

## A Poor Case for a “Digital Platform Agency”

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### Introduction

For the past twenty-five years, the U.S. Government has increasingly looked to antitrust—rather than regulation—to protect consumers in the Internet Ecosystem. The Telecommunications Act of 1996 made it clear that “it shall be the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”<sup>1</sup> With the occasional setback,<sup>2</sup> the Federal Communications Commission (“FCC”) has since made progress in lifting the yoke of regulation on Internet Service Providers (“ISPs”).<sup>3</sup> Moreover, “edge” providers such as Google, Apple, Facebook and Amazon that rely on the underlying “core” network have been spared completely from *ex ante* regulation at the FCC or elsewhere, with Congress choosing instead to subject these big tech firms to *ex post* antitrust and consumer protection oversight by the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”).<sup>4</sup>

That said, there is a growing school of thought that an antitrust-only approach has failed and is ill-suited for the Internet Ecosystem.<sup>5</sup> Reform advocates worry the giant Internet Platforms—primarily Apple, Facebook, Amazon and Google—have grown too large and too dominant under antitrust’s watch (or alleged lack thereof).<sup>6</sup> The unbridled growth of big tech along with the high evidentiary requirements and slow pace of antitrust cases have some reformers looking for alternative forums for oversight—forums with a

more anticipatory, immediate, and interventionist perspective.

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Without an obvious choice among existing enforcement agencies—all of which are heavily criticized by reformers—there are some who seek the creation of a new regulatory entity with expansive powers over the Internet Ecosystem (and beyond).<sup>7</sup> One such proposal comes from former FCC Chairman Tom Wheeler and his co-authors Phil Verveer and Gene Kimmelman (hereinafter the “*Wheeler Proposal*”).<sup>8</sup> Dissatisfied with existing regulatory institutions like the FCC and FTC,<sup>9</sup> the *Wheeler Proposal* calls for the creation of a new “Digital Platform Agency” or “DPA”—complete with its own novel governing statute.

This PERSPECTIVE summarizes the parameters of the DPA and its proposed statutory charter as outlined in the *Wheeler Proposal*. As explained below, central to the argument for the DPA is that with the combination of “Digital DNA” and “cooperative engagement” with the industry, this new DPA will somehow be different from

existing regulatory agencies and thus fully capable of regulating dynamic markets with minimal intrusion. The reality, however, is that the *Wheeler Proposal's* desired new statutory framework would give the DPA broad and unchecked regulatory powers over the entire Internet Ecosystem—including both tech platforms and Internet Service Providers alike.

### **An Overview of the Digital Platform Agency (DPA)**

According to the authors of the *Wheeler Proposal*, there are “inherent limitations of trying to shoehorn digital realities into an agency created for the oversight of industrial activities.” While the authors concede that “existing regulatory agencies are populated by good and responsible individuals,” the authors maintain that these “institutions bring with them decades of operational and jurisprudential precedent that inhibits the ability to address the dynamics of the new digital marketplace.” As such, they argue that “Congress must establish a new set of expectations for behavior in the digital marketplace and those expectations should be overseen by a new digital agency.”<sup>10</sup>

Despite this call for a “new set of expectations” for the digital marketplace, the authors of the *Wheeler Proposal* take a somewhat traditional approach to the organizational structure of their proposed DPA. The new DPA would be an independent agency comprised of three commissioners who are appointed by the President and confirmed by the Senate, one of whom would act as Chairman and Chief Executive. The DPA commissioners would serve staggered five-year terms and no more than two commissioners could be of the same political party.<sup>11</sup> This design matches closely with the FTC and the FCC (albeit with two fewer commissioners).

But while the authors of the *Wheeler Proposal* opt for a “traditional” organizational structure for their new regulator, they contend that it is also possible to infuse the new bureaucracy with a

novel culture of “Digital DNA.” According to the authors, “Digital DNA” means “hiring computer scientists” and “appointing commissioners with demonstrated expertise in the management of the digital environment.”<sup>12</sup> What should be avoided, they say, is the “prevailing practice of appointing former congressional staffers to commissioner posts,” though there is no mention of the suitability to the job of the normal pool of possibilities including former industry lobbyists and generous campaign donors.<sup>13</sup> Armed with such “Digital DNA,” the DPA would stand apart from other existing institutions, which “as a result of their statute, staff, tradition and jurisprudence are infused with an inherently analog DNA.”<sup>14</sup>

But organizational structure and personnel decisions are only one piece of the puzzle; the new DPA will also require a new governing statute. As for the details of what that new legislative model would look like, the *Wheeler Proposal* is obtuse. Motivated by a dissatisfaction with antitrust’s consumer welfare standard—which the authors describe as nothing more than a “conservative litmus test for judicial appointments”<sup>15</sup>—the *Wheeler Proposal* would like for Congress to enact three “core concepts” into law.

