INTRODUCTION

Ten years ago, Oren Bracha and Frank Pasquale asked if the time had come to create a "Federal Search Commission" (Bracha and Pasquale 2008). Today, we can expand that question beyond the monopoly that Bracha and Pasquale feared would dominate search to the broader world of digital platforms. As explained below, history demonstrates that an industry may over time become so important to the national economy that neither generic competition law nor generic consumer protection law can adequately address it. When that happens, Congress (usually in response to increasing social pressure, and after the failure of industry self-regulation and state regulation) ultimately passes a federal law and creates an agency capable of providing ongoing, industry-specific supervision (Cooper 2014, Cooper 2013). Whether or not we need an entirely new agency, or should simply expand the jurisdiction of an existing agency, the general rise to prominence in our economy and in our lives of "digital platforms" makes it necessary to impose sector-specific structural regulation to promote competition and further the broader public interest.

I have written this book explicitly to begin this conversation. I do not imagine that everyone will share my views. For one thing, I will frequently invoke the idea of the "public interest," a concept roundly criticized by conservatives and neo-liberals as vague and unsuited to a time when we believe in "data-driven policy" and "cost-benefit analysis." But these things describe tools, not the object of legislation and policy. Policy should certainly be driven by data, but that does not tell us where we want to go. Our ultimate aim flows not from the tools we use to analyze the world and devise necessary solutions. It must flow from our fundamental values as a society.

Unfortunately, for almost a generation, the elimination of government oversight of all aspects of the private sector has transformed from a reaction against the perceived over-regulation of the 1950s and 1960s to an end in itself. We have experienced a political and policy generation weaned on a single quote from Ronald Reagan, the 40th President of the United States: "[G]overnment is not the solution to our problem; government is the problem." Few of those claiming to follow this tradition choose to remember that Reagan qualified that statement with the words "in the present crisis" (by which he referred to the "stagflation" of the 1980s).[1] Whether or not Reagan was right in his inaugural address in 1981 as to the specific crisis then facing the nation, his would-be disciples have chosen to see the unqualified version of his statement as a catechism to follow with ever increasing devotion. We have seen this quote transformed from general dictum to philosophy, and from philosophy to article of unshakable faith.

[1] Copy of address available at: https://www.presidency.ucsb.edu/documents/inaugural-address-11

Nothing better exemplifies this religious belief that the end-goal of policy should be the abolition of all government oversight of "the market" than President Trump's Executive Order requiring federal agencies to eliminate two regulations for every new regulation adopted.[2] This approach is, of course, the exact opposite of "data-driven policy." "Regulation" is neither a pernicious strangling weed to be eliminated, nor some form of chemotherapy for the body politic — a poison with literally nauseating side effects used only in desperate need. Law and policy are tools by which we simultaneously express the values of our society and the mechanism by which we seek to achieve real-world outcomes consistent with those values. Nearly everyone can quote the stirring line from the Declaration of Independence that all of us are "endowed by our Creator with certain rights." Few recall that the very next sentence says that "to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Likewise, the Constitution affirms that the express purpose of government is not merely "to establish justice, insure domestic tranquility, [and] provide for the common defence." The Founders also regarded our more centralized form of government as necessary "to promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." This is not a nation founded on the principle that "government is not the solution, government is the problem."

By the same token, of course, regulation for its own sake is as contrary to good policy as deregulation for its own sake. This returns us to the concept of the "public interest," a phrase used often by no less a proponent of "free markets" than Adam Smith. Smith argued that an important role of government was to promote and regulate commerce to serve the public interest. Certainly, Smith famously argued that individuals acted for the most part in their own interest, with little awareness of their broader role in promoting the public interest, and that this state of affairs was more beneficial than the active effort by the state to dictate all economic activity. But Smith was also a strong proponent of analyzing when public regulation or public investment would better serve the public interest than the unregulated private sector (Smith [2003] Part III (discussing public works and institutions)).

I begin from this understanding of government as the means by which we secure our rights and promote the general welfare. But I do so mindful of the equally important lessons from history that no matter how well intentioned, regulation — like anything else — can cause considerable damage when applied wrongly or in excess. The scholarship around "agency capture" and "public choice theory" is not inherently wrong, but like so many other analytic approaches deployed with the single end of eliminating public oversight of the private sector it has been elevated from caution

[2] Executive Order 13771, 82 Fed. Reg. 9339 (February 3, 2017).

to dogma. Public choice theory may indeed be “politics without romance” (Buchanan and Tollison 1984). But to substitute empty cynicism in place of genuine analysis simply replaces an idealistic delusion with a more toxic and dystopian one.

