The Case for the Digital Platform Act:
Breakups, Starfish Problems, & Tech Regulation

Harold Feld | May 2019

Digital platforms play a central role in the economy and our everyday lives. Their rapid development since the birth of the public commercial internet over 20 years ago has produced many societal benefits and new opportunities for free expression and innovation. Each platform has distinct characteristics, but in recent years specific concerns have grown around their dominance in the marketplace and impact on key parts of daily life.

This book provides a framework for the ongoing debate on the regulation of digital platforms. It aims to unite ongoing debates on competition, content moderation, consumer protection, and public safety/law enforcement into a unified whole. Drawing on the lessons of the last 100+ years of telecommunications and media law, we see that digital platforms raise many of the same policy challenges that the rise of the telephone and radio broadcasting created in their day. Like today's digital platforms, the advent of electronic communication and electronic mass media raised similar questions as to what responsibilities the new broadcast networks owed to maintaining a democratic society, how to protect consumers from new opportunities for fraud or abuse through the technologies coming directly into their homes, and how to address the alarming tendencies of these businesses to gravitate to monopoly absent regulatory intervention. As with Silicon Valley, the rise of broadcasting and the telephone went through an initial stage of techno-euphoria to a subsequent "techlash" as the enormous economic, political, and social power of these increasingly concentrated industries became clear.

Specifically, I propose the following to comprise a federal "Digital Platform Act":

Definition of "Digital Platforms":
Sector-specific regulation requires a definition of the sector.

I define a digital platform as: (1) A service accessed via the internet; (2) the service is two-sided or multisided, with at least one side open to the public that allows the public to play multiple roles (e.g., content creator as well as content consumer); and (3) which therefore

enjoys particular types of powerful network effects. As I explain in Chapter 1, these characteristics create a set of abilities and incentives unique to the defined sector.

While the debate around competition generally focuses on a handful of dominant players, concerns about consumer protection and content moderation extend to small companies as well. For example, the perpetrator of the mosque shooting in New Zealand uploaded his video of the shooting not only to massive platforms such as Facebook and YouTube, but to numerous small platforms as well. This allowed the content to continue to spread and reappear on the larger platforms despite literally millions of takedowns over a period of 24 hours.

Cost of Exclusion, A New Measure of Platform Dominance

Behaviors that are harmless, or even positive, in competitive markets may become anticompetitive or anti-consumer when a market becomes concentrated. For that reason, sector-specific regulation often distinguishes between dominant firms and non-dominant firms. This is especially true when sector regulators are trying to affirmatively promote competition in a concentrated industry, or where the economics of the industry create an unusually strong tendency toward concentration. “Dominance,” however, is a tricky concept. Definitions of, and tests for, economic dominance vary enormously depending on the specific characteristics of the specific market.

Therefore, I propose a new measure of dominance: the “cost of exclusion” (CoE). This measures the cost to a business or individual of being excluded from a specific platform. If that cost is sufficiently high, then we should assume that the firm under scrutiny is a dominant firm and that the economic power and social impact of firms with high CoE requires targeted regulation to promote competition and protect consumers. I anticipate that many of the pro-competitive policies described in Chapter 4 will apply, if they apply at all, only to firms with a high CoE (i.e., dominant firms).

Adopt a Set of Specific Values to Govern Regulation of Platforms

We have long recognized that the object of regulation is to achieve particular social goals that express our values as a society, not to promote some abstract state of economic efficiency for its own sake. Indeed, it is the vital role of Congress to decide when to sacrifice “economic efficiency” for such social goals as ensuring access to vital services for all Americans, promoting democratic discourse, and protecting consumers from harm. I recommend that any regulation of digital platforms, particularly any regulation that hopes to address the wide scope of concerns in a comprehensive manner, must begin by embracing these fundamental and enduring values.

Sector-Specific Regulation: Policy Proposals

After outlining the aforementioned general principles, I propose the following specific policy changes for consideration by Congress and regulators.

Designate a federal agency to have ongoing and continuous oversight of the sector. Sector-specific regulation requires oversight. Congress must either dramatically expand the jurisdiction of an existing agency or create a new agency specifically charged to regulate digital platforms.

