatens consumer safety, an immediate suspension of the product is justified.

However, in many categories of harm, there will not be as compelling of a counter-interest. When one merchant points out that another small business has suspiciously glowing reviews on its Amazon site, it is excessive to delist the

³⁴⁰ See Alexander W. Aiken, Comment, *Class Action Notice in the Digital Age*, 165 U. PA. L. REV. 967, 978, 982 (2017) (explaining how traditional methods are often ineffective).

³⁴¹ See *id.* at 1003 (discussing machine learning as a method for improving the provision of class action notice).

³⁴² Cf. Jeremy R. McClane, *Class Action in the Age of Twitter: A Dispute Systems Approach*, 19 HARV. NEGOT. L. REV. 213, 230 (exploring use of technology to improve class actions).

³⁴³ *Supra* Part I.

³⁴⁴ 407 U.S. 67, 70 (1972).

³⁴⁵ *Id.* at 87.

³⁴⁶ *Id.* at 90.

³⁴⁷ Wikipedia emphasized this goal early on. See Hoffman & Mehra, *supra* note 17.

products without a prior investigation and giving the accused a chance to explain.³⁴⁸ The writer who built her book material on Instagram should not have had her entire account permanently disabled because of allegations by one copyright holder of violations.³⁴⁹ When the interest on one side is preventing assault at a resort, indefinite blocking of even a single post without at least a rapid follow-up investigation also is inappropriate. More than one safety-related post by a verified user should immediately weigh in favor of leaving the content posted.

Despite the delicate balancing act and context-specific nature of these inquiries, parameters are possible. For instance, the federal rules could consider the relative power dynamics of the groups—large businesses versus consumers, or harassers and harassed. Injunction-related procedures imposed on credit card companies clearly favored the consumer by blocking collections on a disputed debt until the matter is resolved.³⁵⁰ At a minimum, any account suspension or content takedown merit an accelerated timeline for investigation and resolution. Absent extenuating circumstances, account restoration should result immediately upon any ruling in favor of the accused along the chain of appeals.

The rules should also disfavor extreme punishment when lesser sanctions exist. When removal of content or individual products would suffice, such as when there are no repeated offenses, the platform should face procedural hurdles in suspending accounts. And the procedural bar for permanent bans should be higher. Public adjudicators mostly impose permanent bans only for extreme conduct, such as fraud and Ponzi schemes depriving investors of millions.³⁵¹ The overarching procedural ideal is to minimize punishment inflicted before it is clear that a wrong has occurred.

5. Reputational Accuracy and Completeness

A leading legislative sponsor of the Fair Credit Reporting Act explained the legislation through a memorable quote: “The loss of one’s good name is beyond price and makes one poor indeed.”³⁵² Yet Amazon delists sellers based on ratings; Airbnb uses third-party data, such as from social media, to block guests before they have done anything wrong, reminiscent of the preemptive crime-fighting in the dystopian future portrayed in *Minority Report*;³⁵³ and Google allows victims’ reputations to be tarnished by refusing to demote clearly false websites even in the face of complaints.³⁵⁴ Platforms’ philosophy regarding reputation sits in tension with federal law in other areas. Most notably, federal rules block hearsay testimony

³⁴⁸ See *supra* note 56 and accompanying text (discussing this case).

³⁴⁹ See *supra* note 72 and accompanying text (discussing this case).

³⁵⁰ 12 C.F.R. § 226.13 (d)(1).

³⁵¹ See, e.g., *United States v. Madoff*, 626 F. Supp. 2d 420 (S.D.N.Y. June 29, 2009) (imposing a lifetime ban on Bernie Madoff from the financial industry for creating a Ponzi scheme that scammed investors out of millions of dollars).

³⁵² *Bryant v. TRW, Inc.*, 689 F.2d 72, 79 (6th Cir. 1982) (quoting a lawmaker quoting Shakespeare).

³⁵³ See PHILIP K. DICK, *THE MINORITY REPORT* (2002) (depicting a dystopian world in which the government imprisons people because it believes they will commit crimes); *supra* note 108 and accompanying text (describing Airbnb practices).