The current misuse of public choice theory does not falsify the basic observation that public policy is conducted by human beings, and many factors influence human beings besides the desire to serve the public interest. We must therefore design any system of regulation with appropriate limits and appropriate safeguards. To reject the philosophy that government is ***always*** the problem does not mean embracing the binary opposite that government is always the solution. To recognize the importance of public oversight of critical sectors of the economy does not require embracing central planning.

Importantly, I recognize that we have only begun the debate on how to maximize the public interest and minimize the likelihood of public harms. We do not, at this point, even have agreement on how to define “platforms.” We have a broad, general feeling that, in the 30 years since the rise of the commercial internet, specific companies seem to concentrate a great deal of economic power and influence over our daily lives. For some, this state of affairs is intolerable and inconsistent with our basic principles of self-governance. As Sen. John Sherman (R-OH) famously stated: “If we will not endure a king as a political power, we should not endure a king over the production, transportation or sale over any the necessaries of life.” Those who share these views increasingly call for the use of antitrust law to break up the largest of these companies such as Amazon, Facebook, and Google.

Others do not go nearly as far, but find themselves feeling increasingly uneasy. Digital platforms, including the largest, provide many valuable services. Indeed, as I discuss below, these platforms have so integrated into the broader economy and broader society that their actions can cause widespread and dramatic public harm. This is precisely why we need sector-specific regulation. At the same time, we might achieve the same ill effects as “no regulation” through poorly designed regulation. The argument that regulation invariably protects incumbents and cements their power is surely false, but the argument that poorly designed regulation ***can*** serve the interests of incumbents rather than the public is surely true.

At the same time, uncertainty cannot freeze us into perpetual inaction. Refusal to act, and especially the refusal to even engage in serious discussion, is as much a poor choice as acting precipitously. The hoary clichés trotted out by acolytes of the gods of the marketplace to practice “regulatory humility” and “first do no harm” deserve the answer given by Jeremiah: “They cry

'peace, peace,' but there is no peace."[3] We will only determine the right course of action by finally recognizing the problem and developing a suitable policy response. The response to our current ignorance is to cure it with rigorous examination and debate. The response to our inability to predict possible unintended consequences is to develop a system with flexibility and self-correcting mechanisms.

To begin the conversation requires selecting some rational starting point. I have therefore begun with a historical analysis to place this current inflection point in its historic context. Specifically, the rise of digital platforms represents the latest evolution in electronic communication. As I discuss at length below, digital platforms share many of the same economic and social characteristics of electronic communications and electronic media. In particular, because communication is so central to the human experience, the power of electronic media to capture our attention, inform our impressions of the world around us, and work on our most basic emotions has long required regulation to preserve the robust "marketplace of ideas" on which democracy depends. As a result, the fundamental values that have guided government policy with regard to communications serve as a useful starting point for the values that should govern our policy on digital platforms.

I draw upon this history to propose a wide range of regulatory powers for the exercise of public oversight of digital platforms and urge that we either empower an existing agency or create a new agency to use these powers as necessary. It is highly unlikely that the laundry list of economic regulations I propose in Chapter IV will apply to every digital platform, or necessarily to most digital platforms. For this reason, I believe that Congress should empower an agency with a wide range of tools and reasonably broad discretion to use them. To mitigate the concerns over agency inaction or agency abuse, Congress should avoid preemption of other federal antitrust and consumer protection agencies, and should avoid preemption of state regulators. Additionally, although I have tried to provide sufficient specificity to inform intelligent discussion, I understand that nearly every recommendation will require further details on how to translate them into effective legislative language.

I do not expect that everyone will agree with me that this entire tool kit is necessary. I expect for each recommendation considerable argument with regard to both the necessity and the wisdom of entrusting such powers to an enforcement agency. Others will argue that if a federal agency has such comprehensive and sweeping powers, further regulation by the states will frustrate federal policy and impose needless costs. I have attempted to provide some preliminary answers to these

[3] Jeremiah 6:14.

challenges. But I have also tried to make each recommendation sufficiently robust that it can stand on its own and achieve some good, even if other recommendations are rejected.

