

THE BROOKINGS INSTITUTION

WEBINAR

COULD A NEW DIGITAL PLATFORM AGENCY
PROTECT CONSUMERS FROM BIG TECH?

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PARTICIPANTS:

TOM WHEELER, Moderator
Visiting Fellow, Center for Technology Innovation
The Brookings Institution

GENE KIMMELMAN
Senior Fellow, Shorenstein Center on Media, Politics and Public Policy
Harvard Kennedy School

FIONA SCOTT MORTON
Theodore Nierenberg Professor of Economics
Yale School of Management

LESLIE C. OVERTON
Partner
Axinn

PHIL VERVEER
Senior Fellow, Shorenstein Center on Media, Politics and Public Policy
Harvard Kennedy School

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ANDERSON COURT REPORTING
1800 Diagonal Road, Suite 600
Alexandria, VA 22314
Phone (703) 519-7180 Fax (703) 519-7190

P R O C E E D I N G S

MR. WHEELER: Good morning. I'm Tom Wheeler. I'm a visiting fellow at the Brookings Institution, and I am joined today by two other colleagues of mine. We are also senior fellows up the Shorenstein Center, at the Harvard Kennedy School.

Phil Verveer, who is a noted public servant, and spent a career in antitrust and public policy. Most notably, he has the distinction of being the original lead attorney on the AT&T -- U.S. versus AT&T case.

And Gene Kimmelman, who also has an outstanding career, both in Congress and Department of Justice, in antitrust, and is one of America's leading public policy -- Public Interest Advocates.

Together, the three of us have proposed the creation of a new Digital Platform Agency, along with a recasting of the nature of the regulatory model necessary for the digital age. The Brookings website, now, contains a blog that the three of us have written, that also includes links to the paper up at The Kennedy School. We are joined, today, by two noted commentators, Fiona Scott Morton, a former Antitrust Division Official, who is now a Professor of Economics, at Yale, and Leslie Overton, also a former Antitrust Division Official, who is now a partner at the Axinn Law Firm.

This is an interactive session, that we're going to be having today. So, please submit your questions. If you're doing it on Twitter, it's #techoversight, or @brookingsgov, and if you want to email your questions, you can email them to events@brookings.edu.

The format today is we're going to begin with Phil and Fiona reflecting on antitrust as a tool for overseeing the digital marketplace. Leslie has a slightly different point of view, that she'll express, and then Gene will close out with comments on the real politic, if you will, of being able to pull something like this off.

But, let me set the stage. We are all familiar with move fast and break things, the motto that Mark Zuckerberg came up -- which is kind of become the motto of Silicon Valley, and we have become convinced that what that really means is move fast to create rules, regardless of their public

interest, and that the tech companies, particularly the platform companies, have assumed a pseudo-governmental role of making the rules for the new digital environment, while at the same time lobbying to keep the representatives of the public from establishing rules, themselves.

And, the question then becomes, okay, how do you conduct oversight, in this entirely new digital environment? I was privileged to be the chairman of Regulatory Agency, during the Obama administration, and my experience was that you lived by old statutes that didn't reflect digital realities, and that you had to operate under old procedures, that were built in an industrial era model, that weren't relevant to the digital era.

So, the conclusion that the three of us have put forward in our paper, and that we'll be discussing today, is that there is a need to return to the public interest obligations that were long established in common law, a duty of care, and a duty to deal, and to oversee those traditional expectations. We need an agency that has digital DNA, that is not a bolt on to some other agency, but is an agency that has a staff and commissioners, that, themselves, come out of a digital environment, and are charged with interpreting those common law principles inside the new digital reality.

So, with that as an overview, let's turn to the panelists and hear their thoughts. So, first, let's start off with Phil and Fiona. I mean, you picked up the morning paper, and everybody is talking about antitrust as the way of dealing with the new digital marketplace. Is that, Phil and Fiona, is that really the right kind of solution?

MR. VERVEER: Well, Tom, thank you. I've spent a fair amount of time considering that, in connection with the project that has resulted in this paper, and our sort of summary conclusion is this, that antitrust is an important tool, with respect to digital platforms, but we don't believe that it is a reliable mechanism to deal with the various competitive issues that the major digital platforms raise. Now, why not?

Three reasons, monopolization cases take a long time. AT&T, which is analogous case that I had something to do with, took seven and a half years from complaint to settlement. Microsoft to -- a bit harder to gage the timeframes, but it took approximately six years from the complaint to a resolution,

including two trips to the D.C. Circuit. So, time is a serious consideration. Secondly, the outcome of any litigation is going to be uncertain, and that's particularly true for antitrust cases, given the narrowing of the antitrust laws, at the hands of the courts, over the last 40 years or so.

And, third, working out remedies that will reliably deal with the perceived problems is a very difficult proposition, particularly a difficult proposition for the judiciary to handle. So, those are the three concerns we have, and with that, I'd like very much to get -- is Professor Scott-Morton, who has written very extensively on these issues, and recently. So, Professor Scott-Morton.

MS. SCOTT-MORTON: Thank you very much, Phil. I basically agree with what you say. I don't think anybody wants to wait seven and a half years, to get an answer to Google litigation, that might be filed this week or next. And antitrust law is -- is designed to be fairly narrow, and the enforcement agencies are not designed to engage in ongoing monitoring of an industry. So, it's really not going to give us solutions to a lot of the problems that we have, and I want to -- I chaired a group that wrote a report for the Stigler Center, at the University of Chicago, last year, and we recommended both more vigorous antitrust enforcement, but also a regulator, of the kind that you three propose.