First, the authors argue that the new DPA should conduct its oversight “on the basis of risk management rather than micromanagement.” According to the authors, “this means targeted remedies focused on market outcomes”, which would thus avoid “rigid utility-style regulation.”<sup>16</sup>

Second, the authors would like to see a “[r]eaffirmation of common law principles of a duty of care and a duty to deal as the underpinning of DPA authority.”<sup>17</sup> According to the authors, a duty of care “must be targeted towards critical values not otherwise protected such as privacy and the security of personal information,” and a duty to deal should be imposed upon those companies “deemed

systemically important to society due to their economic dominance or essential nature.”<sup>18</sup>

Third, the authors envision a regulatory regime whereby the DPA would participate in “cooperative engagement” with the industry to “develop enforceable behavioral codes.”<sup>19</sup> Should this “cooperative engagement” mechanism fail, however, the authors would also give the DPA the plenary “authority to act independently should that become necessary.”<sup>20</sup>

### Analysis of the Proposal

#### *The Ability to Self-Define its Own Jurisdiction*

Given the DPA’s eponymous title, the casual reader might assume that the DPA’s jurisdiction would be limited to large digital platforms such as Apple, Amazon, Google and Facebook. Not so.

The regulatory emphasis of the DPA is to impose a duty to deal upon those companies “deemed systemically important to society due to their economic dominance or essential nature.”<sup>21</sup> “Systematic importance” centers around “whether network effects, economies of scale, economies of scope, power over data and similar factors have given certain companies excessive economic or social power, most often reflected by having a dominant position—*bottleneck or gatekeeper control*—over a key aspect of the digital market.” (Emphasis supplied.)<sup>22</sup> (As a side, the *Wheeler Proposal* describes data as having “economies of scale,” but economies of scale are a property of a firm, not an asset.<sup>23</sup>)

There are two key aspects to “systematic importance” worth mentioning. First, the authors of the *Wheeler Proposal* contend that the DPA—and not Congress—should “determine what companies are *systemically important* in their social and economic impact.”<sup>24</sup> As a general proposition, granting any regulatory agency such broad discretion to self-define what firms come under its jurisdiction based on a subjective

standard of “systematic importance” is an invitation for mischief.<sup>25</sup>

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Second, the only limiting principle to “systematic importance” is that “bottleneck or gatekeeper control” is required. The *Wheeler Proposal* bases its definition of “bottleneck or gatekeeper control” on the language used by the FCC in its 2015 *Open Internet Rules* (which is unsurprising given the authors’ professional history).<sup>26</sup> Under such weak constraints (and given the preceding point that the DPA would have the ability to self-define which firms fall under its jurisdiction) it is entirely possible that members of the DPA would view their jurisdiction to reach far beyond “platforms” like Google, Facebook and Amazon, including core network providers such as AT&T and Comcast (who the FCC previously defined as “gatekeepers” in the 2015 *Open Internet Order*) as well as any other firm that operates as a “platform” (i.e., a firm in a two-sided market).<sup>27</sup> Unquestionably, the authors of the *Wheeler Proposal* intend for the jurisdiction of their new DPA to be profoundly broad and encompass the entire Internet Ecosystem (and perhaps beyond).

#### *Codification of “Common Law Principles”*

The analytical cornerstone of the *Wheeler Proposal* is the desire to codify into statute the “common law-derived principles” of a *duty of care* and a *duty to deal*. According to the authors, “[e]nacting the [sic] principles into law will supply a reliable basis for the development of obligations applicable to systematically important digital platforms, even as technology and market activities evolve.”<sup>28</sup> The authors further contend

that “Congress should make the obligations as general and flexible as circumstances permit.”<sup>29</sup> This proposal ignores both the substantial bodies of economic literature and judicial decisions that warn against such obligations.