This is even more true for the recommendations in Chapter V on recommended content moderation policy. It is precisely because speech is so central to the human experience that it has such powerful potential for both harm and good. Regulation in this space is therefore at once critical and fraught with danger. Unlike in the economic space, where we have clear fundamental values of promoting competition and protecting consumers, any policy on content moderation must invariably balance the conflicting fundamental values of free speech and protecting the most vulnerable from threats of violence and harassment. My recommendations on speech should therefore be regarded as particularly tentative.

In short, while I am confident that the complete package of recommendations I make herein best serves the public interest and provides the best expression of our fundamental values, I am not so egotistical to believe that others will share this view. I expect that while some will see my discussion and recommendations as overwhelmingly broad and sweeping, others will find them wholly insufficient. Nevertheless, I hope that even those who reject my fundamental premises will find particular recommendations of value and points of common ground. I would further hope and expect that those who proceed from a different vision of the role of government, a different understanding of our fundamental values, or a differing opinion on what government may practically achieve, will offer their own solutions. For all the mess and dysfunction around politics and public policy, human beings have yet to find a superior means of reaching a livable consensus on how to maximize the likelihood of good results and minimize the likelihood of bad results. If this is indeed "politics with romance," then I confess that I remain a hopeless romantic.

A. Why Sector-Specific Regulation Rather Than Antitrust Alone?

Most of the debate around the regulation of digital platforms so far has centered on antitrust, and with good reason. The problems with existing digital platforms manifest themselves most clearly with platforms that have experienced explosive growth, with no potential rival in sight. This has coincided with the rise of the new "Brandeis School," a reaction to the dramatic about-face in antitrust jurisprudence that has occurred over the last 40-plus years. Calls for the breakup of giant digital platforms such as Amazon are now buttressed by the general demand for a more robust and expansive antitrust. This more expansive antitrust should, proponents argue, address social harms and protect the "marketplace of ideas" as well as narrowly consider negative impacts on consumer prices.

But the resort to antitrust instead of sector-specific regulation arises from a more pernicious policy problem. After all, Justice Louis Brandeis himself was a proponent of sector-specific regulation to enhance competition and protect consumers (Sallet 2018). It appears that the reluctance to consider sector-specific regulation flows in part from the misconception discussed above on the role of government in regulating the economy to advance the public interest. Two false premises undergird the current policy environment. First, that regulation should only occur after a clear display of "market failure." Setting aside the important role of government in affirmatively preventing harms to consumers or harmful levels of concentration, the vague definition of "market failure" allows opponents of public oversight of private companies to argue that no set of circumstances meets the definition of market failure. Second, that even where regulation is appropriate, only "natural monopolies" or "public utilities" should have unique, sector-specific regulations. Anything else is "unfair" to the regulated industry, which — proponents argue — deserves a "level playing field." Specific regulations in a competitive sector, they contend, "pick winners and losers" (Del Priore 2018).

As a consequence, a great deal of discussion presupposes that unless one can prove that a specific digital platform is a "public utility" or "natural monopoly" of some kind, we may only apply antitrust or laws of general applicability rather than targeted sector-specific regulation. For example, despite the clear connection between advertiser-supported digital platforms and the collection and abuse of massive amounts of personal data, and the relationship between data collection and platform market power, discussion has primarily centered on how to apply antitrust law to a handful of giant platforms, or on generally applicable privacy laws. Alternatively, others have spent considerable time and effort trying to shoehorn specific, individual companies into the definition of "natural monopoly" or "public utility."

It is not my purpose here to explore either the logical fallacies or moral failings that make fairness to corporations more important than fairness to actual flesh and blood human beings. But because these twin concepts hold such a powerful grip in the current political environment, I must first explain why this understanding is wrong. The idea that only an absence of competition justifies regulation — or the converse idea that using antitrust to eliminate excess concentration in the market will automatically solve all consumer problems — has no grounding in law and runs contrary to all but the most recent history.

