

CHAPTER VII: PUBLIC SAFETY, DISABILITY ACCESS, AND CONSUMER PROTECTION.

For reasons discussed in Chapter IV, any comprehensive regulation of digital platforms should include both a consumer protection component and a public safety component. In this context, “public safety” is not a euphemism for surveillance or cooperation with law enforcement. Rather, it means the use of digital platforms for communications in times of emergency by authorized local, state, and federal officials. Already, first responders and authorized officials are working voluntarily with social media to spread information in times of crisis. The statute should encourage these efforts and authorize the enforcing agency to consider how best to integrate the evolving capabilities of digital platforms with the existing Emergency Alert System.

Disability access deserves separate comprehensive treatment that cannot be addressed here. But I would be remiss if I failed to emphasize the importance of disability access given the centrality of digital platforms to our economy and our daily lives. The important role digital platforms increasingly play in our lives means they need to be accessible to all Americans. As more economic and social activity migrates to digital platforms, we must ensure that Americans with disabilities are not cut off and can actively and fully participate in the use of digital platforms. Although Congress has empowered the FCC to address this in a limited way,¹⁴⁸ Congress must provide broad authority to ensure that American with disabilities may participate fully in our digital future.

A. Consumer Protection and the Importance of Rulemaking Authority.

The role of any digital platform statute in protecting consumers and the role of an enforcement agency as a consumer protection agency require further elaboration. As discussed below in Chapter VIII, the recommendation that the designated oversight agency be given specific and general consumer protection authority does not displace the FTC’s existing general consumer protection authority, the authority held by existing specific consumer protection agencies such as the Consumer Financial Protection Bureau (CFPB), or concurrent state authority. To the contrary, these sources of consumer protection are both necessary and complementary to one another. My purpose in this section is to outline the consumer protection structure needed by a statute designed to provide comprehensive oversight of digital platforms. I will also touch on the necessity of including private rights of action.

Including consumer protection in comprehensive sector regulation is a reflection of fundamental values. But it does more than that. It recognizes that when a sector of the economy is important enough to require comprehensive regulation, the potential for consumer harm is

¹⁴⁸ Twenty-First Century Communications and Video Accessibility Act (CVAA) Pub. L. 111-260 (2010).

significantly greater than for other services. In the case of digital platforms, we have reached the point where consumers interact daily with multiple digital platforms, increasing these users' exposure to potential harm. Their activities on these platforms include important services and expose sensitive personal information, so the capacity of digital platforms to harm consumers can be severe. Finally, because several of these digital platforms operate in ways that are not transparent to consumers, platforms have the capacity to engage in harmful practices that only an expert agency with broad oversight of the industry can adequately detect, investigate, and remedy.

For similar reasons, the relevant oversight agency requires rulemaking authority. Particularly in a field marked by rapid growth and innovation, consumers and digital platforms must have clear "rules of the road" that establish rights and responsibilities. All consumers are painfully aware that virtually every digital platform reserves the right to change its terms of service at any moment. In such an environment, *post hoc* enforcement provides little stability or reassurance for consumers. A digital platform need only tweak its terms in response to an enforcement action to create a new cycle of uncertainty and litigation. By contrast, an agency empowered to make prophylactic rules can provide clear and enforceable rights that remain stable over time, enhancing consumer confidence and providing certainty to platforms.

Finally, as the industry evolves and new forms of consumer abuse become possible, an agency empowered to make prophylactic rules can address new concerns. The FTC's experience trying to cope with the emergence of digital privacy issues provides a cautionary tale. Since the mid-1990s, the FTC has struggled to overcome the limitations of its generic statute (Feld 2017c). While it does have some rulemaking authority under specialized and cumbersome procedures, unlike the (relatively) simple procedures generally available to federal agencies, the FTC abandoned efforts to use these procedures after a series of mostly unsuccessful and politically contentious attempts to adopt consumer protection rules in the 1970s and 1980s. The FTC has even found, in the absence of rules, that enforcement of privacy regulation may be impossible unless it can trace specific harms to the privacy breach and circumscribe specific conduct.¹⁴⁹ The emergence of an entire "surveillance economy" starkly demonstrates the inadequacies of this approach.

Looking again to the Communications Act as a model, we can identify three types of consumer harm the relevant oversight agency should address: typical consumer harms; typical consumer harms that are uniquely amplified or difficult to discover because of the nature of the sector; and harms unique to the nature of the sector.

¹⁴⁹ *LabMD, Inc. v. FTC*, 678 F. App'x 816 (11th Cir. 2016) (finding that LabMD satisfied request for stay because of "serious question" whether privacy violation due to security breach could constitute "unfair practice" without tracing specific harms).