We might also ask—if a duty of care and a duty to deal are firmly entrenched in the common law, then why do we need to codify these duties via statute into civil law? Doing so, it seems, is a bit redundant. In fact, the duties described in the *Wheeler Proposal* are *not* firmly entrenched in current common law. The authors are stuck in yesteryear, when the “common law” produced the outcomes they prefer.

Take, for example, the *Wheeler Proposal*'s call for a duty to deal. The authors ground their argument that a blanket duty to deal can be found in the “common law” by pointing to the “essential facilities” doctrine under antitrust jurisprudence, citing, for example, the Supreme Court’s 1912 decision in *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383 (1912) and the Seventh Circuit’s 1983 decision in *MCI Communications Corp. v. American Tel. & Tel.*, 708 F.2d 1081 (7th Cir. 1983).<sup>30</sup> But what the authors of the *Wheeler Proposal* refuse to acknowledge is that the common law *evolves*—it is a dynamic, not static, concept. Accordingly, as economic understanding grew and legal principles evolved, the duty to deal in the “common law” has changed significantly since 1912.

As the Ninth Circuit recently explained in detail in *FTC v. Qualcomm*, 969 F.3d 974 (9th Cir. 2020), in the years since *Terminal Railroad* the Supreme Court has repeatedly emphasized that:

there is “no duty to deal under the terms and conditions preferred by [a competitor’s] rivals[.]” Likewise, “the Sherman Act “does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” This is because the

antitrust laws, including the Sherman Act, “were enacted for ‘the protection of *competition*, not *competitors*.’” Or, as we recently put it, in a bit more colorful terms: “Competitors are not required to engage in a lovefest.”<sup>31</sup>

That said, the court pointed out that there is there is “one, limited exception to this general rule that there is no antitrust duty to deal” under the Supreme Court’s decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Under this exception,

a company engages in prohibited, anticompetitive conduct when (1) it “unilateral[ly] terminat[es] ... a voluntary and profitable course of dealing,” (2) “the only conceivable rationale or purpose is ‘to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition,’”; and (3) the refusal to deal involves products that the defendant already sells in the existing market to other similarly situated customers.<sup>32</sup>

Still, as the Ninth Circuit observed, the Supreme Court later characterized the *Aspen Skiing* exception in *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko* as “at or near the outer boundary of § 2 liability.”<sup>33</sup>

If courts are unwilling to impose a blanket “duty to deal” like that the authors of the *Wheeler Report* seek, then it is highly disingenuous for the authors of the *Wheeler Proposal* to describe their proposal as being based in the “common law.” In reality, the *Wheeler Report* wants an unequivocal, statutorily mandated duty to deal across the entire Internet Ecosystem that goes well-beyond what the courts have unambiguously rejected.<sup>34</sup> The *Wheeler Report* provides neither an economic nor a legal justification for such a radical reformulation of a firm’s duty to deal with its rivals.



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Complicating matters further, the *Wheeler Proposal* provides no guidance as to how this “duty to deal” would work in practice. Absent any specifications about the boundaries and scope of this duty that is as “general and flexible as circumstances permit,” it is impossible to contemplate (much less model economically) the costs and benefits of the statutory obligation. Indeed, if the unbundling experiment of the Telecommunication Act of 1996 has taught us anything, it is that the failure to understand the economics of a mandatory sharing regime will not lead to lasting success.<sup>35</sup>

To be taken seriously the *Wheeler Proposal’s* call for a mandatory duty to deal requires, at a minimum, more specificity. For instance, the proposal’s call for data sharing<sup>36</sup> makes no mention of intellectual property—a legal constraint that cannot be swept under the rug.<sup>37</sup> Like several of the other provisions in the *Wheeler Proposal*, mandatory data portability certainly deserves a more careful analysis than is provided.<sup>38</sup>

*“Cooperative Engagement” (with an Aggressive Regulatory Backstop)*

In addition to its “Digital DNA,” the *Wheeler Proposal* suggests that “agility” rests in the DPA’s ability to combine the “public participation underpinnings of the current regulatory process with a new model based on supervised but cooperative industry-public development of enforceable behavioral codes.” This “cooperative engagement” will “create policies that are more dynamic than traditional regulation.”<sup>39</sup> In

essence, the DPA would differ from existing regulatory agencies only in its cooperation with industry, since public participation is standard fare in regulatory oversight. A cynic might argue, as do several other proposals for enhanced oversight of digital platforms, that regulators already engage in too much cooperation with industry (that is, the regulators are “captured”).