Contrary to popular belief, sector-specific regulation is neither grounded in the concept of "public utility" nor linked to "natural monopoly," although these are often important elements in the decision to create regulatory agencies and shape the nature of the regulation imposed.[4] Congress

[4] For example, the Interstate Commerce Act of 1887 creating the Interstate Commerce Commission addressed, among other things, the ability of railroads to charge monopoly rates along routes devoid of competition. The

created the Federal Radio Commission (FRC) in 1927 in response to the growing power of radio as a means of mass communication and to ensure the distribution of radio licenses on a non-interfering basis in a manner that served "the public interest, convenience and necessity."[5] Congress created the Securities and Exchange Commission (SEC) to provide oversight over the trading of stock and otherwise regulate securities trading to protect investors and protect the economy from the practices that resulted in the market crash of 1929 and the subsequent Great Depression.[6] Congress created the Food and Drug Administration in 1906 (and strengthened it further in 1938) in response to widespread concern about the purity and safety of food, drugs, and cosmetics.[7] None of these agencies were created to oversee sectors of the economy that lacked for competition, or exclusively to promote competition. Rather, Congress created these (and other) sector-specific agencies because evidence showed that leaving these sectors of the economy without government supervision invited profoundly negative consequences that undermined the economy, undermined the institutions of democracy and self-governance, or undermined public health.

Digital platforms — a broad category that can cover everything from search to shopping — have clearly showed themselves as possessing the kind of economic power and centrality in our daily lives to require federal oversight well beyond what even modified general rules of antitrust and consumer protection can adequately address. In the last two years, we have seen increasing evidence that decisions made by digital platforms can bankrupt businesses, sway federal elections, and change the ways we think and feel about ourselves and others without our even realizing it (Duhigg 2018; Farrell and Schneier 2018; Alcott *et al.* 2019). These platforms show an alarming tendency to monopoly, and any sector-specific regulator should include regulation designed to promote competition and to protect consumers from traditional economic harms. The complexity of these platforms, their growing centrality in our daily lives, and their impact on society as a whole requires a diligent permanent regulator charged with making sure that the future growth and development of these platforms serves the public interest as well as private interests.

B. A General Summary of What I Intend to Discuss.

In Chapter I, I define "digital platforms" as a unique sector of the economy. I identify three specific criteria that separate digital platforms from other businesses: 1) They are accessed and used online; 2) They are two-sided or multi-sided platforms, at least one side of which must be open to the public, and where members of the public are capable of interacting with each other; and, 3)

Federal Power Act of 1920 and subsequent amendments created the Federal Power Commission (now the Federal Energy Regulatory Commission) to address first the hydropower industry, then ultimately all oil, gas, and electric production.

[5] Radio Act of 1927, Pub. L. 69-632.

[6] The Securities Act of 1933, Pub. L. 73-22.

[7] Pure Food and Drug Act of 1906, Pub. L. 59-384; Food, Drug & Cosmetic Act of 1938, Pub. L. 75-717.

They enjoy network effects, as distinct from economies of scale. Specifically, they should exhibit "Reed Network" or "Metcalfe Network" effects rather than simply "Sarnoff Network" effects. In a Sarnoff Network, named after radio pioneer David Sarnoff, the value of the network increases based on the number of participants. Every new member of the network makes the network more valuable by N. A Metcalfe Network, named for Ethernet inventor Robert Metcalfe, describes a network where adding individuals increases the value of the network by N^2. A Reed Network, named for internet pioneer David Reed, describes a network were each additional person added to the network increases the value of the network by 2^N.[8]

This combination of factors produces a particular cost structure and set of incentives that differentiates digital platforms from traditional brick-and-mortar businesses (even if those businesses have an online presence), or from other online businesses that do not share all three criteria. Delivery over the internet dramatically reduces the cost of scaling the network as the most expensive component, the build-out of the physical network to reach customers, is already accomplished. Similarly, a two-sided or multi-sided digital market reduces traditional costs for things like inventory or market research. Finally, the presence of strong network effects rewards rapid and massive increase in scale — a strategy called *blitzscaling* — as a means of capturing enduring market power (O'Reilly 2019).

Because these platforms often cross multiple lines of businesses as understood by traditional antitrust analysis, and because digital platforms do not necessarily compete against each other, Chapter I also proposes a new metric for measuring digital-platform market power — the *Cost of Exclusion* (COE). Where the cost to a business or individual of exclusion from the platform is significant, that platform may be presumed to have market power. As demonstrated by Professors Rahul Tongia and Earnest J. Wilson III (Tongia and Wilson 2011), COE captures a far greater scope of harm than simply loss of the value of the network. This is particularly true where a growing portion of society as a whole is included on the platform, and therefore a shrinking number of individuals can be reached without access to the network. Additionally, the model advanced by Tongia and Wilson distinguishes between types of network, allowing regulators to weigh potential complementary effects.