B. Typical Consumer Harms.

Any business can engage in anti-consumer conduct. Examples include billing for services or goods not received, providing defective products, and deceptive sales practices. For this reason, the statute must include a general prohibition on such conduct. In the Communications Act, several statutes provide the FCC with generic authority to protect the public from anti-consumer practices. In the case of wireline services, which are a public utility and where the primary concern for the first several decades involved rates for services, Sections 201(b) and 202(a)¹⁵⁰ prohibit any “unjust or unreasonable” rates and practices and any “unjust or unreasonable” discrimination. For wireless services, which include a diversity of services from broadcasting to mobile broadband, Section 303(r)¹⁵¹ permits the FCC to make rules necessary to protect “the public interest, convenience and necessity.” Section 628(b)¹⁵² prohibits cable operators from engaging in “unfair methods of competition or unfair or deceptive acts or practices.”

Importantly, the statutory language in all cases makes these acts *per se* illegal. It falls to the agency (or the courts) to define which acts fall into the prohibited category. Congress should incorporate similar language into the proposed Digital Platform Act. Of these choices, the “unfair and deceptive practices” (UDAP) language likely works best. Because the DPA does not include any sort of price control mechanism such as traditional telephone tariffs, language regarding “rates and practices” is not a neat fit. Language authorizing rules that serve the public interest is more applicable in the context of licensing, which is the subject of Section 303 of the Communications Act.

But while UDAP language may be most applicable, the FTC experience also demonstrates its limitations. Congress should make clear that the agency is empowered, through rulemaking and enforcement, to define what constitutes an unfair or deceptive practice, and that the agency may enforce its UDAP provision without a showing of specific harm. When operating through rulemaking, courts must defer to the agency’s expert judgment pursuant to the authority delegated by Congress.¹⁵³ Additionally, Congress must clarify that the term “unfair” is not limited to exercises of market power or violations of the antitrust laws. The FTC’s authority to find a practice intrinsically unfair to consumers in the absence of an antitrust violation has been severely hobbled by both Congress and the courts (Feld 2017c). If the DPA includes UDAP language to provide general

¹⁵⁰ 47 U.S.C. §§201(b), 202(a).

¹⁵¹ 47 U.S.C. 303(r).

¹⁵² 47 U.S.C. §548(b).

¹⁵³ In administrative law this is referred to as the *Chevron* doctrine or *Chevron* deference, after the case which defined the relevant standard: *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). By contrast, when the FTC enforces the “unfair and deceptive” language of Section 5 of the FTCA through an enforcement action, the FTC bears the burden of proof in court to show a violation.

protection to consumers, Congress must make clear that the restrictions on the FTC's unfairness authority do not apply to the DPA.

C. Harms Uniquely Amplified by The Nature of the Sector.

In the context of a specific industry sector, certain harmful conduct has more severe repercussions than in the economy as a whole. For example, defects in products designed for infants and toddlers create concern above and beyond our ordinary concern about defective products.¹⁵⁴ The Communications Act has multiple provisions governing privacy, recognizing the critical importance of protecting the confidentiality of communications and viewing habits (Feld *et al.* 2016). The nature of digital platforms similarly acts to amplify the harm to consumers in certain specific instances.

Most obviously, while privacy law in the United States desperately needs comprehensive reform, the nature and history of digital platforms makes privacy a unique concern in this context. Given that digital platforms by definition operate in cyberspace and constantly share information with users, securing digital platforms from hacking and malware takes on greater importance than in most other businesses. Accordingly, the relevant oversight agency should be specifically empowered to address privacy and cybersecurity above and beyond any existing or future generally applicable laws. Where existing specialized agencies already have jurisdiction that includes certain types of digital platforms (e.g., medical services), or certain activities on digital platforms (e.g., electronic payment processing), this jurisdiction should run concurrent with the DPA.

Explicit direction from Congress in the DPA with regard to such harms is important for several reasons. It highlights an area of specific concern and pressing urgency, and thus provides immediate protection without specific agency rulemaking to identify the concern. It also allows Congress to more precisely direct the agency, and, where necessary, limit the agency's discretion. Congress can use this to create minimum standards and focus on specific acts that it concludes are clearly abusive to consumers, rather than leaving it to the agency or courts to make such a determination. Congress can also conduct its own balancing of stakeholder interests and create necessary exceptions. For example, although the Communications Act includes a general provision protecting privacy of communications, it contains detailed provisions protecting privacy of telecommunications¹⁵⁵ and cable subscribers,¹⁵⁶ including notification obligations and exceptions that allow use of personal information without consent.

¹⁵⁴ Consumer Product Safety Improvement Act of 2008, Pub. L. 110-314 (2008).

¹⁵⁵ 47 U.S.C. §222.

¹⁵⁶ 47 U.S.C. §551.