To achieve such cooperation, the *Wheeler Proposal* envisions a mechanism whereby these behavioral codes are developed by a “Code Council” and brought to the DPA for approval or disapproval. This Code Council would be composed of members equally divided between industry representatives and representatives of the public and meet at least once a month.<sup>40</sup>

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While the notion of “cooperative engagement” sounds nice in concept, this proposal appears more aspirational than practical. It seems plausible that the “Code Council” would be populated by different interest groups with conflicting objectives (say, for Net Neutrality, both core and edge providers). Given the highly politicized nature of tech policy and the partisan desires for particular “market outcomes,” it is not difficult to imagine contentious battles over who gets a proverbial seat at the “Code Council” table. The potential for “selection bias” is plain enough. Moreover, the potential for capture of the DPA through this formal “cooperative engagement” is high.<sup>41</sup> In this case, it is a good bet that future disruptive innovators will never have a seat at this table; a fact that incumbents will surely use to their advantage.

If anything, the *Wheeler Proposal's* concept of “cooperative engagement” argues against the creation of a new regulator. If the DPA merely serves a “review” role, then why not have the FTC oversee the Code Council and enforce the behavioral codes under Section 5 of the FTC Act? Using an existing agency with broad powers seems far more efficient than the creating a whole new regulator with a whole new law.

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But the creation of an omnipotent regulator with unrestricted power seems to be the very point of the *Wheeler Proposal*. The notion of “cooperative engagement” is mere window dressing. As Gene Kimmelman—one of the authors of the *Wheeler Proposal*—publicly admitted about the FTC’s ability to convene such a Code Council: “The FTC could do that, has tried to do that, and has often failed in that endeavor, and I think that one of the main failures is the lack of a big stick...”<sup>42</sup> Yet, the FTC has several big sticks, including the ability to recommend criminal prosecution to the Department of Justice.<sup>43</sup> What the FTC does not have, however, is a tendency to let partisan politics drive its decisions (though it is not immune to partisanship). The DPA envisioned in the *Wheeler Proposal* leans toward intervention. With better options available, the creation of a new regulator of digital platforms is ill-advised, especially at a time rich in politically-motivated vendetta.

Indeed, despite their purported enthusiasm for regulation via “cooperative engagement,” the *Wheeler Proposal* also affords the DPA “many of the common characteristics of traditional regulatory agencies,” including adherence to the Administrative Procedure Act (APA),<sup>44</sup> and “traditional rulemaking and enforcement regulatory tools.”<sup>45</sup> These tools include, *inter alia*,

the ability to issue injunctions and levy fines, as well as broad data collection powers, including the power to compel interrogatories and issue subpoenas for documents and testimony.<sup>46</sup> Rather than something novel, that the DPA looks a lot like existing regulatory agencies deemed inadequate by the *Wheeler Proposal* for the modern era.<sup>47</sup>

*“Digital DNA”*

The authors of the *Wheeler Proposal* contend that what would make the DPA better than existing institutions is a secret sauce the authors label “Digital DNA.” As noted earlier, Digital DNA means “hiring computer scientists” and “appointing commissioners with demonstrated expertise in the management of the digital environment,”<sup>48</sup> rather than the Hill staffers and lobbyist that often fill leadership positions at regulatory agencies. The DPA, it is argued, stands apart from other existing institutions, which “as a result of their statute, staff, tradition and jurisprudence are infused with an inherently analog DNA,”<sup>49</sup> where the personnel at existing enforcement and regulatory institutions—from the commissioners down to the staff—suffer from a confirmation bias due to the “simple reality is that their professional lives—let alone their personal lives—have been shaped by assumptions and practices that digital technology has pushed aside.”<sup>50</sup>

There are several obvious concerns with this “Digital DNA” idea.

First, the practice of “appointing commissioners with demonstrated expertise in the management of the digital environment” appears to institutionalize a revolving door between the industry and the regulator. Some observers may say the revolving door problem is not much different than existing regulatory agencies and institutions.