³⁵⁴ See *supra* Part I.A.

and withhold information about a defendant's prior convictions from jurors.³⁵⁵

Platforms' nonchalance regarding reputation also allows for inaccuracies—the animating issue behind regulation of credit reports.³⁵⁶ But accuracy is not the only crucial goal. Information mistakenly omitted can deprive someone of a job or loan.³⁵⁷ In *Haro v. Shilo Inn*,³⁵⁸ a banquet services company decided to promote Robert Haro to manager, and ran a background check before doing so.³⁵⁹ The background check correctly reported that Haro had a charge of failing to register as a sex offender dismissed.³⁶⁰ That information implied that Haro may have had his case dismissed after properly registering as a sex offender. Based on this assumption, instead of promoting Haro, the banquet company terminated him.³⁶¹ However, the court had dismissed the charge of non-registry because it was a case of mistaken identity—Haro had never been accused of the original crime, only erroneously thought to need to register after someone else was convicted.³⁶² A full report would have clarified that vital missing detail.

The interests in reputational accuracy and completeness reflect a procedural justice emphasis on trustworthiness of the process.³⁶³ But they present a delicate balancing act, particularly when combined with other procedural interests such as caution in issuing temporary injunctions. TripAdvisor's erasure of guest reviews about being assaulted underscores the need to limit the platform's ability to self-servingly provide incomplete reputational profiles.³⁶⁴ But a wrongly accused party also may suffer if unsubstantiated information persists.

There will be hard cases and no set of rules will solve all problems. It is tempting to respond by leaving reputational issues, and indeed misinformation more broadly, out of any Platform Rules. Omission would be preferable to letting the issue of reputation derail the larger project. Again, however, it would be a mistake to allow the inevitable complexity and imperfection of new federal rules to perpetuate an even more problematic set of existing private rules. At a minimum, the above proposals for allowing parties to inspect internal adjudications should extend to being able to learn how reputation factored into platform punishment above a certain threshold—such as the termination of an account.³⁶⁵ Similarly, imposing a reasonable investigation requirement on accuracy and completeness of reputational profiles could help simply by prompting the platform to take greater care. Consumers should also have some means to challenge Google or Facebook when they allow extreme speech harms, such as denials of the Holocaust, or

³⁵⁵ FED. R. EVID. 802; FED. R. EVID. 404(b). Granted, in some limited contexts reputation evidence is allowed. FED. R. EVID. 405.

³⁵⁶ *Supra* Part II.B.2.

³⁵⁷ See Elizabeth Doyle O'Brien, *Minimizing the Risk of the Undeserved Scarlet Letter: An Urgent Call to Amend S 1681e(b) of the Fair Credit Reporting Act*, 57 CATH. U. L. REV. 1217, 1220 (2008).

³⁵⁸ No. 08-6306, 2009 WL 2252105 (D. Or. July 27, 2009).

³⁵⁹ *Id.* at *1.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ See Tyler, *supra* note 16 (showing the importance of trustworthiness for legitimacy).

³⁶⁴ See *supra* note 261 and accompanying text (discussing TripAdvisor's takedowns).

³⁶⁵ Cf. Pasquale, *supra* note 109 (calling for visibility into search results).

fabrications of a student's promiscuity, to persist at the top of search results.³⁶⁶

Scholars have recognized that the Federal Rules' allowance for court-appointed experts offers a solution to judges' struggles in the "age of alternative facts."³⁶⁷ An analogous means of accessing an independent fact-checker could help to address related problems in platforms. Given the discriminatory nature of online reputational ratings, restrictions on the use of such information—and heightened accountability for inaccuracy—is warranted.³⁶⁸ One of the chief targets for restrictions should be the big data predictive analytics that platforms such as Airbnb deploy to block access before the individual has done anything wrong.³⁶⁹

Above all, the difficulty of line-drawing buttresses the case for obligatory decrees because it highlights the challenges facing platforms as the default procedural rule writers. Public laws would bring third parties, whether public courts or private appeals processes, into these thorny decisions. One pragmatic path forward would be to begin with specific rules for the clearest issues, such as transparency, notification, and independent appeals, alongside default rules and standards that platform common law can shape for harder issues. Ultimately, the most valuable contribution of Platform Rules would be providing a writ of habeas corpus for the information age by allowing an outside entity to check the currently unfettered power that platforms wield.