At the same time, crafting a specific and detailed list of concerns runs the risk that emerging and rapidly evolving technologies will create new abuses not expressly predicted by Congress, which the enforcing agency or a reviewing court might deem outside the scope of enforcement authority. This reading derives from the legal principle of “*expressio unius est exclusio alterius*” (that which is not expressly included is excluded). For example, the program access provision of the 1992 Cable Act (the provision designed to ensure that dominant MVPDs cannot withhold programming from competitors)¹⁵⁷ declares in Section 628(b) a general prohibition on using “unfair or deceptive practices” to block or “significantly hinder” competition in video program distribution. Section 628(c) contains a set of requirements for rules designed to address specific conduct identified by Congress. For over a decade, the FCC stubbornly maintained that Section 628(b) was not an express grant of general authority but was limited to the specific list in Section 628(c). This allowed cable operators to develop new means of leveraging their ownership of local sports programming and otherwise leverage their existing market power to disadvantage competitors. It was not until *Cablevision Systems Corp. v. FCC* in 2007 that the FCC finally determined that Section 628(b) provided a general grant of authority to address other “unfair or deceptive” practices. Similar arguments are consistently raised against FCC authority with regard to other statutory provisions that provide a general grant of authority followed by specific instructions to address specified practices.

To some extent, Congress can do little about an agency determined to ignore its own authority or activist judges determined to thwart statutory language and the clear intent of Congress. To adapt Friedrich Schiller, “Against deliberate stupidity, the gods themselves rail in vain.” Nevertheless, Congress can at least delegate the agency sufficient flexibility to expand the list of consumer harms and prohibited conduct by using clear and express language that the agency has the power to identify additional consumer harms and to create new regulations to address these harms.

It is beyond the scope of this paper to examine every possible existing harm and determine whether it requires explicit direction from Congress in the DPA. Suffice it to say that as part of drafting the DPA, Congress should carefully consider whether consumer harms covered generally by the statement of general consumer protection authority require additional language to protect consumers and direct the agency. This certainly includes privacy and cybersecurity, but consideration may highlight other issues as well.

¹⁵⁷ Section 628 of the Communications Act, codified at 47 U.S.C. §548.

1. Harms Unique to the Nature of the Sector.

One element of complicated industry sectors is that they create unique opportunities for consumer abuse. In telecommunications, for example, this ranges from such trivial historic wrongs as rigging game shows¹⁵⁸ to more serious concerns, such as using information from telecommunications providers for stalking and harassment.¹⁵⁹ Sometimes new concerns arise from regulations that are otherwise pro-consumer and/or pro-competition but have unintended consequences. For example, the Telecommunications Act of 1996 required the FCC develop rules to require telephone providers to transfer phone numbers to rival carriers when requested by the customer. While this proved enormously successful in stimulating competition (and thus benefiting consumers), it introduced an entirely new form of consumer abuse — unauthorized transfer of phone contracts from one carrier to another, *aka* “slamming.” (FCC 2018) As the capability to engage in this harmful conduct did not exist until after the 1996 Act was adopted and implemented, no previous rule or act of Congress addressed it. Similarly, the introduction of internet-protocol-based telephone calls, *aka* “voice over IP” or “VOIP,” has created opportunities to forge caller ID information (Blanco 2019). This “number spoofing” permits a range of harms, from unwanted robocalls disguised as calls from friends to false 911 calls apparently originating from the victim’s home. Even without the intent to deliberately cause harm, the evolution of the telephone system to an all-IP platform has downgraded the quality of rural phone calls, rendering some parts of America at times virtually unreachable (Feld 2013).

In all these cases, Congress eventually amended the Communications Act to give the FCC specific authority to address these problems. But that amendment process took years. In the interim, the FCC’s broad statutory authority to address unjust or unreasonable practices and unjust or unreasonable discrimination allowed it to act to remedy the situation. For example, the rural call-completion problem first surfaced around 2010, but Congress did not pass a law explicitly directing the FCC to address rural call completion until 2018.¹⁶⁰ In the interim, the FCC proceeded — with increasingly strenuous urging from individual members of Congress — under its general authority. Had the FCC been constrained to address only previously known harms, rural America would have been effectively cut off from the national phone network for years.

Sometimes, however, Congress does not act, and agency action can resolve controversy and provide guidance. For example, in 1974 the FCC issued public notice of a policy statement on the use of subliminal messages in advertising. This addressed public concern without imposing significant new regulations on broadcasters. The idea that words and phrases flashing on television

¹⁵⁸ 47 U.S.C. §509.

¹⁵⁹ 47 U.S.C. §223.