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Second, history dictates that bureaucratic entrenchment and legal precedent will, over time, inevitably befall the DPA. It is the nature of the regulatory process and precedent is a core concept of legal jurisprudence. As former FTC Commissioner Josh Wright observed, “in regulated industries, regulatory bodies are far more likely to be populated by industry insiders with favorable inclinations towards older and outdated modes of doing business.”<sup>51</sup> It is widely recognized that regulators tend to protect incumbents against entrants. Regulatory entrenchment may be exacerbated by the *Wheeler Proposal’s* desire for “cooperative engagement” with the industry it oversees.<sup>52</sup> Fordham University School of Law professor Zephyr Teachout was blunter, tweeting that “setting up a new, specialized agency would be MORE likely to be captured.” (Capitalization in original.) Indeed, argued Professor Teachout, a digital regulator may “look ... stronger, but it’s definitely weaker.”<sup>53</sup>

For the most part, the advantages of the proposed DPA over existing regulatory institutions hangs on the careful and wise choice of leadership (i.e., with “Digital DNA”). The organizational structure is the same, but the *Wheeler Proposal* demands that the President and Senate treat the DPA in a manner distinct from other regulatory agencies in the choice of leadership. Surely, if the success of a regulatory agency depends critically (and solely) on the choice of good leadership, then the same prudence afforded the choice of DPA leadership would serve all regulatory agencies. Why not fix the “Analog DNA”

problem at existing agencies with better appointments?

Relying solely on the choice of leadership to ensure quality regulation, especially when Commissioners are chosen by party affiliation as the *Wheeler Proposal* requires, is the height of naivety. Given the President’s Article II power, he or she may appoint anyone he or she wants to their administration. Appointing people with substantive backgrounds is a laudable goal, but no law prevents such educated choices today. The authors of the *Wheeler Proposal* know from their own personal experience that Washington does not work this way. If history is a guide, then “digital experience” assuredly will give way political fundraising, nepotism, partisan favors, industry pressures, and other considerations that “qualify” appointments today.<sup>54</sup>

The notion that a President and Senate can choose wisely the leadership of the DPA while adhering to the old ways for other agencies is, put simply, silly. By design, the DPA is almost identical to existing regulatory agencies. By rational expectations, the DPA’s leadership will be drawn from the same pool of partisan favorites used for other regulatory agencies (though the DPA, in the present environment, may be a more plum appointment). Which begs the question: if the DPA is more alike than different from existing regulatory institutions— all deemed as inadequate and defective by the *Wheeler Proposal*—is it still good policy to create such an entity? The *Wheeler Proposal* provides no answer.

#### *Private Rights of Action*

Finally, the *Wheeler Proposal* pollutes the idea of a DPA by including a *private right of action* for persons claiming to be damaged by violations of the DPA’s new enabling statute. Complainants would have the right to elect adjudication either by the federal judiciary or the DPA.<sup>55</sup>

The *Wheeler Proposal’s* call for a private right of action is significant for two major reasons. First,

the call for a private right of action goes beyond what other proposals for new digital regulator call for.<sup>56</sup> Second, allowing private parties to sue for an alleged breach of a duty to deal under the DPA's new enabling statute would essentially supersede the antitrust process (which, as explained above, takes a more circumspect approach to claims of refusals to deal) by offering offer plaintiffs an easier path to seek relief. Regardless, it is unclear how opening the door to the trial bar so that they can subject the entire Internet Ecosystem to a tsunami of litigation will promote innovation and support a "dynamic" regulatory agenda.<sup>57</sup>

### Conclusion

By nearly all accounts, the regulation of economic activity has warts. Firms are not passive recipients of regulation but adapt their practices to regulation to minimize impact. Regulators tend toward capture and their efforts often do more harm than good. As such, we may rightly demand compelling arguments for a new regulator, especially one with broad scope and unbridled power over the most important and dynamic segment of the modern economy. The

*Wheeler Proposal's* call for a Digital Platform Agency fails in that regard.