D. Enforcement of Rules

For mandated procedures to work, they must be enforced. Two avenues for enforcement come through courts and administrative agencies. An integral feature is a private right of action for *procedural* violations. Such a lawsuit would be distinct from a right to pursue a public court appeal of the *substantive* decision made by a private platform or appeals board.³⁷⁰ Consumers have private rights of action to sue credit card companies and credit reporting agencies for failing to comply with statutory procedural requirements.³⁷¹ These allow the consumer to recover not only attorneys' fees and actual damages, but also punitive damages for willful procedural violations.³⁷²

It may seem obvious that such a right exists with any mandate. Yet many procedural statutes lack private rights of action.³⁷³ Two design features would improve the effectiveness of a private right of action. First, parties must be able to

³⁶⁶ See, e.g., Citron, *supra* note 15 (providing examples of Google allowing hate speech and Holocaust denials); *supra* note 6 (discussing one law student's experience).

³⁶⁷ Larsen, *supra* note 94, at 223.

³⁶⁸ Yanbo Ge et al., *Racial and Gender Discrimination in Transportation Network Companies* 12 (Nat'l Bureau of Econ. Research, Working Paper No. 22776, Oct. 2016) (finding longer wait times and higher cancellations rates by Uber drivers against users with "African American sounding names").

³⁶⁹ *Supra* note 108 and accompanying text (explaining predictive technologies' usage).

³⁷⁰ See *supra* note 277 and accompanying text.

³⁷¹ See, e.g., Rigby v. FIA Card Servs., N.A., 490 Fed. Appx. 230, 237 (11th Cir. 2012); Dennis v. BEH-1, LLC, 520 F.3d 1066, 1068 (9th Cir. 2008); Burnstein v. Saks Fifth Ave. & Co., 208 F. Supp. 2d 765, 775 (E.D. Mich. 2002).

³⁷² 15 U.S.C. § 1681n(a)(2) (2018).

³⁷³ See, e.g., Mali v. British Airways, No. 17 Civ. 685, 2018 WL 3329858, at *1 (S.D.N.Y. July 6, 2018) (finding that a U.S. resident stranded in Mumbai overnight by British Airways did not have standing under 14 C.F.R. § 250.9 even though the statute was meant to protect consumers).

challenge systemic failures, rather than solely individual cases. The court can reward the complaining party with punitive damages for identifying systemic issues affecting a larger group of people. In this regard, private rights of action for these procedural violations provide redress beyond class actions requiring similar substantive grievances. Instead, a private action may involve many different grievances with shared procedural shortcomings.

Second, the punishment for significant violations must be substantial. The Fair Credit Reporting Act has proven inadequate to prevent inaccuracies in credit scores in part because the consequences are minimal if the credit agency is merely negligent.³⁷⁴ The company must only pay for damages incurred—such as a higher interest rate on a loan—and attorney’s fees.³⁷⁵ Not only are those actual damages arduous to prove, but they are capped at \$1,000.³⁷⁶ Few consumers will sue and the bank therefore risks minimal, unlikely damages.³⁷⁷ And it is exceedingly rare to prove willful violations giving rise to substantial punitive damages.³⁷⁸ Thus, credit report procedures are structured to under-deter because a credit bureau will not pay significantly for flawed resolution of inaccuracies, but will benefit from saving costs that would otherwise be required to more accurately verify information. Unsurprisingly, credit reports have remained “riddled with inaccuracies” even after the procedural mandates.³⁷⁹ To increase the likelihood of compliance, procedural rights of action should enable damages commensurate with platform size for negligence in addition to willful violations.

The judicial system has an important role to play in public oversight, but has limits. The time and energy required to exhaust a complex private process is already great, making it unlikely that parties would pursue the next, more resource-intensive step of appealing to the public courthouse. Moreover, even in the private platform appeals system whole categories of disputes will never surface. As with credit reports, it “may prove practically impossible for consumers, when dealing with big-data scoring systems that potentially integrate thousands of variables, to verify the accuracy of their scores and reports or to challenge decisions based on alternative models.”³⁸⁰ Public courts alone will provide suboptimal accountability if they rely solely on individuals to initiate cases.

Administrative agencies can fill the sophistication gap by conducting regulatory audits of platforms’ dispute resolution systems.³⁸¹ The most likely agency in the existing regulatory framework is the FTC, which has a broad cross-industry mandate. For audits to work, the platform must be required to keep records of the

³⁷⁴ 15 U.S.C. § 1681n(a)(1).