¹⁶⁰ Improving Rural Call Quality and Reliability Act of 2017, Pub. L. 115-129.

or movie screens faster than human beings could perceive consciously could influence people's behavior without their knowledge, a technique dubbed subliminal messaging, became popular in the mid-1950s after a movie-theater owner claimed subliminal messaging had increased popcorn and soda sales. Despite the lack of scientific evidence supporting these claims, widespread popular concern arose that the movie or television industry could use these technologies to influence viewers without their knowledge. In 1974, the idea surfaced again, with an advertising agency purchasing television advertising time for commercials containing the subliminal message "Get it!" embedded in the product ad. The FCC issued a public notice to address public concern and prevent broadcasters from broadcasting any future use of subliminal messaging in advertising (FCC 1974). As the 1974 public notice pointed out, it did not matter if subliminal messaging actually worked or not. The intent of subliminal messaging was deceptive, and therefore "inconsistent" with the public-interest responsibilities of broadcast licensees.

It is unsurprising that no one anticipated this possible issue when Congress created the Communications Act in 1934, or that Congress failed to pass legislation even after the issue of subliminal advertising first emerged in the 1950s. This is the value of an administrative agency with general oversight. A single public notice calmed public hysteria and prevented a practice which — whether it worked or not — was designed to be manipulative.

Generally, the same technological evolution that enables new services loved by consumers opens the door to potential abuses they hate. For this reason, Congress must empower the relevant oversight agency to identify and address new forms of abusive conduct. While Congress can subsequently act to amend the statute to address emerging harms (as it has done with the Communications Act), this process frequently takes years. The oversight agency sits in the best position both to discover emerging harms and to address them in the first instance. In drafting the DPA, Congress must use language that makes it clear to reviewing courts that it intends the relevant oversight agency to identify and address new harms as they emerge — and that courts should defer to the agency's judgment in these matters.

We have already seen allegations that raise public concern about deceptive, manipulative conduct by digital platforms, even if there is little scientific proof that the conduct actually affects people's behavior. For example, numerous critics of Facebook and other social media platforms have accused these platforms of "designing for addiction." That is, they use known cognitive behavior theories to manipulate users to remain psychologically engaged with the platform, to the detriment of other more important activities such as work or family (O'Brien 2018; Wu 2016). Facebook has admitted to experimenting with news feed inputs without the user's knowledge or consent, to see if they can reliably manipulate people's moods without their knowledge (Goel 2014). Fraudsters have learned how to manipulate platform advertising technology to find targets

particularly susceptible to their scams, despite efforts by platforms to root out such abuses (Faux 2018).

These are certainly novel claims of harms, uniquely enabled as a consequence of platform technology and its role in our lives. Whether or not existing law reaches any of the above conduct, there is no doubt that the majority of people view even the attempt to manipulate them as deceptive and wrong. Congress cannot possibly anticipate these types of behavior, nor can it respond with new legislation every time a new public outcry occurs. The only way to effectively counter such conduct and preserve public trust in the sector is to empower an agency to act broadly against unfair, deceptive, or otherwise harmful conduct.¹⁶¹

D. Enforcement Powers and Private Rights of Action.

Justice delayed is justice denied. This is particularly so for consumers, who often face enormous disparity of power when seeking remedies from abusive practices. Particularly when individuals are “nickel and dimed” so that no single individual feels strongly enough to pursue action, bad actors have an incentive to act unless countered by risk of penalties strong enough to outweigh the potential financial advantage. The same is true for cases that do not involve explicit intent to harm consumers, but result from providers’ lack of incentive to take the precautions needed to prevent harm.

The Story of the Plastic Owl

When I began my career over 20 years ago, my workplace had a pigeon problem. Pigeons would congregate around the courtyard, creating messes and being a general nuisance. My employer purchased some plastic owls, believing that the pigeons would recognize its traditional predator and go elsewhere.

During the winter, this worked reasonably well. But then spring came and the pigeon population multiplied. People started eating outside again, creating all manner of tempting pigeon

¹⁶¹ Opponents of regulation invariably argue that fear of public backlash will prevent deceptive conduct. It is difficult to take seriously an argument so regularly contradicted by daily life, but it arises frequently enough that I provide a few basic answers to this knee-jerk objection in this footnote. 1) Vigilante justice, even internet vigilante justice, is generally considered the antithesis of a prosperous, orderly society and the rule of law. To police an entire sector of commerce and social activity through roving mobs of internet trolls surely meets Hobbes’s definition of “nasty, brutish and short.” 2) As discussed in Chapter I, massive information asymmetry is an outcome of the way in which digital platforms operate. This creates a “Market for Lemons” problem (Akerlof 1970), which is only resolvable by providing a suitable remedy for discovery of the harm *post hoc*. 3) As we have seen from constant new revelations, the bad conduct can go on for years without being detected. This is a high social cost to ask users to bear on the off chance that the harm can be discovered and proven without the power to subpoena evidence or compel a company to cooperate in an investigation. To the extent this is insufficient, other reasons can certainly be provided to rebut this tired Libertarian cliché.

treats in the form of food scraps and wrappers. The pigeons crowded around the courtyard at the edge of whatever their pigeon senses told them was the threat radius of the plastic owl. Eventually, the circle of pigeons got so crowded that one of the pigeons hopped or was pushed closer to the plastic owl.