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Antitrust, while imperfect, is grounded in precedent and is conducted in a dispassionate manner, thus avoids the pitfalls of regulatory capture and rent seeking accompanying regulation.<sup>58</sup> Accordingly, if we are concerned that antitrust enforcement is lacking, then perhaps increasing the budgets of the DOJ and the FTC, coupled with more alert Congressional oversight, is the better policy choice at this time.<sup>59</sup>



## NOTES:

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<sup>1</sup> 47 U.S.C. § 230(b)(2) (emphasis supplied).

<sup>2</sup> See, e.g., G.S. Ford and L.J. Spiwak, *Section 10 Forbearance: Asking the Right Questions to Get the Right Answers*, 23 COMMLAW CONSPPECTUS 126 (2014). This deregulatory recalcitrance has led some to call for Congress to explicitly curtail the FCC's authority and transfer its competitive oversight function over the Federal Trade Commission. See, e.g., J. Eggerton, *AT&T's Cicconi to FCC: Change or Become Irrelevant*, MULTICHANNEL NEWS (September 10, 2013) (available at: <https://www.nexttv.com/news/att-s-cicconi-fcc-change-or-become-irrelevant-262775>).

<sup>3</sup> See, e.g., *Restoring Internet Freedom Order*, FCC 17-166, DECLARATORY RULING, REPORT, AND ORDER, 33 FCC Rcd. 311 (2018), *aff'd* *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019), *reh'g en banc denied*, (D.C. Cir. 18-1051) (Feb. 6, 2020); *In the Matter of Business Data Services in an Internet Protocol Environment, Technology Transitions; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC 17-43, REPORT AND ORDER, 32 FCC Rcd. 3459 (rel. April 28, 2017), *aff'd* *Citizens Telecommunications Company of Minnesota v. Federal Communications Commission*, 901 F.3d 991 (8th Cir. 2018); *In the Matter of Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services*, FCC 20-152, REPORT AND ORDER, \_\_ FCC Rcd. \_\_ (rel. October 28, 2020).

<sup>4</sup> See, e.g., Press Release: *Justice Department Sues Monopolist Google For Violating Antitrust Laws; Department Files Complaint Against Google to Restore Competition in Search and Search Advertising Markets*, Department of Justice (October 20, 2020) (available at: <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>); Press Release: *FTC Sues Facebook for Illegal Monopolization; Agency Challenges Facebook's Multi-Year Course of Unlawful Conduct*, Federal Trade Commission (December 9, 2020) (available at: <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>).

<sup>5</sup> C.f., L.M. Khan, *The Separation of Platforms and Commerce*, 119 COLUMBIA LAW REVIEW 973 (2019).

<sup>6</sup> See, e.g., *Investigation of Competition in Digital Markets*, MAJORITY STAFF REPORT AND RECOMMENDATIONS, SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY (2020) (available at: [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf)).

<sup>7</sup> See, e.g., George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business, Committee for the Study of Digital Platforms - Market Structure and Antitrust Subcommittee, Report (01 July 2019) (available at: <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf>); H. Singer, *What to Do About Google?*, FORBES (September 8, 2017) (available at: <https://www.forbes.com/sites/washingtonbytes/2017/09/08/what-to-do-about-google/#4c8e72947001>); H. Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About*, THEANTITRUSTSOURCE (August 29, 2017) (available at: [https://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/aug17\\_singer\\_8\\_2f.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug17_singer_8_2f.authcheckdam.pdf)); K. Caves & H. Singer, *When The Econometrician Shrugged: Identifying And Plugging Gaps In The Consumer Welfare Standard*, 26 GEORGE MASON LAW REVIEW 1 (2018) (available at: [http://georgemasonlawreview.org/wp-content/uploads/2019/10/3.-CavesSinger\\_Final.pdf](http://georgemasonlawreview.org/wp-content/uploads/2019/10/3.-CavesSinger_Final.pdf)); *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (March 2019) (available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf)); but c.f., G. Ford, *Beware of Calls for a New Digital Regulator*, NOTICE & COMMENT - YALE JOURNAL ON REGULATION (February 19, 2021) (available at: <https://www.yalejreg.com/nc/beware-of-calls-for-a-new-digital-regulator-by-dr-george-s-ford>).