³⁷⁵ *Id.*

³⁷⁶ *Id.* § 1681n(a)(1)(A) (providing a cap); see *Miller v. Wells Fargo & Co.*, No. 3:05-CV-42-S, 2008 WL 793683, at *7 n.7 (W.D. Ky. Mar. 24, 2008) (finding plaintiffs’ actual damages arguments unpersuasive).

³⁷⁷ See, e.g., Hadfield, *supra* note 29, at 84.

³⁷⁸ See Alexandra P. Everhart Sickler, *The (Un)Fair Credit Reporting Act*, 28 LOY. CONSUMER L. REV. 238, 256 (noting that the Fair Credit Reporting Act “limit[s] consumers’ ability” to receive damages by “imposing procedural hurdles that are difficult to satisfy”).

³⁷⁹ Mikella Hurley & Julius Adebayo, *Credit Scoring in the Era of Big Data*, 18 YALE J.L. & TECH. 148, 178 (2016).

³⁸⁰ *Id.* at 189-90.

³⁸¹ For a similar proposal for regulatory auditing of complaints, see Van Loo, *The Corporation as Courthouse*, *supra* note 18.

entire process—thereby creating an “audit trail.”³⁸² Similar record-keeping requirements are imposed in other areas of dispute resolution. For example, federal law instructs airlines to keep passenger complaints for government audit of procedural compliance with consumer protection laws.³⁸³ In one incident, after reviewing complaints, the Department of Transportation fined Delta Airlines \$750,000 for bumping passengers from flights without first seeking volunteers and offering adequate compensation—in other words, for inadequate adjudicatory processes.³⁸⁴

The regulator’s role would be to occasionally sample the platform’s dispute records and analyze aggregate complaint statistics, such as categories of complaints, rationales, and remedies deployed. This information would help identify grounds for regulatory prosecution of the platform for rule violations. Also, the regulator should have rulemaking authority to adapt compulsory procedures to fast-moving industries. Monitoring is the norm for most large industries—from banking to food manufacturing to pharmaceuticals.³⁸⁵ Chargebacks’ overall success likely benefits from the Consumer Financial Protection Bureau’s close monitoring of credit card companies, including for effective chargeback systems.³⁸⁶ Regulatory monitoring of platform federal rules would thus be consistent with the overall modern regulatory framework for promoting compliance, as well as the existing governance of financial platform dispute resolution.

E. Objections

In addition to the localized counterpoints addressed throughout this Article, several broader objections merit consideration. One objection views skeptically the willingness to leave dispute resolution mostly in private hands (and algorithms). If reforms are needed, why not instead improve the public court system? For cases involving speech, keeping the core decisions in private hands avoids concerns about authoritarian state censorship. For other types of conflicts, a public alternative could be part of the solution, but would require a massive and unlikely overhaul of the judicial system. Federal courts are already overburdened, managing over 1.5 million cases annually.³⁸⁷ Handling even a hundred million platform disputes annually would require massive increases in resources and technology deployment to the public judicial system or to administrative law judges.³⁸⁸

³⁸² Scholars have called for audit trails in other contexts. *See, e.g.*, Citron & Pasquale, *supra* note 15, at 28 (calling for audit trails for automated scoring, such as for credit scores).

³⁸³ 14 C.F.R. § 259.5(b) (2011).

³⁸⁴ Bart Jansen, *Delta Fined for Violating Bumping Rules – Again*, USA TODAY (June 26, 2013, 4:36 PM), <https://www.usatoday.com/story/travel/flights/2013/06/26/delta-fine-bumping/2461229/>.

³⁸⁵ *See* Van Loo, *Regulatory Monitors*, *supra* note 250, at 436-40.

³⁸⁶ *See* Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 VAND. L. REV. 1563, 1620 (2019) (noting that financial institutions are some of the most heavily regulated businesses).

³⁸⁷ U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2019 (compiling information of pending federal court cases).

³⁸⁸ Administrative agencies come with greater risk of capture than do courts. On the problem of capture, *see, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010).

Large companies whose core competency is technological sophistication are better situated to repurpose algorithms and big data to sift through large numbers of cases at low cost. As operators of the platforms, they also have the ability to automate the collection of information, and to police problematic behavior, far more efficiently.³⁸⁹ Unless and until unprecedented institutional capacity is built in the public sector, platforms must handle the vast majority of disputes internally. This Article's proposals simply provide public oversight of those inevitably private systems.