Utilize a regulatory toolkit for competition. Chapter 4 reviews various pro-competitive sector-specific regulations that have worked in electronic communications and discusses how they might be translated to the digital platform. These range from relatively modest proposals such as data portability, to the "nuclear option" of breaking up existing platforms in a variety of ways designed to promote competition. In all of these cases, I attempt to describe the pros and cons and point to additional information Congress or an enforcement agency would need to successfully develop and implement these measures. The list of regulatory tools for the toolkit are:

- Data portability, including the right to delete data from the "losing" platform;
- Open application programming interfaces (APIs) and interconnection;
- Mandatory fair and reasonable non-discriminatory (FRAND) licensing for essential intellectual property;
- Customer proprietary network information (CPNI) rules protecting the information of competitors that must operate on or interconnect with platforms to reach their customers;
- Limits on size and limits on vertical integration (including possible break ups of existing dominant platforms as a last resort if necessary);
- Product unbundling;
- Non-discrimination rules;
- "Privacy by Design"; and
- Due process rights for companies that are subject to regulation and for those seeking to exercise regulatory rights against dominant platforms.

While Congress should consider the entirety of this toolkit, it is important to stress that we are a long way from determining which tools Congress should adopt or how to implement them. In light of the recent interest in "breaking up" the largest digital platforms, I stress that such

break ups are incredibly difficult to achieve as a practical matter, and even then require additional regulations to address the economic factors that drive the industry to consolidation. Congress should therefore begin with easier-to-implement behavioral regulation that is designed to encourage competition, while potentially authorizing the enforcing agency to take more extensive steps if necessary.

Develop content moderation that is consistent with the First Amendment and free expression. Contrary to popular belief, the First Amendment does not prevent any legislative effort to protect either individuals or society as a whole from harassing content, fraudulent content, or content that seeks to undermine democracy and civic discourse. At the same time, both the First Amendment and general concerns for freedom of expression require exercising a good deal of caution. In particular, I argue that legislation that weighs evidence and balances interests is explicitly the job of Congress, not private companies. The current situation of pressuring companies to take "voluntary" action is seductively easy because it avoids forcing Congress to make the necessary hard choices. It also opens the door to soft censorship and the promotion of political propaganda in the name of "responsible" corporate governance. However difficult and controversial Congress may find it to develop content moderation requirements for digital platforms, perpetuating the current efforts to force platforms to develop "voluntary" codes is corrosive to democracy and undermines the rule of law.

At the same time, any workable system will need to have some cooperation from platforms and rely to some extent on platform discretion. In Chapter 5, I outline what Congress should consider in striking this proper balance.

Section 230: our enormously destructive distraction. Section 230 of the Communications Act was created to provide certainty to emerging digital platforms as to their responsibility with regard to third-party content. It is not, as some argue, a general immunity for digital platforms with regard to all economic activity (e.g., it does not confer on platforms immunity to laws prohibiting discrimination on the basis of race or gender). Nor does it protect platforms from criminal law. Nevertheless, it has generally been interpreted as providing platforms with broad immunity for liability for third party content or for failing to follow their own terms of service with regard to taking down offensive content.

In Chapter 5.C, I review why simple repeal of Section 230 would not achieve the imagined effects because "publishers" do not have liability for most of the things that people ask platforms to take down. For example, any news "publisher" could run the video of the New Zealand mosque shooting countless times without incurring any liability. Book publishers

routinely publish books glorifying white supremacy. Such actions do not trigger any criminal or civil liability, even if they are alleged to inspire others to commit acts of violence. On the other hand, eliminating Section 230 would cause enormous confusion and uncertainty in the law, at least in the short term while the courts dealt with the invariable deluge of lawsuits and class actions.

Additionally, prior to Section 230, there were exactly two cases interpreting "publisher liability" in the context of interactive services. What little case law existed prior to Section 230 indicated that a declaration of "caveat emptor" and a refusal to have terms of service policing content would protect digital platforms from publisher liability.

Rather, as demonstrated by legislation such as the Digital Millennium Copyright Act (DMCA), Congress should decide what content regulation regime we need to balance the interests discussed above. Congress would then simply add at the beginning of the statute the following introductory words: "Without regard to Section 230 . . ."

In other words, I recommend that we stop arguing about Section 230 and figure out what sort of content moderation regime works. Once Congress resolves this issue, Section 230 will no longer pose a significant obstacle. In the meantime, however, Section 230 should remain in place to preserve certainty until a new regime is ready.