In Chapter II, I review the general criteria which have historically supported sector-specific regulation. In *Munn v. Illinois*, the Supreme Court examined the application of the traditional common-law principles of common carriage and when a business becomes "affected with the public interest," creating a need to create new duties and protections by statute. Tracing the evolution of regulation since *Munn,* indicia of the need for sector-specific regulation and the characteristics of

[8]The reasons for these different valuations are described by Tongia and Wilson. (Tongia and Wilson 2011)

public interest regulation become clear. In addition to purely economic criteria, the law also recognizes that where a new industry or technology potentially affects fundamental values such as free speech or self-governance the government has a responsibility to act to protect — and in some cases affirmatively promote — these values through regulation of private entities.[9] Additionally, new technologies and the businesses that use them often create new consumer protection challenges not addressed (or not adequately addressed) by existing regulation. Finally, Chapter II examines the exceedingly rare case of the "public utility," a service so critical that the government has an affirmative responsibility to ensure universal access (Feld 2017a; Rahman 2018). A comparison of these traditional criteria for sector-specific regulation with search platforms and social media platforms confirms that we have now reached the point in the evolution of these technologies that they require their own sector-specific regulator at the national level.

Chapter III examines the lessons that the history of regulation of communications and electronic mass media have to offer the regulation of digital platforms. Although digital platforms exhibit characteristics that make them different from traditional media of electronic communication, they have a significant number of similarities that make the lessons from this sector relevant to determining the appropriate regulatory regime. Both sectors are marked by rapid technological and economic change. Both involve unusual economic structures such as network effects, two-sided platform economics, potential bottleneck facilities and potentially high switching costs associated with lock-in.[10] Information asymmetries allow providers to manipulate content or services without users necessarily being able to determine the fact of manipulation, never mind its source or scope, without some kind of enforceable disclosure. Finally, regulation and management of both industry sectors raises the question of how to preserve important fundamental values of free speech from both government control and private abuse.

Regulation of electronic communication has gone through cycles, veering between periods of close government supervision and periods of significant deregulation. The Telecommunications Act of 1996 represented a massive effort to restructure electronic communications and electronic

[9] As some scholars have observed, we find an inherent tension between the underlying values inherent in the First Amendment and the plain language of the First Amendment as a limitation on government power (Wu 2017a). Nevertheless, as discussed throughout the paper, numerous cases support not merely restriction on federal censorship but carefully tailored, content-neutral laws designed to ensure a robust marketplace of ideas. In particular, the "Public Forum Doctrine" and specific cases arising from the regulation of electronic media by the Federal Communications Commission (FCC) make clear that viewpoint-neutral federal regulation designed to promote access to competing sources of news and a diversity of views and opinions is both a long-standing objective of sector-specific regulation where appropriate and permitted by the Constitution.

[10] "Switching cost" involves more than the simple monetary expense of moving from one service to another, such as paying an early termination fee for cancelling a subscription or the need to buy new equipment. It includes any burden to a user trying to switch from one service to another, including the need to learn a new operating system, losing access to friends who remain on the prior platform, the difficulty in transferring any of the user's own content from one platform to another, and other non-monetary hardships that make switching platforms that much harder than simply buying a different brand of cereal the next time one goes to the grocery store. These costs can create "lock-in," the inability of unwillingness of users to switch platforms even in the face of significant price increases or other sources of dissatisfaction (Farrell and Klemperer 2006).

mass media to limit regulation primarily to physical infrastructure and rely on competition to produce the public-interest effects previously achieved via direct regulation. As time wore on, industry incumbents succeeded in significantly reducing the level of regulatory oversight even further — subject to the occasional backlash. Examining which mechanisms worked to foster competition and which mechanisms failed informs the analysis of which mechanisms are most likely to succeed in promoting competition in the digital platforms sector.

Chapters IV and V apply the lessons from Chapter III to digital platforms. Like telecommunications, digital platforms have become important to broad sectors of the economy, as demonstrated by the impacts of a change in algorithm on existing businesses. The existence of a multi-billion-dollar "search engine optimization industry"[11] designed solely to manipulate Google Search and dominant platforms such as Facebook and Amazon illustrates the need for sector-specific regulation. Additionally, the management of many digital platforms (especially social media platforms) raises similar concerns with regard to the creation and dissemination of news and the general impact on the "marketplace of ideas" traditionally raised by the electronic media. Finally, as demonstrated by the recent focus on "addiction by design" (Morgans 2017), the experiments in mood manipulation by Facebook (Goels 2014), and the ability to exploit the information-gathering capabilities of these services without subscriber knowledge or consent (Cresswell 2018), the rise of these industries creates unique consumer protection needs that justify both sector-specific regulation and the need for a dedicated expert agency to regulate the sector.