Others will have the opposite concern, that public involvement may prove inefficient or a detriment to platform justice.³⁹⁰ Why not leave it to markets to self-adjust in response to user demand? Such skepticism is appropriate not only for procedural mandates, but for almost all regulation. Nobel-prize winning work has debunked the notion that markets will solve every problem, through research establishing pervasive market failures, such as the puzzling persistence of used car dealers who continue to sell "lemons" even though laissez-faire economics suggests that such sellers would be driven out of the market by word-of-mouth.³⁹¹ Just as it is hard to know beforehand whether someone has bought a lemon, it is too onerous for consumers to assess the quality of a platform's dispute system before joining. Those challenges help explain how platforms could persist with flawed dispute resolution even if competition is assumed to be robust.

Throughout history, policy makers initially believed that regulation was unnecessary in most industries. From Upton Sinclair's exposure of the meatpackers, to banks' risky behavior preceding the financial crisis of the 2000s, to the Deepwater Horizon oil spill in the Gulf of Mexico, to Boeing pressuring regulators to ease off their fatal 737 MAX design, legislators have ultimately concluded that originally lax regulation posed a societal threat and greater public oversight was necessary to complement private autonomy.³⁹² Similarly, concerns that regulation would "kill the internet" drove early scholarly examinations, the legacy of which persists today.³⁹³ In light of other industries' histories of failed self-regulation and platforms' early missteps, expecting platforms to solve all their own governance problems would be unrealistic—especially because competition has limited effects on many leading platforms.³⁹⁴

Additionally, the government already imposes diverse public duties on the largest companies, including conscripting the largest U.S. companies to regulate

³⁸⁹ See David S. Evans, *Governing Bad Behavior by Users of Multi-Sided Platforms*, 27 BERKELEY TECH. L.J. 1201, 1201 (2012).

³⁹⁰ The federal courts' procedures are largely inert and rarely change. See, e.g., Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 551 & 559 (1998) (remarking that on the scarcity of amendments and failed legislative reform efforts).

³⁹¹ George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488, 495 (1970) (explaining how quality and uncertainty affect markets and allow for inferior and poorer quality products, or lemons, to be sold rather than good products).

³⁹² See, e.g., Van Loo, *Regulatory Monitors*, supra note 385, at 371-72 (summarizing the history of interventions necessitating regulation).

³⁹³ See Paul Ohm, *We Couldn't Kill the Internet If We Tried*, 130 HARV. L. REV. F. 79 (2016); Solum, supra note 13, at 57-58 (summarizing the early literature on the internet).

³⁹⁴ See Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1017 (2019) (detailing many platforms' tendencies toward natural monopolies).

third parties.³⁹⁵ For instance, the FTC has forced Facebook into a law enforcement role to ensure that app developers and other parties comply with consumer protection and privacy laws, and oil companies are expected to monitor all of their contractors' compliance.³⁹⁶ It is methodologically difficult to establish that any particular legal intervention is justified.³⁹⁷ In particular, it is impossible to know the counterfactual, because without regulation companies may over time yield to public pressure as Facebook has done in creating its Oversight Board. Yet public pressure fades, and the level faced by Facebook is unusually intense and thus unlikely to be applied to every large platform whose dispute resolution is in need of improvement. It also bears emphasis that existing oversight of the world's largest companies, including mandated dispute resolution procedures for credit conflicts and online copyright violations, has not kept those firms from being highly profitable global leaders in their industries.³⁹⁸

In short, one option is to risk trusting platforms alone to police market entry, preserve reputation, and protect the "engangered species"³⁹⁹ of objective facts. However, since established tools are readily available and markets have generally failed in self-regulating, a more promising option would be providing platforms with public partners in their difficult adjudicatory tasks.

Another potential objection focuses on the distinction between dispute resolution and governance. Namely, a dispute arises whether Amazon bans a merchant because of complaints from other traders or Amazon identifies an issue on its own. What do we gain by viewing platform decisions about users from more of a judicial perspective, rather than as an executive or legislative entity?

Conceptual precision is valuable. Conflicts are central to platforms because intermediation defines them.⁴⁰⁰ Internal policies and algorithmic adjudications develop through an iterative feedback loop, informed heavily by those conflicts.⁴⁰¹ Therefore, a rigorous institutional analysis of dispute resolution is crucial to examining platform policies. It is thus essential to understanding the nature of platforms and their place in society.

