

CHAPTER VIII: WHO WILL BELL THE CAT? DESIGNATION OF A FEDERAL OVERSIGHT AGENCY AND CONSIDERATIONS WITH REGARD TO PREEMPTION.

Unless Congress intends the public to enforce the new statute purely through private rights of action, the statute must designate an enforcement agency. This presents a choice. Congress could rely on the Federal Trade Commission as the general enforcer of competition and consumer protection law (and as the agency that currently polices digital platforms under its generic consumer protection and competition authority). Congress could expand the jurisdiction of an existing specialized agency, most likely the Federal Communications Commission. Or it could create an entirely new agency as a uniquely focused and specialized agency. Each approach has advantages and disadvantages, which I outline below.

Congress has generally created a new agency when new technology creates a new industry whose complexity requires specialization. Examples include the Federal Power Commission (now the Federal Energy Regulatory Commission) and the Federal Radio Commission (now the Federal Communications Commission). Congress has also created new agencies when experience shows that necessary and existing jurisdiction is divided among agencies, when the regulation required is not a good match with the general nature and practice of an existing agency, or when functions of that agency create internal conflict. For example, Congress created the Consumer Financial Protection Bureau (CFPB) in response to criticism that the diffusion of consumer protection authority for various forms of financial authority among the FTC and multiple regulators of financial institutions created confusion for consumers and enforcers. No single agency had sufficient authority or enforcement ability to curb widespread consumer harms across a wide variety of lending institutions. Additionally, traditional banking and finance agencies regarded their mission as promoting the health of the financial sector rather than protecting consumers. Institutional limits on FTC authority, as well as a lack of resources, undermined the FTC's ability as the country's general consumer protection agency to provide adequate protection for consumers from a wide variety of sophisticated abuses. Creation of a single agency charged exclusively with protecting consumers provided a way to move forward on a wide variety of problems that had plagued the consumer finance industry for years.

The history of the FCC provides another example of how Congress may revisit the need for an independent agency and the appropriate scope of that agency's authority. Congress originally assigned jurisdiction over wireline telecommunications regulation to the Interstate Commerce Commission under the Mann-Elkins Act of 1910, on a theory that it shared similar characteristics with railroads and other national networked industries operated on a common carrier basis. For a variety of reasons, however, this arrangement proved unsatisfactory over time. Advocates argued that the

ICC focused primarily on railroads, providing little oversight to the telecommunications industry (Paglin 1989).

Meanwhile, Congress first addressed radio broadcasting in 1912. Initially, Congress saw the problem as one of registration to prevent amateur radio operators from interfering with official communications or spreading “fake news.” The Radio Act of 1912 therefore contained relatively few regulations, simply requiring those wishing to communicate by radio to fill out a form (so they could be held accountable for any violation), use designated frequencies (to avoid interfering with federal communications), and give priority to emergency communications (Lasar 2011b). Notably, while mass radio broadcasting was in its infancy, the primary use of radio in 1912 was for personal communication. The matter was sufficiently ministerial as to be delegated to the Department of Commerce.¹⁷⁴

The rise of commercial broadcasting dramatically altered every aspect of the regulation of radio. Rather like the transition of digital platforms from spunky start-ups to corporate titans, radio transformed from being primarily about amateurs and direct communications to being primarily about the ever bigger and ever more important business of commercial radio broadcasting. Congress completely altered the existing regime for radio licensing and created the Federal Radio Commission in 1927. As explained by the Supreme Court, “Congress moved under the spur of a widespread fear that, in the absence of governmental control, the public interest might be subordinated to monopolistic domination in the broadcasting field.”¹⁷⁵ This allowed “Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.”