Nothing happened.

After a suitable period of observation, the circle of pigeons contracted. Soon, another pigeon decided to test the limit on the “owl” and hopped forward. Again, nothing happened. Several repetitions later, the pigeons realized the owls were no threat. Not only did the pigeons once again re-infest the courtyard, they could be seen perching and doing their “pigeon business” on the plastic owls. While I cannot claim to be an expert in pigeon psychology, I suspect the pigeons enjoyed doing their “business” on this helpless representation of their natural predator.

When an agency lacks the authority or willingness to act, it becomes a plastic owl. Eventually the industry realizes that the agency presents no threat and cheerfully does its “business” all over consumers. Agencies therefore need authority to act swiftly to address consumer complaints. This process must be sufficiently easy for consumers to use that they will not find the complaint process itself a deterrent. The agency must resolve the complaint in a reasonable time and inform the complainant of the result. The agency should also have express power to order remediation to consumers rather than simply authorizing the agency to issue fines and forfeitures. The primary object of consumer protection is to make consumers whole, not simply to punish bad actors.

For consumers, it is far better that abuse not happen at all than to have it happen and remediate it. It is better to resolve the problem directly with the provider than to resort to a complaint to the agency or to a lawsuit. Additionally, businesses far prefer to know in advance what to do to limit liability. For this reason, the agency should have clear authority to create rules designed to avoid confusion and unreasonable practices and to facilitate resolution between consumers and digital platforms. For example, many digital platforms have no clear means by which consumers can contact someone to voice complaints or ask questions about fees or terms of service. A rule requiring a provider (or provider above a specific size) to create a process for addressing consumer concerns would clearly be valuable. Additionally, the agency itself might act as an ombudsman between consumers and digital platforms, resolving disputes through non-adversarial processes. Congress should make clear that the relevant enforcement agency has authority to create rules governing transparency and standards of conduct necessary to protect consumers, and has authority to use informal mechanisms where appropriate.

Because agencies' resources are limited, and because agency enforcement is subject to the shifting winds of political will, Congress should include the opportunity for private rights of action and the right to bring class-action lawsuits against providers. The law should allow for actual damages, as well as liquidated damages where actual damages may be difficult or impossible to prove.¹⁶² For example, the Communications Act allows a private right of action for actual damages against any telecommunications carrier. It also provides a private right of action with a liquidated damages clause of \$1,000 per day per violation for violations of the cable privacy statute. Similarly, Congress should consider which circumstances would permit a general private right of action, and when to include provisions for liquidated damages.

A potential problem with authorizing private rights of action — and especially class actions — is the widespread use of “forced arbitration clauses.” Under the terms of service, consumers must waive their rights to sue or join a class action lawsuit and must agree to resolve any and all disputes with the provider through an arbitration process dictated by the provider. Such clauses would render any private right of action granted by Congress meaningless. Congress should therefore make clear that the right to sue or join a class-action lawsuit over violations of the DPA is not waivable.

1. Costs to Stakeholders Are Not Irrelevant, but Are Not Determinative and Are Often Over-Exaggerated.

Whenever the question of consumer protection arises, there are complaints that it will raise the cost of doing business and therefore drive up the cost to consumers generally or even dissuade potential providers from offering services.¹⁶³ The short answer is that any business model that depends on exploiting consumers is not a good business model. Someone must bear the cost of defective products or deceptive practices, either the consumer or the provider. For reasons that have held true since Brandeis wrote in support of creating the Federal Trade Commission, public policy should act to protect consumers from the disparity in bargaining power and the inability to detect defects or deceptive practices.

The cost of compliance tends to be exaggerated by providers. But this does not mean that consumer protection regulation, particularly proactive regulation, is entirely without cost. As noted

¹⁶² “Liquidated damages” is a legal term meaning a set minimum monetary amount paid in damages for a violation. Liquidated damages are used in private contracts and in statutes when actual damages are either difficult to compute or are insufficient to deter violations.

¹⁶³ The argument that businesses have no “incentive” to harm customers is also frequently raised, displaying both an astonishing ignorance of basic economics and a willful blindness to reality. Let us assume away all actual malevolent actors. Profit-maximizing firms may have no incentive to harm their customers, but they have every incentive to cut costs and charge “all the traffic will bear.” Our experience in the real world confirms this empirical reality over the wishful thinking of economists bandying about phrases such as “reputational harm.”

numerous times above, the potential tradeoff in benefits as against the costs to providers and opportunity cost to consumers is part of the calculus. There are occasions when it is appropriate to require the consumer to bear the risk of potential defects — provided the risk is clearly explained. Similarly, compliance costs that can easily be absorbed by large businesses may be overwhelming for new entrants and smaller businesses. In these cases, the benefits of imposing consumer protections must be balanced against the advantages of permitting new entry and enabling small businesses to function. Regulators in such instances should reject simplistic “level playing field” arguments that equate small firms or new entrants to large firms that are capable of causing greater harm to larger numbers. Industry advocates cannot simultaneously plead the case for the small business or new entrant as too weak to bear the cost of compliance, and claim that exempting these businesses gives them an unbeatable advantage over well-funded incumbents.