From a public policy standpoint, adopting a dispute resolution perspective can help the networked society flourish. To illustrate, in early 2020 Facebook and Twitter rejected House Speaker Nancy Pelosi's request to delete a heavily edited video, posted by President Trump, implying that she ripped up his State of the Union speech as he honored one of the last survivors of World War II African-American pilots who integrated the U.S. Army's Air Forces.⁴⁰² In considering

³⁹⁵ Van Loo, *The New Gatekeepers*, *supra* note 246 (summarizing new gatekeeper regulation).

³⁹⁶ *Id.*

³⁹⁷ *But see* Van Loo, *The Missing Regulatory State* (summarizing studies concluding that regulatory monitoring improves legal compliance).

³⁹⁸ *See id.* (discussing how companies have withstood regulatory monitoring); Van Loo, *The New Gatekeepers*, *supra* note 246 (explaining how the largest U.S. companies, which operate in banking, technology, oil, and pharmaceuticals, serve as enforcers); *supra* Part II (discussing dispute resolution mandates).

³⁹⁹ Larsen, *supra* note 94, at 175.

⁴⁰⁰ Cohen, *Law for the Platform Economy*, *supra* note 10, at 136.

⁴⁰¹ Klonick, *supra* note 2, at 1638 (providing a historical account of content moderation); Van Loo, *The Corporation as Courthouse*, *supra* note 18, at 566-68 (describing the iterative process of dispute resolution and policies).

⁴⁰² Michael Levenson, *Pelosi Clashes With Facebook and Twitter Over Video Posted by Trump*, N.Y.

Pelosi's claim, Facebook applied a policy that it had rolled out a month before: content would be removed if it "would likely mislead someone into thinking that a subject of the video said words that they did not actually say."⁴⁰³ Because Pelosi had in fact torn up the speech, the video did not meet that standard.⁴⁰⁴ Prior to its recent policy, the company had long resisted the idea of removing manipulated media, but reversed its "anything goes" position after receiving intense criticism from users and the public.⁴⁰⁵

The Pelosi-Trump dispute shows not only the litigation process for new cases based on platforms' established policies, but also the incredible power involved. Responsiveness to public pressure offers a form of accountability. But an independent appeals process would help insulate the platform's judicial function from undue influence. It would be easier for the President or Speaker of the House to pressure a CEO, who has considerable stock and much to lose from increased government scrutiny, than a large independent pool of appeals judges who have guaranteed salaries.⁴⁰⁶

To be clear, this Article's thesis does not require seeing platforms as closer to courts than to administrative agencies or governors. Indeed, depictions of platforms' executive function underscore the need for a judicial check on that authority. If administrative agencies are the governmental analogy of choice for platforms, it bears emphasis that the Administrative Procedure Act sets forth rules for formal administrative agency hearings, including cross-examinations, apprising parties of material facts, and the agency's power of appeal.⁴⁰⁷ Agencies have detailed published rules used in administrative judge hearings, modeled after the Federal Rules.⁴⁰⁸ Those formal rules are missing from existing law and technology conversations about process.⁴⁰⁹ Given many similarities between those administrative rules and the Federal Rules, both agencies and courts as the government analog would indicate similar policy implications as those put forth in this Article.⁴¹⁰

A final potential source of pushback is that the focus on process is inadequate, if not detrimental to the most important substantive issues needing regulatory attention. In this view, focusing on process provides a safe way to intervene without actually prohibiting any specified bad conduct. At its worst, lawyers' misguided "faith in procedure" could create an excessively complex and costly process only

TIMES, Feb. 8, 2020, at A1.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ David McCabe and Davey Alba, *Facebook Says It Will Ban 'Deepfakes'*, N.Y. TIMES, Jan. 7, 2020, at B7.

⁴⁰⁶ Although still subject to influence, on how such a large committee with independent funding would decrease the likelihood of influence by the President, see Barkow, *supra* note 388, at 17-18.

⁴⁰⁷ 5 U.S.C. §§ 554, 556, 557 (2018).

⁴⁰⁸ See, e.g., Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. § 18 (2012) (providing procedural rules for the U.S. Department of Labor Administrative Law Judges modeled after civil rules of procedure).