I next consider which specific regulations any effective regulatory regime will require. As explained in the relevant sections, not all of these recommendations will be applicable to all platforms. Some by their very nature (such as platform unbundling or horizontal and vertical limits) apply only to dominant platforms. Others, such as data portability, must apply to all platforms to achieve their goals. Still others, such as various non-discrimination requirements, are a grey area. Certain types of non-discrimination (such as discrimination based on race) should, of course, apply to all platforms as they do to all brick-and-mortar businesses (although enforcing these non-discrimination requirements may present novel challenges in the context of digital platforms). On the other hand, certain types of exclusive deals or forms of preferential treatment may be harmless, or even beneficial, when carried out by non-dominant firms, but anticompetitive and anti-consumer when engaged in by dominant firms.

First, drawing on fundamental values that have guided the evolution of communications technology since the founding of the Republic (Griffin and Feld 2013), and the more recent history of

[11] Estimates place the spending on SEO in the United States in 2016 at approximately $65 *billion* dollars (DeMers 2016).

the Communications Act, I propose that the goals should be to encourage diversity of voices, protect the integrity of the democratic process, promote vigorous economic competition, protect consumers, and enhance public safety. Drawing in part on the recent work of Tim Wu (Wu 2017a; 2017b), I propose the following specific recommendations to enhance competition:

- Open-source and interoperable APIs as a substitute for traditional network interconnection. This must also address the problem of standard essential patents (SEP) hold-up and other means by which industry participants leverage intellectual property to gain and achieve dominance.[12]

- Non-discrimination/common-carriage obligations. Electronic communications rely on the traditional common-law idea of "common carriage" to facilitate competition between users of the service — including the service itself in cases of vertical integration. Common carriage requires the service to treat all similarly situated customers the same and prohibits any unjust or unreasonable discrimination among users. For some communications-like services, such as messaging, common carriage may be appropriate. But an important role of many platforms, such as search, is to help users sort information. This makes common carriage largely inapplicable to digital platforms. But other forms of non-discrimination, such as a prohibition on favoring affiliated services, are both feasible and in many cases appropriate.

- Clear lines of structural separation from the core function, with testable and observable mechanisms to prevent unreasonable discrimination.[13]

- Regulations along the lines of Customer Proprietary Network Information (CPNI). Section 222 of the Communications Act limits how a telecommunications provider can use information collected as a consequence of the carrier/customer relationship and requires a provider to honor a consumer request to provide relevant information to rivals to perform competing services. The same statute also requires that carriers respect the confidentiality of rival interconnecting carriers' information, and of other providers offering rival (or potentially rival) services to a carrier's subscribers over the network. Similar regulations would promote both competition and user privacy on digital platforms.

[12] I discuss below in the relevant section the role of the government in formulating standards versus "vetting" standards based on the history of the FCC.
[13] "Reasonable" and "unreasonable" discrimination are terms of art borrowed from the history of common carriage generally and communications law specifically. As discussed below, a search engine must discriminate in order to function (Bracha and Pasquale 2008), as must any sort of recommendation function. Although some platforms, such as social media, can technically operate in a purely chronological fashion, the ability to search and organize content dramatically improves the utility of the service to members of the public as well as to advertisers.

- Sharp restrictions on vertical integration and horizontal cross ownership — particularly for existing incumbent services.

- A "content moderation" scheme that recognizes the differences in activities in which a user of a digital platform may engage (consumption versus sale and distribution, speaking versus receiving information), and distinguishes which decisions are properly referred to government for potential enforcement and which are properly handled by the platform.

- Ways to foster a robust marketplace of ideas essential to democratic self-governance and to counter the tendency of algorithms to create "filter bubbles."

- Maintaining permanent regulatory oversight.