Over the next seven years, it became increasingly clear that while different in many ways, radio broadcasting (more specifically, comprehensive control of all uses of spectrum for communications) and telecommunications shared sufficient similarities and interrelated sufficiently to require combining the regulation of all non-federal communications into a single agency. Following the recommendation of a White House committee examining the regulation of telecommunications, President Roosevelt sent a message to Congress urging the creation of a new “Federal Communications Commission,” combining the authority vested in the Federal Radio Commission and the telecommunications jurisdiction of the ICC (Paglin 1989). Roosevelt’s reasoning

¹⁷⁴ As Lasar points out, the early pioneers of radio communication and the popular culture around wireless shared many of the same aspects as the rise of the technology sector today. That includes forgetting that the early stage of innovation was not at all focused on broadcasting, which would ultimately become the primary purpose of radio frequencies in the popular culture for the first two decades of the 20th century. Indeed, radio culture for communications was so embedded in popular culture that L. Frank Baum used it as his fictional means of communicating with Dorothy in *Oz* (Baum 1913).

¹⁷⁵ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

flowed from rethinking the relationship between government and sector-specific industries. As Roosevelt explained in his message to Congress:

I have long felt that, for the sake of clarity and effectiveness the relationship of the Federal Government to certain services known as utilities should be divided into three fields: Transportation, power, and communications. (Paglin 1989)

As this history illustrates, the decision on whether to create a new agency or expand the jurisdiction of an existing agency will depend on multiple factors — including the perceived nature of the industry and the intent of the sector-specific regulation. This understanding may also evolve over time. Initially, Congress conceived of telecommunications as similar to railroads and other common carriers. By 1934, the President and Congress viewed telecommunications as part of a specific economic sector that rose to the level of “utility” and required unified federal regulation to ensure that the sector functioned in accordance with the public interest. This shift in thinking meant that telegraph, telephone, and other telecommunications services were now perceived as having more in common with radio broadcasting than with traditional common carriers. It may seem obvious today that our integrated data networks have more in common with each other, whether or not they include a wireless or wireline component, than with railroads and shipping companies. But this convergence of technologies into a “communications” sector was not obvious in 1910 when Congress first addressed the question of regulating telecommunications, or in 1912 when Congress first delegated regulation of radio to the Commerce Department, or even in 1927 when Congress formed the Federal Radio Commission.

This is another factor to bear in mind when considering the appropriate enforcement agency for the proposed Digital Platform Act. The shape of the sector may not become clear for some time, and Congress may need to revisit its initial decision. Congress took four tries to come up with the basic framework of the Communications Act of 1934. But the evolution and convergence of communications policies since then has validated the basic framework Congress ultimately adopted.

A. The FTC: *Pro and Con.*

There are two substantive arguments advanced in favor of designating the FTC as the primary enforcement agency for regulation of digital platforms.¹⁷⁶ The first is that the entire premise

¹⁷⁶ Arguments about a “level playing field” with other sectors (such as network access providers, or other “edge providers” which do not meet the definition of digital platform) should be rejected without serious consideration. As discussed above, sector-specific regulation is premised on the idea that the sector has unique characteristics that differentiate it from other lines of commerce. This is like arguing that football and baseball need to be conducted under the same rules when the entire point is they are not the same game.

of the argument is wrong. Digital platforms do not form a distinct sector of the economy, and the aspects identified at the beginning of this paper as defining digital platforms — accessed using the internet, multi-sided platforms with one side open to the public, and enjoying sufficiently strong network effects — are merely aspects of a business model rather than features that define a sector in need of sector-specific supervision. While certain aspects may require more targeted remedies, this is still sufficiently generic to maintain the general supervision shared by other businesses. To use an analogy, if the FTC is the “cop on the beat,” then all that is needed is the equivalent of a homicide division rather than creation of a new and independent enforcement agency.

The second argument is almost the mirror image of the first. To the extent digital platforms are regulated, it has been by the FTC pursuant to Section 5 of the FTC Act. The FTC has consent decrees in place with the major platforms, notably Google and Facebook, entered into as a precondition of merger approval, to settle antitrust investigations, or to settle complaints of “unfair and deceptive practices” under Section 5. This, proponents of the FTC argue, gives the FTC unique institutional expertise on par with an expert agency regulating a specific sector.