⁴⁰⁹ The omission is because existing treatments do not focus on dispute resolution. See, e.g., Citron & Pasquale, *supra* note 15, at 28 (applying due process to algorithmic scoring).

⁴¹⁰ The biggest difference may be the greater willingness in the agency context to have an appeals structure that is not organizationally removed from the original adjudicator. See *supra* Part III.A.

navigable by sophisticated parties.⁴¹¹

Admittedly, procedural reforms will not solve all of platforms' problems. Most substantive decisions would remain in private hands. But improving procedural quality leads to better substantive outcomes.⁴¹² In particular, a neutral appeals body could reduce racial discrimination, debilitating account terminations, or fake news even when profit motives may insufficiently push the platform to fix those and other problems.

Furthermore, for much of modern history, the prevailing view was that the substantive outcome drove people's perception of justice.⁴¹³ A set of experiments in the 1980s changed that narrative.⁴¹⁴ Through survey instruments designed to assess people's perceptions of a judicial process, psychologists demonstrated that the procedure for reaching an outcome influences people's perception of its legitimacy as much, if not more than, the substantive outcome.⁴¹⁵ The reforms above incorporate that research into what matters to people.

Additionally, dispute resolution interventions offer a means for substantial steps toward justice as perceived by the consumer. They are an essential part of any comprehensive solution to regulate platforms. Moreover, mandating procedures is more politically viable than substantive interventions. Businesses have increasingly realized that effective and legitimate dispute resolution improves profits.⁴¹⁶ For those who oppose regulation on the grounds that it impinges on private autonomy, especially for matters involving speech, procedural interventions are more appealing because they largely preserve the private sector's ability to make substantive decisions.⁴¹⁷

To be clear, these and other objections raise valid concerns that can inform and improve platforms' procedural design. The strategy is for the dispute architecture to leverage the strengths of both public and private sectors. Ultimately, whether the system is public, private, or hybrid, for whatever substantive laws exist, a set of procedures will govern the resolution of platform disputes. Those procedures will influence outcomes and the quality of administered justice. The design of those rules, whether mandated or voluntary, would ideally reflect norms not only of private sector efficiency and innovation, but also the public value in procedural justice.

⁴¹¹ Cf. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 387-93 (2019) (discussing how repeat industry players benefit from excess procedure).

⁴¹² See Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications For Civil Commitment Hearings*, 46 SMU L. REV. 433, 434 (1992) (“[B]ias, honesty, and expertise . . . are believed to influence the ability of a procedure to reach an objectively correct outcome”).

⁴¹³ TYLER, *supra* note 16, at 5.

⁴¹⁴ *Id.* at 9.

⁴¹⁵ See *id.* (showing more broadly the value of procedural justice to the law); Torben Hansen et al., *Managing Consumer Complaints: Differences and Similarities Among Heterogeneous Retailers*, 38 INT'L J. RETAIL DISTRIBUTION MGMT. 6, 10 (2010) (reviewing the literature and concluding that for consumers the process may matter more than the outcome).

⁴¹⁶ Van Loo, *The Corporation as Courthouse*, *supra* note 18.

⁴¹⁷ Cf. Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1212-13 (2003) (“[P]aternalism prevents people from behaving in their own best interests”).

CONCLUSION

This Article has begun to sketch the contours of a necessarily much larger project. With or without intervention, tech platforms play a court-like role in society, resolving disagreements between merchant and consumer, driver and passenger, or two interlocutors in the modern public square. Financial platforms—most notably credit card companies and credit reporting agencies—by their nature serve as intermediaries in private adjudicatory processes. Unlike tech platforms, however, financial platforms’ dispute resolution proceedings are subject to minimum legal standards such as conducting reasonable investigations and notifying parties. A central challenge in platform governance moving forward is determining how to shape the ongoing mass, secretive trials that can define people’s identities and banish them from communities.

In the framers’ vision for a new country’s judicial system, they began not with due process, but with Article III: “The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁴¹⁸ As societal power migrates to platforms in the information age, something like a constitutional convention—with a diverse array of stakeholders—is needed to design a system of checks and balances. A fundamental part of that enterprise would be deciding whether Congress should ordain and establish a platform supreme court and federal rules of platform procedure for billions of disputes currently relegated to sometimes brutish colonial-style justice.

⁴¹⁸ U. S. CONST. art. III § 1 cl. 1