Finally, consumers should not be asked to bear certain risks, even if precautions raise costs and create barriers to entry. Restaurants and food trucks are often small businesses and are often started by immigrants and other traditionally economically disadvantaged individuals. Health codes to ensure that the food does not make people sick undoubtedly raise the cost of doing business, as does compliance with inspection rules. Some individuals who would otherwise start restaurants or food trucks cannot afford to do so as a result of the added expense. Nevertheless, as a society we decide that this cost and the resulting barrier to entry are preferable to making consumers bear the risk of eating contaminated food, even though restaurant and food-truck operators have an incentive to avoid poisoning their customers.

E. Application to All Platforms versus Application to Platforms with Market Power.

Not all proposed provisions of the DPA — including the consumer protection provisions and subsequent regulations — need apply equally to all digital platforms. The Communications Act has often distinguished between dominant and non-dominant firms, applying greater regulatory scrutiny and more vigorous enforcement in the case of dominant firms where the primary concern is limiting market power. For example, at the heart of the Telecommunications Act of 1996 were provisions designed to open existing incumbent local voice loops to competition.¹⁶⁴ These provisions included incentives for local loop providers to open their networks by allowing them to enter the long-distance market once pro-competitive provisions of the statute had been satisfied.¹⁶⁵ Other provisions, such as rate regulation of the cable basic tier, were to be phased out once the FCC found that a dominant incumbent provider faced “effective competition.”¹⁶⁶ Similarly, the FCC has

¹⁶⁴ Telecommunications Act of 1996, Title I.

¹⁶⁵ See 47 U.S.C. §§271-72.

¹⁶⁶ See Telecommunications Act of 1996 §301.

often exempted or modified the obligations of small providers when the cost of compliance would impose significant burdens on provision of service.

1. Why Sector-Specific Regulation Frequently Distinguishes Between Dominant and Non-Dominant Firms.

This approach to regulating dominant firms rests on a policy preference for competition. Imposing limitations and obligations that were designed for massive firms with market power on startups and potential competitors may entrench dominant firms by driving up the cost of market entry or otherwise making market disruption more difficult. At the same time, incumbents often seek to confuse the issue by arguing that treating new entrants or smaller providers differently from dominant providers “picks winners and losers.” Rather than actually creating a competitive marketplace, incumbents argue that regulators should create a “level playing field” by exempting the very incumbents the regulation targets, or by applying the same level of regulation to the competitors whom the regulation seeks to foster (Del Priore 2018). This, of course, ignores the entire reason for regulatory action in the first place: to **create** competition, not maintain the status quo.

As the mixed success of these provisions demonstrates, it is difficult to find the proper balance between limiting market power and encouraging the emergence of new firms. Political pressure may push regulators to find that firms are non-dominant too soon. Additionally, many regulations promoting competition or protecting consumers may need to apply to all market participants to achieve the desired effect. For example, the Communications Act imposes an obligation on all telecommunications service providers, not simply incumbent or large providers, to interconnect.¹⁶⁷ Without such a requirement, the public switched network — the “network of networks” that makes it possible to call anyone anywhere using a standard 10-digit phone number — simply would not work. Only where all networks reliably interconnect with one another can the entire network be reliable.

In considering the proposals set forth in this paper, I have on some occasions indicated that it would prove easier to apply specific proposals to dominant firms. But I do not propose any strict conclusion at this preliminary stage of debate. While the general guiding principles of consumer protection, economic competition, and competition in the marketplace of ideas are universally applicable, implementing these recommendations will require careful consideration of how to balance the tension between curbing market power, protecting consumers, and promoting competition.

¹⁶⁷ 47 U.S.C. §251(a).

2. Important Differences Between Regulatory Determinations of Dominance and Antitrust Determination of Dominance.

The word “dominance” does not appear in the antitrust statutes. Indeed, many of the words we routinely associate with antitrust — such as “market power,” “monopsony,” and “consumer welfare” — appear nowhere in the statutory language or the legislative history. They have emerged over time as interpretations of the harm antitrust is designed to avert. This flows from the nature of antitrust enforcement in the United States. The antitrust statutes impose civil or criminal liability for specific behaviors — the laws usually speak of “agreements” or “acts” or other specific things — that “restrain trade,” “monopolize,” or “lessen competition.” The system proceeds from the assumption that commerce as a whole works well, and that specific acts that threaten competition should be prohibited. Notably, as currently understood by the courts,¹⁶⁸ antitrust does not even prohibit monopoly or monopsony if obtained through legal means. Rather, as the D.C. Circuit has explained, “[w]hile merely possessing monopoly power is not itself a violation of antitrust law, it is a necessary element of a monopolization charge.”¹⁶⁹