The counter-argument to both of these is essentially the same. Digital platforms are now a distinct sector of the economy that impinges on nearly every aspect of our lives. The existence of a handful of dominant firms, and the economic features of digital platforms that create and support their enduring market power, require more than a few tweaks to existing FTC authority. In the market generally, competition can usually be achieved by breaking up bigger companies into smaller competing companies. If a merger would produce too few grocery stores or funeral homes in a market, requiring sufficient divestitures reestablishes competition without further intervention. As discussed at length above, it is neither clear how to physically break up digital platforms nor clear that breaking up these platforms would automatically produce competition. Nor does the FTC have expertise in the equally important area of content moderation. Nothing in the FTC’s jurisdiction or experience relates to the problems of online harassment, deliberate disinformation campaigns for political (rather than commercial) purposes, or how to promote exposure to diverse sources of news and entertainment. Nor does the FTC have any experience with public safety.

The proposed Digital Platform Act employs an approach utterly contrary to FTC practice, and implementation would require an entirely different set of skills than those used by the FTC under Section 5. It takes a proactive *ex ante* regulatory approach to aggressively promote competition, rather than a *post hoc* approach designed to preserve existing levels of competition. It requires the FTC to constantly monitor areas and practices utterly unfamiliar to it. True the FTC could, with sufficient investment of resources by Congress, acquire such expertise and create an entirely separate sub-agency devoted to digital platforms. But it would be cheaper and more effective to create a new agency from scratch (or to expand the FCC, which has more experience in the relevant

areas). In any event, doing so would negate the value of any previous experience, and the need to undertake a radical restructuring of the FTC to implement the proposed DPA demonstrates why it is not merely a new business model or product.

B. The FCC: *Pro and Con.*

If Congress wishes to build upon existing agencies, the logical choice is the FCC. As discussed above, there are sufficient similarities between communications and digital platforms, especially in network economics and social goals, to use the Communications Act as a model for comprehensive legislation. Nor would this be the first time Congress has dramatically expanded the FCC's authority to reflect the evolution of communications technologies. For example, the 1984 Cable Act added Title VI to the Communications Act on the regulation of cable services. Congress significantly modified the FCC's wireless authority in 1993 to address the introduction of mobile services. Given that the essential quality of digital platforms is their distribution over the internet and their status as self-organizing "virtual networks" that perform similar functions to traditional telecommunications and media networks, the FCC seems the logical regulator of digital platforms. Furthermore, the FCC has vast institutional experience with proactive rulemaking as well with consumer protection and public safety. This institutional experience seems relevant when implementing a statute such as the DPA.

There are several concerns with expanding the jurisdiction of the FCC to include the proposed DPA. The most important is an existential one. The FCC has had responsibility for promoting diverse content, requiring transparency in advertising and content sponsorship, and implementing content moderation schemes such as the Children's Television Act and parental controls. Yet Congress has been very careful to prevent the FCC from regulating the actual producers of content as distinct from the licensees who carry the programming. It has done this deliberately to minimize the influence of government over content. Furthermore, the broad authority and discretion delegated (at least in theory) to the FCC is made tolerable by the fact that it is strictly tied to the physical networks over which communications travel. Expanding the FCC's jurisdiction to include digital platforms potentially erodes this structural firewall between the regulation of physical networks and the regulation of communications and content.

This brings up the second concern. Given the multitude of public interest goals Congress has already entrusted to the FCC, there is a danger that the FCC may see its role as balancing the interests of physical networks with those of digital platforms. While the FCC has on occasion handled the introduction of new competing technologies well, its track record is mixed. The FCC delayed the rollout of television in a manner clearly designed to avoid disruption of incumbent radio broadcasters (Wu 2010). Likewise, before Congress passed the 1984 Cable Act, FCC regulation was

designed to prevent cable operators from competing directly with television broadcasters. Prior to the passage of the 1993 amendments to the Communications Act, the FCC limited the rollout of mobile services to avoid disrupting the incumbent wireline services. On the other hand, when given explicit direction by Congress, the FCC has proven more willing and able to promote new entry and competition. The wireless industry grew rapidly as a result of the implementation of the 1993 amendments, and — despite a significant rise in concentration in the last two decades — wireless remains the most competitive sector of the communications ecosystem.