With regard to horizontal and vertical integration, it is important to recognize a critical difference between these networks and traditional antitrust considerations. Generally, lower switching costs between services diminish concerns with regard to horizontal consolidation. Especially where industry-specific regulation is designed to explicitly reduce switching cost, the temptation is to regard the danger of horizontal consolidation, or vertical control of adjacent markets, as reduced. Or, as Google has consistently insisted, if "competition is only a click away" there should be no need to fear horizontal or vertical consolidation (Edlin and Harris 2012).

This overlooks the difficulties in gaining entry and the long lead time necessary to establish a viable business as a competitor in light of the power of incumbent network effects. Given the enormous advantages that come from scale and network effects, the most likely source of competition comes from adjacent markets. Facebook's strategy of buying nascent competitors in arguably adjacent markets (e.g., Instagram (photo sharing), WhatsApp (messaging)) demonstrates the enhanced need for vertical and horizontal ownership limits. Likewise, Google's ability to leverage its dominance in one market (horizontal search) into other markets (e.g., mapping, vertical search) is enhanced by the reduced switching costs from formerly vibrant competitors such as Yelp and Mapquest (Hyunjin and Luca 2018).

Accordingly, given the goal not merely of *protecting* competition, but of affirmatively *promoting* competition, the reduced switching cost between services actually argues for more stringent horizontal and vertical ownership limits than for more relaxed limits. A digital platform that enjoys a sufficiently high cost of exclusion will attract users from rival platforms with greater ease where the cost of switching from one platform to the other is low. This network effect defeats the

usual value of low switching cost in facilitating entry. The larger network acts as a giant gravitational "black hole," pulling customers away from rivals by sheer size. Only by preventing the absorption of the smaller rival can regulators preserve a hope of competition and prevent the larger platform from reaching an unbeatable size (O'Reilly 2019).

Alternatively, a platform in a vertically related line of business may grow large enough to overcome this gravitational effect, ultimately expanding into the dominant network's line of business to offer new competition. This cannot happen if dominant platforms are allowed to absorb potential rivals in different lines of business because traditional antitrust analysis deems these mergers as having no impact on competition. Regulators should therefore be particularly wary of permitting platforms to acquire other platforms that could expand into the dominant platform's line of business with comparatively little effort, since the low switching cost makes this vertical acquisition target a strong potential rival.

With regard to the First Amendment and other concerns, I urge regulators to reject the path of exclusively relying on platforms to act as police for bad speech, subject to virtually no oversight except public opinion. History shows that private censorship — especially when given government sanction — invariably serves to suppress important but controversial perspectives as both government and incumbents seek to preserve the status quo. While more direct public-interest regulation of speech raises First Amendment concerns (Wu 2017a), the relatively weak First Amendment interest of the platform in the exercise of this editorial discretion is balanced by the important government purposes of protecting individuals from threats and harassment, preserving our norms of civic engagement, and enhancing our ability to obtain trustworthy information necessary for self-governance.[14]

Finally, sector-specific regulation should address the novel potential harms inherent in the nature of the platforms. For example, former Facebook employees have raised concerns that social media platforms are designed to be "addictive," raising social policy concerns (Morgans 2017). Additionally, while privacy is a broad concern throughout the online ecosystem, the longstanding unique relationship between digital platforms and the collection and manipulation of personal information gives rise to special concerns above and beyond those shared more broadly.

I conclude with a review of whether the proposed sector-specific regulation requires a new regulator, or whether Congress should simply expand the authority of an existing agency. Specifically, should Congress expand the jurisdiction of the Federal Trade Commission or of the Federal Communications Commission, or create a new "Digital Commerce Agency" to provide the

[14] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

necessary implementation of the proposed Digital Platform Act and ongoing oversight? Each approach has certain advantages and disadvantages. Rather than rushing to answer the question, Congress should instead focus on drafting a suitable, comprehensive Digital Platform Act and then determine based on the content of the DPA which path to follow.

Whatever Congress decides with regard to an enforcement agency, Congress should preempt neither overlapping federal law nor complementary state law. No single federal agency, however well equipped, can possibly hope to monitor a sector as vast and important as digital platforms. History shows that permitting complementary enforcement maximizes consumer protection and consumer benefit, while the costs to industry are significantly over-exaggerated. This is not to say that all preemption is inherently bad, especially where Congress imposes a floor on protection rather than a ceiling. But preemption should never be the default assumption. To the contrary, those seeking to preempt either consistent generally applicable federal law, or consistent state law, should be required to show why preemption serves the public interest rather than simply the interests of incumbents.