Two consequences flow from this. First, the government always bears the burden of proof when seeking a new remedy under the antitrust laws. Second, each time the government brings a case against a company for a new violation, it must establish the same elements of (a) monopoly or monopsony power; and, (b) enhancement or protection of that power through illegitimate means. No matter that the government previously proved that the firm has monopoly or monopsony power in a similar action under similar circumstances last month. The government must once again prove all the elements of a monopolization claim — including once again showing the existence of market power.¹⁷⁰ Certainly previous convictions and settlement decrees establishing market power are part of that evidence. But the government must still show both the continued presence of market power *and* new conduct that seeks to enhance or defend existing market power through illegitimate means.

A finding of dominance in the context of sector-specific regulation, however, serves a different purpose. Unlike antitrust, sector-specific regulation generally seeks to moderate the market power of dominant firms no matter how obtained, and to promote competition for the express purpose of eliminating dominance. It therefore looks to structural evidence of a firm’s ability

¹⁶⁸ I am aware that current judicial interpretations of antitrust law have come under fierce criticism in a number of quarters. This includes arguments that the existing antitrust laws support the elimination of monopoly in all circumstances, regardless of how obtained. I do not seek here to enter into that debate. But whatever the law *should* mean, courts today require antitrust enforcers and private litigants to show both market power and abuse of market power to support an antitrust action.

¹⁶⁹ *United States v. Microsoft op.cit.*

¹⁷⁰ The situation is different when an antitrust agency seeks a penalty for violation of an existing consent decree. The burden of proof in that case is to show that the party violated the consent decree, rather than to prove again the facts of the complaint admitted to in the consent decree.

to exercise market power regardless of the means by which the firm obtained its market power. Where antitrust law today considers acquiring a monopoly through product superiority or other “legitimate” means an acceptable outcome that enhances “consumer welfare,” sector-specific regulation reflects a judgment by Congress — enforced through a regulatory agency — that factors unique to the designated sector make dominance (however defined) on the part of any firm contrary to the public interest, at least absent regulation to prevent abuse before it occurs. Where antitrust offers a *post hoc* (“after the fact”) remedy to harms already committed, sector-specific regulation offers an *ex ante* (“before the fact”) safeguard to prevent potential harm from occurring.

Because of this difference, a finding of dominance by a regulator is not a one-time event, repeated on every occasion the agency creates rules or tries to enforce them. Generally, agencies define what constitutes a “dominant” firm in terms of some objective set of market criteria, and then determine whether a specific firm does or does not meet that definition. Once the regulator determines that a firm is dominant, the burden shifts to the dominant firm. To avoid regulation as a dominant firm, the firm must show that it no longer can exercise market power.

The difference between antitrust and a regulatory finding of dominance is illustrated by the long history of regulation of telecommunications networks. From the beginning of the 20th century until the break-up of AT&T in 1982, the Department of Justice sued AT&T multiple times for various antitrust violations (Wu 2010; Wu 2018). On each occasion, the department was required to establish the same elements of both the existence of monopoly power and an illegal abuse of that power. It also had the burden in each case to detail the appropriate remedies based on the specific facts proved at trial.

By contrast, when the FCC began to shift from a regulated monopoly framework to an effort to introduce competition in the various segments of the telecommunications market in the 1970s and 1980s (Cannon 2003; Wu 2010), it decided to distinguish between dominant and non-dominant firms for regulatory purposes. As the FCC explained in what would become known as the “First Competitive Carrier Order,” (FCC 1980) Congress required the FCC to ensure that rates were “just and reasonable.” Setting rates by traditional principles of rate regulation imposes significant costs on carriers, which carriers then pass on to customers. Furthermore, many potential competitors cannot afford to go through the rate-making process, especially because the rate-setting process happens before the would-be carrier can even offer service and acquire customers. The FCC reasoned that if market competition could achieve the desired outcome — just and reasonable rates — without expensive rate regulation, this would serve the public interest by lowering costs and encouraging new entrants.