This outcome should not be surprising. Like other institutions, agencies have their biases. Even without resorting to some of the more pessimistic aspects of public choice theory, it is easy to see how an existing agency charged with promoting the health of a particular industry will continue to do so unless something shifts its institutional momentum. This is especially true if authority is expanded without sufficient increase in funding and resources. It would be odd indeed if the FCC could set aside its 85-year focus on maintaining the stability of communications networks and embrace the potentially disruptive effects of “virtual networks.” And while the agency would have responsibility to ensure the health of the entire ecosystem, it would not be surprising for the FCC to gravitate to the arguments in favor of the networks it has traditionally regulated, and whose lobbyists have considerable experience with the institution.

Finally, while many digital platforms — such as social networks — bear close resemblance to traditional telecommunications or media and replicate many of the same features, others do not. Online shopping, for example, does not easily fit into the traditional jurisdiction of the FCC. Of course, nothing prevents the FCC from acquiring new expertise as needed, and any agency — whether existing or created for the purpose of implementing and enforcing the DPA — will need to hire new staff and acquire new skills. There is precedent for the FCC adding entirely new fields of expertise. In 1982, Congress expanded the FCC’s jurisdiction to include certification of all electronic devices that emit radio frequencies as incidental to their operation, such as computers.¹⁷⁷ This required the FCC to acquire expertise in engineering outside its traditional scope. Similarly, when Congress authorized the FCC to assign spectrum licenses by auction in 1993,¹⁷⁸ it required the FCC to expand its expertise in auction theory and hire new staff to build the necessary software to conduct auctions.

Nevertheless, it is reasonable to worry that the overall institutional tilt of the FCC toward a communications worldview might create challenges when applying its new authority to digital platforms that are less like traditional communications services and much more like traditional brick-and-mortar businesses. On the one hand, the FCC might simply neglect oversight of these

¹⁷⁷ 47 U.S.C. §302a.

¹⁷⁸ 47 U.S.C. §309(j).

platforms, in the way the ICC neglected oversight of telecommunications a century ago in favor of its primary focus on transportation. On the other hand, the FCC might apply policies and approaches that work for communications but are inappropriate for platforms primarily providing non-communications services.

All this suggests that while committing implementation of the DPA to the FCC could be workable, and might even have positive benefits by simplifying enforcement of certain aspects of the DPA that overlap with existing FCC responsibilities, Congress must proceed with care. As with the 1993 amendments and the 1992 Cable Act, Congress must give explicit guidance to the FCC (along with the necessary resources) to shift its the natural momentum and keep it from either neglecting its new responsibilities or favoring traditional networks over digital platforms when assessing competing public interest goals.

C. The “Digital Platform Commission”: *Pro and Con.*

In many ways, the cleanest solution to the question of implementation is to start fresh. Passing the DPA would create a new and comprehensive set of rules on a segment of the economy that has, until now, enjoyed comparatively little oversight. While this sector shares many characteristics with traditional electronic communications networks, it combines them in new ways that may make traditional experience unhelpful or even a hindrance, if lessons from traditional network regulation are inapplicable. A new agency also can view with fresh eyes the characteristics common to businesses within the sector that are not common in traditional communications networks or among businesses as a whole.

Most importantly, an agency dedicated exclusively to digital platforms will have no distractions from this increasingly important sector of our society. As with telecommunications and the ICC, we should not let surface similarities — however instructive — lead to grouping a unique sector of the economy with an entirely different sector. There is already more than enough work to justify creation of a separate agency. Moreover, variations among platforms require the kind of careful judgment that a separate agency dedicated entirely to digital platforms and enforcing a comprehensive digital platform act would be suited to carry out.