<sup>8</sup> T. Wheeler, P. Verveer and G. Kimmelman, *New Digital Realities; New Oversight Solutions in the U.S. The Case for a Digital Platform Agency and a New Approach to Regulatory Oversight*, Shorenstein Center (August 2020) (hereinafter "*Wheeler Proposal*") (available at: [https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities\\_August-2020.pdf](https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities_August-2020.pdf)).

<sup>9</sup> See, e.g., *id.* at 29, 30-31.

<sup>10</sup> *Id.* at 15.

## NOTES CONTINUED:

<sup>11</sup> *Id.* at 21.

<sup>12</sup> *Id.*

<sup>13</sup> *C.f.*, Editorial, *An Industry Man for the F.C.C.*, NEW YORK TIMES (May 8, 2013) (available at: <https://www.nytimes.com/2013/05/09/opinion/tom-wheeler-an-industry-man-for-the-fcc.html>).

<sup>14</sup> *Id.* at 19.

<sup>15</sup> *Id.* at 13.

<sup>16</sup> *Id.* at 41.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 43.

<sup>19</sup> *Id.* at 41.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 43.

<sup>22</sup> *Id.*

<sup>23</sup> A McDonalds franchise does not have economies of scale simply because the average cost of its griddle is declining with the number of burgers sold.

<sup>24</sup> *Id.* at 43-44.

<sup>25</sup> *C.f.*, N. Chilson, *Does Big Tech Need its Own Regulator*, George Mason University Global Antitrust Institute (2020) (available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3733726](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733726));

<sup>26</sup> *Id.* at 43-44.

<sup>27</sup> *Protecting and Promoting the Open Internet*, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER, 30 FCC Rcd. 5601 (2015), *aff'd* *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *pet. for rehearing en banc denied*, 855 F.3d 381 (2017), *cert. denied*, No. 17-504 (Nov. 5, 2018) (2018 WL 5779073).

<sup>28</sup> *Wheeler Proposal*, *supra* n. 8 at 52.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 34-35.

<sup>31</sup> *Qualcomm*, 969 F.3d at 993 (citations omitted and emphasis in original).

<sup>32</sup> *Id.* at 993-94.

<sup>33</sup> *Id.* at 994 (citing *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 409 (2004)).

<sup>34</sup> It should be noted that even the Communications Act contains no such expansive obligations. For example, common carriers subject to Section 202 of the Communications Act (47 U.S.C. § 202) do have a form of a duty to deal, but it is far from the type of blanket duty the *Wheeler Proposal* advocates. Indeed, under Section 202, common carriers are only prohibited from engaging in *undue* discrimination and have no legal obligation to treat everyone equally. For an analysis of the caselaw governing Section 202, see L.J. Spiwak, *USTelecom and its Aftermath*, 71 FEDERAL COMMUNICATIONS LAW JOURNAL 39 (2019)

<sup>35</sup> See, e.g., G.S. Ford and L.J. Spiwak, *Lessons Learned from the U.S. Unbundling Experience*, 68 FEDERAL COMMUNICATIONS LAW JOURNAL 95 (2016).

<sup>36</sup> *Wheeler Proposal*, *supra* n. 8 at 35, 45-46.

<sup>37</sup> See L.J. Spiwak, *Set-Top Box Shenanigans at the FCC*, THE HILL (September 19, 2016) (available at: <https://thehill.com/blogs/pundits-blog/technology/296565-set-top-box-shenanigans-at-the-fcc>).

## NOTES CONTINUED:

<sup>38</sup> See, e.g., G.A. Manne & S. Bowman, *Data Portability and Interoperability: The Promise and Perils of Data Portability Mandates as a Competition Tool*, International Center for Law and Economics (10 September 2020) (available at: <https://laweconcenter.org/wp-content/uploads/2020/09/Data-Portability-Paper-v4-2020-09-03.pdf>).

<sup>39</sup> *Wheeler Proposal*, *supra* n. 8 at 51.

<sup>40</sup> *Id.* at 58-59.