Promoting Robust Competition in the Marketplace of Ideas

In addition to concerns related to potential censorship of content in the effort to protect users from harmful or deceptive content, the evolution of online digital platforms that select content based on algorithms has raised concerns about "filter bubbles." Filter bubbles occur when algorithms select answers to search queries and structure news feeds or recommend content based on algorithmic assessment of what a user likes or would find most relevant and engaging. Over time, this has a tendency to filter out dissenting views and can lead to a more polarized society.

Traditionally, one of the central purposes of media policy has been to promote exposure to diverse sources of news and ideas. A secondary purpose has been to encourage representation of all Americans in our mass media culture as a means of breaking down stereotypes and addressing the fundamental desire of all Americans to see themselves represented in our national culture rather than rendered invisible. While traditional media policy has relied in large part on aggressive ownership limits and other structural means to promote competition, law and policy have also used behavioral regulation to encourage both diversity of news sources and representational diversity. In Chapter 6, I discuss various steps

platforms could take—either voluntarily or as a matter of regulatory policy—to promote these twin concepts of diversity.

Specific Recommendations for Content Moderation Policies

While recognizing that solutions for content moderation remain complex, and that we lack sufficient information or consensus to solve the problems, I make several specific recommendations for moderating harmful content in Chapter 5.D:

- Congress should employ a mixed model of direct prohibition on certain types of harmful content (such as harassment), reporting requirements (for "red flag" indicators of potential illegal activity), and private monitoring under government oversight (to ensure that platforms do not censor legitimate speech);
- Distinguish between the broadcast/many-to-many functions v. common carrier/one-to-one, distinguish between passive listening v. active participation, and limit penalties imposed for off-platform conduct. Potentially, it should be easier to restrict someone's ability to post content viewable by everyone or to have harmful content surface in search or recommendations than it is to ban someone from using the platform entirely or eliminating controversial material even for those who actively seek it out. We should be most reluctant to intervene in electronic communications between willing parties that resemble traditional communications functions, such as messaging or voice;
- Regulations designed to moderate "bad" content should have clearly articulated goals, and the enforcing agency should collect information to determine the effectiveness of the measures adopted and monitor for unintended consequences;
- In recognizing that all content moderation regimes may be invoked maliciously or in an effort to suppress speech to gain political or economic advantage, create sufficient safeguards and ways to punish offenders.

In Chapter 6.B, I make several specific recommendations to combat the problem of filter bubbles and to address the problem of "fake news" undermining democratic discourse.

- Address the problem of filter bubbles by selecting recommendations through a "wobbly algorithm" that provides a wider range of possible results;
- Promote representational diversity by prohibiting algorithms from applying certain suspect classifications or actively reversing these categories at random. (*E.g.*, at random intervals, the algorithm should assume the user is female rather than male while holding all other factors the same.);

- Encourage the development of new tools to identify reliable sources of information; and
- Promote news and media literacy as components of basic education.

The Unique Challenges of Consumer Protection in the Digital Platform Space.
Consumer protection is a critical element of any comprehensive sector-specific regulation. In addition to protecting consumers from traditional dangers such as fraud or general issues such as privacy, Congress must empower the sector regulator to identify and remedy new harms such as design for addiction.

Federal and State Enforcement
Finally, the book argues that state enforcement is complementary to federal enforcement. Additionally, federal laws of general applicability, such as antitrust and the FTC's general consumer protection authority, should continue to apply. Over a century of regulating interstate and global streams of commerce has shown that while federal preemption is sometimes necessary, the supposed increased cost or potential for contradictory regulation in multiple jurisdictions are extremely exaggerated. Telephone service, for example, has been jointly regulated at the state and federal level for 100 years, and our telephone network was the envy of the world—until 21st century deregulation weakened quality controls and oversight.

Conclusion
While past lessons drawn from the history of communications regulation are helpful and informative, we cannot simply apply them in cookie-cutter fashion. We also need to recognize that the final structures for regulating electronic communications—the Communications Act of 1934 and the creation of the Federal Communications Commission (FCC)—took decades of deliberation. The first federal law to license radio broadcast was in 1912. The first federal law regulating the telephone as a common carrier was in 1914. While even the platforms themselves have acknowledged a need for some form of regulation, not all platforms will need to have each recommendation applied to them. Rather, as is the case in nearly all regulated industries, the bulk of regulation designed to promote competition will apply only to dominant firms. Still, the enormous complexity of the digital platform sector, and its enormous importance to the very concept of informed democracy, requires that we act—with careful deliberation and on a full record.