The chief barriers to creating a new agency are political. New agencies invariably require greater expense than simply expanding an existing agency. Additionally, accusations that Congress is needlessly expanding the federal bureaucracy by creating another regulatory agency may impede adoption of the DPA as a whole. At the same time, however, expanding the jurisdiction of an existing agency would also require massive investment of resources and incur restructuring costs, since regulation of digital platforms would differ markedly from its existing mission.

That these objections are political makes them no less real. Congress will need to weigh whether the advantages of creating a new agency are sufficiently compelling to warrant creating a new agency over these objections.

Finally, creating a new agency might blur traditional lines of authority and make overall enforcement more difficult. These problems, while real, should not be overestimated. The FTC has concurrent jurisdiction with a number of other agencies, such as the Department of Justice (for antitrust), the Food and Drug Administration (over advertising of food, drugs, and cosmetics), and the FCC (over robocalls and non-common carrier services such as cable). Agencies must work proactively to avoid allowing businesses to fall between the cracks between the two agencies, but the relevant agencies have years of experience resolving precisely these kinds of jurisdictional issues.

Of relevance, the UK House of Lords' recent report on regulating platforms examined this question and could not decide whether to create an entirely new agency or regulate through multiple existing agencies (House of Lords 2019). The report recommends forming a coordinating committee composed of members of relevant agencies (such as the Competition and Markets Authority and the Office of Communications) to ensure that the myriad of concerns that arise from digital platforms are properly addressed and matters are referred to agencies with proper jurisdiction. It remains to be seen whether this arrangement is workable, or whether this coordinating committee will ultimately evolve into a sector regulator.

This raises one last question. To what extent should generally applicable laws such as antitrust or state consumer protection laws apply to digital platforms? I discuss this in the final section.

D. Continued Need for Traditional Antitrust Enforcement and Consumer Protection by Federal and State Agencies.

Laws of general applicability are valuable because they are generally applicable. In the early and mid-20th century, Congress exempted certain regulated industries from generally applicable antitrust law or consumer law on the theory of “natural monopoly.” The trend over the last 50 or so years has been to reverse this trend. There are many reasons why generally applicable federal law — particularly antitrust — remains important despite adoption of comprehensive sector-specific regulation.

Antitrust and generally applicable federal consumer protection supplement comprehensive sector-specific regulation in several important ways. First, no single federal agency can cover the entire scope of an industry sector unless that sector is concentrated to the point of “natural monopoly.” Antitrust agencies, with their specialized knowledge of antitrust, continue to serve a valuable role in protecting competition broadly even as the agency charged with sector-specific enforcement promotes competition within the relevant industry sector. Likewise, no industry-specific agency can hope to catch every case of consumer abuse. It is not a question of whether we have a single “cop on the beat.” History shows competition and consumer protection need as many cops on the beat as necessary. Where agencies have experience enforcing laws of general applicability, their additional oversight enhances the public interest.

This is particularly true during those periods when specialized agencies choose to pursue other goals besides competition or consumer protection. Throughout most of the 20th century the FCC emphasized the stability of the telecommunications network and universal access to telecommunications services rather than competition.¹⁷⁹ It was the Department of Justice that repeatedly brought antitrust actions against AT&T for its anticompetitive practices in related markets (such as control of the customer equipment market), and then ultimately in the long-distance market. The FCC did not seriously seek to promote competition in telecommunications until the late 1960s and 1970s (Wu 2010; Wu 2018).

This conflict between the Justice Department and the FCC flowed from the FCC’s mandate to ensure universal access to all Americans at just and reasonable rates. This prompted the FCC to emphasize certain aspects of its jurisdiction, such as stability, and it deliberately permitted higher monopoly rates in urban areas to subsidize rates in rural areas. It was the Justice Department, with its general mandate to prevent anticompetitive conduct, that pushed back on AT&T’s assertion that it needed to control related markets to meet these statutory goals. It is difficult to imagine how the modern telecommunications market could have evolved without the break-up of AT&T, and it is difficult to imagine how that could have come about without an independent antitrust enforcer willing to go where the sector-specific regulator would not.