<sup>41</sup> See, e.g., Tweet by Hal Singer (September 20, 2020 at 5:20 pm) (“I support a new Digital Agency, but I think it is a mistake to allow the tech industry to develop the regulation.”) (available at: <https://twitter.com/HalSinger/status/1308154268726198275>); *Regulation in High-Tech Markets: Public Choice, Regulatory Capture, and the FTC*, Remarks of Joshua D. Wright, Commissioner, Federal Trade Commission at the Big Ideas about Information Lecture Clemson University, Clemson, South Carolina (April 2, 2015) (available at: [https://www.ftc.gov/system/files/documents/public\\_statements/634631/150402clemson.pdf](https://www.ftc.gov/system/files/documents/public_statements/634631/150402clemson.pdf)) (“One can certainly imagine a scenario in which multiple firms operating in an industry with significant externalities—thus providing a plausible basis for regulating the industry—banding together to convince legislators to introduce regulatory legislation with the principal aim of the legislation to create barriers to new entry.”)

<sup>42</sup> The Brookings Institution Webinar, *Could A New Digital Platform Agency Protect Consumers From Big Tech?* Washington, D.C. (Wednesday, September 23, 2020), Transcript at p. 17.

<sup>43</sup> See 15 U.S.C. § 46 (k)(1) (“Whenever the Commission obtains evidence that any person, partnership, or corporation, either domestic or foreign, has engaged in conduct that may constitute a violation of Federal criminal law, to transmit such evidence to the Attorney General, who may institute criminal proceedings under appropriate statutes.”)

<sup>44</sup> *Wheeler Proposal*, *supra* n. 8 at 52.

<sup>45</sup> *Id.* at 53.

<sup>46</sup> *Id.* at 60.

<sup>47</sup> *C.f.* Ford, *supra* n. 7.

<sup>48</sup> *Wheeler Proposal*, *supra* n. 8 at 21.

<sup>49</sup> *Id.* at 19.

<sup>50</sup> *Id.* at 19.

<sup>51</sup> Wright, *supra* n. 41 at 14.

<sup>52</sup> For a good discussion of the literature on this topic, see, e.g., N. Chilson, *supra* n. 25; T. Lambert, *Rent-Seeking and Public Choice in Digital Markets*, George Mason University Global Antitrust Institute (2020) (available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3733707](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733707)) (“A market failure, though, is not a sufficient condition for a governmental fix. Because government interventions can themselves create losses, policymakers should always balance the expected welfare gain from averting a market failure against any welfare loss a contemplated intervention is likely to occasion. Moreover, such balancing should occur “at the margin,” meaning that the likely welfare gain (market failure loss averted) from each additional increment of restrictiveness should be compared to the welfare loss (from government failure) that the extra bit of restrictiveness is likely to produce. Oftentimes, contemplated government interventions will not be justified even though they are responding to legitimate market failures.”)

<sup>53</sup> Tweet by Zephyr Teachout, October 22, 2020 at 10:35 am (available at: <https://twitter.com/ZephyrTeachout/status/1319286187190702085>).

<sup>54</sup> *Supra* n. 13; see also L.J. Spiwak, *A Political Temper Tantrum at the FCC*, THE HILL (December 1, 2016) (available at: <http://thehill.com/blogs/pundits-blog/technology/308187-a-political-temper-tantrum-at-the-fcc>); G.S. Ford, “Regulatory Revival” and Employment in Telecommunications, PHOENIX CENTER POLICY PERSPECTIVE NO. 17-05 (June 12, 2017) (<https://www.phoenix-center.org/perspectives/Perspective17-05Final.pdf>).

<sup>55</sup> *Id.*

<sup>56</sup> See, e.g., Stigler Center, *supra* n. 7.

**NOTES CONTINUED:**

<sup>57</sup> Indeed, the insistence of some to include a private right of action has been one of the major sticking points for why we have yet to see any much-needed federal privacy legislation. *See, e.g., Federal Privacy Law Efforts Move Forward in Congress*, JDSUPRA (October 5, 2020) (available at: <https://www.jdsupra.com/legalnews/federal-privacy-law-efforts-move-19243>).

<sup>58</sup> There is some movement in Congress to reform antitrust, but such proposals contain so many economic and due process problems that they should be rejected. *See* L.J. Spiwak, *The House Staff Antitrust Report Will Negatively Affect More Than the Tech Industry*, FEDERALIST SOCIETY BLOG (November 6, 2020) (available at: <https://fedsoc.org/commentary/fedsoc-blog/the-house-staff-antitrust-report-will-negatively-affect-more-than-the-tech-industry>).

<sup>59</sup> *Id.*; *see also* Ford, *supra* n. 7.