At the same time, the FCC recognized that when a carrier had sufficient power in the market to control its prices and outputs regardless of market demand — *i.e.*, the carrier had market power — it still required close supervision and traditional rate regulation. “A firm with market power is able to engage in conduct that may be anticompetitive or otherwise inconsistent with the public interest. This may entail setting price above competitive costs in order to earn supranormal profits, or setting price below competitive costs to forestall entry by new competitors or to eliminate existing competitors.” To determine whether a carrier could exercise market power, the FCC would focus “on clearly identifiable market features.” (FCC 1980) This included not merely the number of competitors at any given moment, but features of the market such as “barriers to entry” and “control of bottleneck facilities.” As the FCC recognized, these features in particular might allow a firm to exercise market power without regard to the number of competitors or availability of potentially competing services.¹⁷¹

Critically, the FCC did not simply look at a single snapshot in time or count the number of competitors in the market at the moment. Instead, it looked to the overall structure of the market, including difficulty of entry and how easily the allegedly dominant firm could raise the cost of doing business to potential rivals through control of essential facilities. If control of an essential facility meant that a deregulated carrier could strangle competitors tomorrow, the firm retained its designation as a dominant firm. Nor did it matter that dominant carriers acquired their dominance legally — in fact with the government’s affirmative blessing. The point of designating dominant carriers was not to “punish” carriers, but to describe accurately a market structure where some firms could — absent regulation — exercise market power. For the same reason, it was not “unfair” to allow competitors to operate under a different set of regulations. Unlike antitrust, which presumes that high market share is the result of consumer choice unless demonstrated otherwise, the FCC was looking at competition as a form of regulation to accomplish a specific goal — ensuring that rates remained just and reasonable. But price regulation through competition rather than traditional government-managed rate-setting only works when the market is actually, not just theoretically, competitive.

Where Congress or the FCC have relied on the number of competitors rather than on market structure analysis, the results have proven extremely unsatisfactory. For example, although the Cable Act of 1992 required rate regulation for cable operators to protect against unjust and unreasonable rates, the Telecommunications Act of 1996 eliminated rate regulation for cable systems subject to “effective competition.” The 1996 act defined “effective competition” as the

¹⁷¹ For example, if there are significant barriers to entry, an existing dominant carrier will have significant warning of the arrival of a potential competitor and may engage in “predatory pricing,” pricing their services so low that the new entrant cannot compete without taking a loss. After the competitor is driven out of business, the carrier can return to charging prices well above the competitive level.

presence of two comparable MVPDs serving at least 50 percent of the franchise area, with at least 15 percent of the households in the franchise area subscribing to a rival MVPD. The Telecommunications Act of 1996 made no reference to barriers to entry, control of bottleneck facilities, or any other structural elements that might permit an incumbent cable operator to exercise market power despite the presence of two comparable competitors.

Nearly every cable system in the United States has been found to be subject to “effective competition” under this definition, yet deregulated cable rates have climbed at rates consistent with market power rather than with competitive markets (Kimmelman and Cooper 2017). Although there are multiple explanations offered for why cable prices have consistently risen at rates far exceeding inflation for nearly two decades, one thing is clear: Simply taking a snapshot in time and counting the number of potential competitors in the marketplace does not ensure that the market will effectively regulate rates as predicted. A determination of “effective competition” (or, more accurately, a determination that the market will remain competitive for the long term and therefore keep prices reasonable) must consider the underlying structure of the market.

Application of the Telecommunications Act of 1996 to telecommunications provides another important lesson. Because its drafters were eager to replace direct regulation with market competition and regulation only of essential facilities and dominant firms, they created processes for removing regulation of dominant firms. These included a statutory pathway for ILECs to enter the long-distance market, a right to petition the FCC to “forbear” from applying any statute or regulation on a finding that enforcement was “no longer necessary as a result of competition,”¹⁷² and “regulatory reviews” every few years to determine whether the existing rules remained necessary.¹⁷³ This created a lever for political pressure, where ILECs could repeatedly challenge continued regulation as dominant firms and then complain to Congress and the courts that the FCC was refusing to declare them non-dominant — despite the fact that little had actually changed in the marketplace.

Congress created these mechanisms based on its adherence to public choice theory rather than actual market-based economic analysis. History and economics demonstrate that market structure is difficult to change, and that some regulatory oversight remains necessary in specific sectors, both to counteract market forces that create market power rather than competition and to correct premature judgments as to the durability of competition absent regulatory intervention. But Congress chose instead to rely on the ideological belief that agencies always strive to maximize regulation for its own sake. As the last two decades have shown, reliance on “policy with cynicism in place of romance” results in highly concentrated markets and their attendant evils for consumers,

¹⁷² 47 U.S.C. §160.

¹⁷³ 47 U.S.C. §161.

rather than a competitive nirvana where the state has withered away and capitalism assures “to each according to his ability.”

Applying these lessons to the proposed Digital Platform Act, Congress should provide guidance to the enforcing agency on which criteria to consider when declaring a firm dominant or non-dominant for any particular regulatory purpose. As noted in Chapter I, I believe that the “cost of exclusion” (COE) is the appropriate metric for determining dominance. But whichever metrics Congress and the enforcing agency use, Congress should make it clear that a finding of dominance lasts until the dominant firm can prove that the market has changed sufficiently. Congress should also trust the agency to assess honestly the relevant market conditions to determine whether a firm is no longer dominant, and/or that the elements of industry structure that drive the market toward monopoly or oligopoly have changed.