To ensure that antitrust agencies can continue to play this important role, the DPA must explicitly reverse the application of recent Supreme Court decisions limiting the power of antitrust where Congress has entrusted overall regulation of the industry sector to a specific regulator. In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLC*,¹⁸⁰ the Supreme Court held that once the FCC determined that a carrier no longer had a regulatory “duty to deal” with rivals, then

¹⁷⁹ Indeed, Congress did not remove the authority of the FCC to immunize telecommunications providers from antitrust until the Telecommunications Act of 1996. Pub. L. 104-104.

¹⁸⁰ 540 U.S. 398 (2004).

such a duty could not exist under antitrust law. Essentially, the FCC determination that Verizon did not need to offer certain products at wholesale to competitors as a regulatory matter served to insulate Verizon from any antitrust claim that would mimic the previous regulatory condition. In *Credit Suisse Securities (USA) LLC v. Billing*,¹⁸¹ the Supreme Court extended this rationale to the securities market. Despite the statutory language referencing existing antitrust law, the Supreme Court reasoned that by committing regulation of the securities market to the Securities and Exchange Commission (SEC), Congress had implicitly immunized the securities market against certain types of antitrust enforcement that would be “repugnant” to the overall scheme of federal securities regulation.

Antitrust scholars and courts have debated the full scope of the impact of these decisions for the last decade. But even using the narrowest reading, the *Trinko* and *Credit Suisse* decisions greatly expanded the industries and conduct that were, for practical purposes, exempt from antitrust scrutiny.¹⁸² Antitrust enforcement agencies have understandably been reluctant to expend limited resources bringing cases that risk being thrown out due to *Trinko* concerns — and confirming for specific industries that, for them at least, generic antitrust has become dead-letter law.

In creating statutes to regulate digital platforms, it’s important that *Trinko* not be used to create a no-man’s land where neither regulation nor antitrust are applied to harmful behavior. A traditional antitrust savings clause can no longer be relied upon, as the clause in the 1996 Telecommunications Act was found insufficient to protect antitrust enforcement in *Trinko*. So were references to existing antitrust law in the Securities and Exchange Commission Act. Legislation creating regulation and antitrust enforcement for digital businesses should address this concern head on. The statute must be extremely specific, explaining for each tool and goal whether it is intended to supersede antitrust or not. Antitrust enforcers and other agencies can share dual authority with different review standards and goals. They can account for one another’s determinations in a manner that will

¹⁸¹ 551 U.S. 64 (2007).

¹⁸² Howard Shelanski, at the time the FTC’s top antitrust economist, testified in Congress on behalf of the commission a few years after the *Credit Suisse* decision. He argued that a narrow interpretation of *Trinko* was possible. The key facts in *Trinko* were that the legislation at issue, the 1996 Telecommunications Act, went further than antitrust law; an agency, the FCC, had issued rules directly regulating the conduct at issue; and the FCC actively administered those rules. Shelanski said in 2010, “Where a competent agency actively administers a rule whose standard for the competitive conduct at issue in litigation is more demanding on the defendant than antitrust law, the Court was right to find it relevant whether the marginal gains outweigh the potential costs of antitrust enforcement against the same conduct.” Yet he expressed concern that courts may use much broader interpretations of the line of cases. The Court in *Trinko* expressed concern about misuse of antitrust law by impudent plaintiffs, so some preemption could be limited to private plaintiffs, with expert agencies being given greater leeway.

minimize inconsistencies without having one always take priority over the other. Antitrust must remain in full force, except where Congress explicitly says otherwise.

Regulated industries frequently complain that having “two regulators” — a sector-specific regulator and the regulator for generally applicable laws, such as the FTC — creates confusion and potentially subjects regulated industries to contradictory and competing mandates. Examples of this confusion, however, are scant or non-existent. Consumers, certainly, do not object to having multiple agencies capable of addressing their complaints. It is far more difficult and confusing for consumers to try to determine whether to bring a complaint to one agency or the other than to bring a complaint to both. Agencies can, and generally do, resolve the question of overlapping jurisdictions with memorandums of understanding to delineate shared responsibilities.

Sector-specific regulation, even comprehensive sector-specific regulation such as the proposed DPA, does not warrant preemption of federal antitrust law or consumer protection law. Sector-specific regulation and laws of general applicability happily co-exist, and their co-existence serves the broader public interest.

1. The More Complicated Question of Preempting State Law.

Whether or not to preempt state law, however, poses a more complicated question. The Constitution gives authority over interstate commerce to the federal government. When the Constitution was written, the distinction between interstate and foreign commerce on the one hand, and purely intrastate commerce on the other, was fairly clear and straightforward. Over time, the economy has grown increasingly complicated and these components have become intertwined. At first glance, the digital economy appears quintessentially interstate, if not entirely global in nature. We have seen historically how local protectionist interests may give an advantage to incumbents and commercial rivals who fear disruptive technology despite the benefits to consumers and to society as a whole. The creation of a vast internal market relatively free of commercial friction has allowed the United States to become an economic and industrial superpower. Opponents of continued state authority over internet services frequently argue that the need to comply with “50 different sets of regulation” imposes significant cost, making it more expensive to provide new and innovative services.

Nevertheless, states remain the first layer of defense against harms done to their residents. Additionally, as the layers of government closest to the people and most accountable to them, state and local governments are uniquely situated to act to protect residents and preserve competition locally. Federal agencies may have no means to become aware of emerging problems on the ground. The Administrative Procedure Act imposes limitations on the ability of agencies to act

quickly. While these limitations are an important part of the checks and balances on federal action, they come at a cost. By contrast, the value in our federalist system with its “50 laboratories of democracy” is that it allows states and localities to take measures that are sensible based on the evidence before them, but which may not be ready for national implementation.

Additionally, the structure of federal oversight and federal rulemaking favors national actors and national interests. This is precisely why federalism remains important. There are often situations where the unique circumstances of a local community or a state require an approach suited to the specific local circumstances. Allowing states to respond to local needs ensures that these communities will have the power to protect themselves.

Accordingly, any sector-specific regulation must strike the appropriate balance between preemption and maintaining local authority. This is, of course, easier said than done. In the 20th century it was relatively straightforward for the Communications Act to distinguish between interstate communication and intrastate communication, or for the Federal Power Act to distinguish between wholesale distribution of power and retail distribution of power. A platform such as Facebook or eBay has its share of intrastate commerce and effects, but these are much more difficult to distinguish from the interstate or international aspects. Cyberbullying in a high school may be a local matter, but it can also cross state lines or even national borders.

It seems logical to insulate state antitrust laws and traditional state consumer protection laws from preemption. As discussed above with regard to federal laws of general applicability, having a broad base for enforcement of these general laws has historically proven beneficial to society. Permitting state-based sector-specific laws, however, is more problematic. Here, the possibility of manipulation by incumbent rivals and concern about additional friction that impedes innovations benefitting consumers has more historic support. But even here, the case for preemption is hardly clear-cut. As noted above, state action is often a necessary precursor to federal action.

Rather than make an immediate decision on which sector-specific regulation to prohibit, Congress should presume that states are in the best position to judge how to protect their residents and how to evaluate the necessary tradeoffs. The DPA should empower the enforcement agency to preempt state law it finds inconsistent with the goals and regulations adopted by the DPA. As an added protection, however, the DPA should not permit blanket preemption, but should require that the agency justify preemption on a record reviewable by a federal court. Additionally, the DPA should clearly authorize states and localities to pass laws or adopt regulations that are consistent with the DPA.

In short, the approach of the DPA to the states should be to view them as valuable partners in protecting the public interest, rather than as obstacles to a flourishing and innovative industry sector. Only when there is clear evidence that a national policy is needed, or that a specific state practice undermines the goals of the DPA, should the enforcing agency preempt state or local law.