And let me just highlight, for the listeners, the kinds of activities that one would want, I think, to put inside such a regulator. So, first, there's a whole range of consumer protection issues, like what are the defaults concerning data that I, the consumer, control, so, another way to say that would be privacy. What are the defaults that I get to control? What are the interfaces, and the choices shown to me, for me to decide to do something different? Okay, because right there are 75 pages of legalese, and I have to hit, I agree, in order to get to the service I want, and choices can be controlled, and influenced and manipulated, by the platform.

And, third, there's an addictive nature to a lot of this technology. Many of our listeners may have watched the social dilemma, on Netflix recently, which is great documentary, and actually I have a new paper with Dr. Niels Rosenquist and Sam Weinstein, about addictive technologies, and how to handle them in an antitrust enforcement context. So, you've got a whole consumer protection set of stuff, then you've got based lined conditions that determine what sort of competition we're going to get,

so, things like data portability. Can I take my data from platform A, and bring it to platform B, and is there somebody defining the standard for that, so that its useful to platform B, when it gets there?

An example of this would be open banking, in the U.K., or interoperability, so that multiple services can all provide a service to the consumer, and they can connect to each other, like email. Can -- I can have Gmail and you can have Hotmail, and we can connect to each other. The internet of things, would something where connectivity would be really important, or autonomous vehicles. If the cars on the roads can't talk to each other, then we've got a big problem, in terms of making that work. I have a, also, just to promote my own work, a paper that's out this morning, the Washington Center of Equable Growths website, that's about interoperability and network effects.

And, then, third, you want to have salience of characteristics, like price and quality, to enable consumers to shift their business to better firm -- better offers. We have Energy Star ratings, we have nutrition labels, that help consumers figure out what is, in fact, good. None of these things exist in the digital context, which is really a problem.

And, then, third, we have competition enforcement, so, discrimination, raising rivals' costs, of existing rivals, or perhaps of nascent rivals, small mergers that are going to be below the HSR Threshold, that are going to require some specific sectoral expertise to see how it is that they affect competition in the future. That kind of traditional antitrust enforcement, that been eroded by the courts, is an open area, where we effectively are underenforcing, along with this consumer protection, and kind of rules of the road area.

And, then last, you might want to prevent existing market power from hurting the consumers and other sides of the platform too much. So, you might have an existing market power problem that creates a lot of bargaining power for the platform, and you might protect some other sides of the market. So, that's just a quick overview of all the kinds of things that antitrust, today, is not going to deal with, in a timely and effective fashion, that you might want to put inside the regulator, and, Phil, I hope that was an answer to your question.

MR. VERVEER: We have another couple of moments (auto skips). Let's just spend a

quick moment summarizing the interoperability paper, that you apparently just published this morning.

MS. SCOTT-MORTON: Oh, sure. It's basically arguing that if you have a dominate firm that achieved -- that violated the antitrust laws, and the market tip to that dominant firm, and it's protected by the network effects, that is to say nobody wants to change to a different phone system because nobody else in on the phone system. We're all on the same phone system. My phone -- and I value all the other people who have a phone system, that what you could have, as a remedy, is to require the dominant firm to interoperate, and then, if the dominant firm had once been AT&T, now there would be Verizon, and T-Mobile, and Sprint. Then, they could all compete because their phones could connect to everybody else's phones, and that would be a great way to achieve competition, going forward, without -- and sort of erode those entry barriers. Great, so, now, we're going to turn it over to Gene and Leslie. You're muted, Leslie.

MS. OVERTON: Sorry about that. I'm working on two screens, apologies. Can everybody hear me now?

MR. WHEELER: Okay, well, apparently, Leslie, you're muted, so, I'm going to give you one more shot here to -- can you? You're still muted, Leslie.

MS. OVERTON: Can you hear me now?

MR. WHEELER: You got it. Thank you.

MS. OVERTON: Okay, I'm sorry. I'm not that sure how I got re-muted. I was saying that I'll start with -- I will start with a disclaimer, and just say that I am speaking for myself today, not on behalf of Axinn, or any particular clients, even though we have clients, including Google, who may have an interest in these topics, and in the general direction of antitrust law.

But I'll say that I appreciate the authors being interested in speaking to what they perceive as challenges with digital platforms. But I have a lot of confidence in the ability of the antitrust laws to handle any perceived challenges that arise, and so -- and I have that confidence after having been -- after having been in practice, and in government twice, and seen the antitrust laws applied to many different industries, including high-tech industries, and I've also seen the antitrust agencies invest in

greater capacity, invest in greater litigation readiness, invest in greater ability to monitor consent decrees, and I think that it is -- it is important to recognize the challenges that a regulatory approach could present, in terms of an adverse impact on innovation and the like, and so, I will -- one question that I did have for you, Gene, about the paper, is I wanted to understand what market failure you all have determined, that you think forms a partial basis for a -- for this type of regulation, given the risks that such regulation could pose?

MR. KIMMELMAN: Well, thanks, Leslie, and I, too, have massive faith in antitrust and the great skills of the people who are the practitioners in the enforcement agencies. But my experience is that we have often relied upon parallel government oversight, with antitrust, to achieve competition goals. For example, I'll get to the market failure, but in the case the Phil described, of leading up to the consent decree for breaking up AT&T. During that entire time, an expert agency was working on how you would interconnect companies, how you made equipment interoperable in a network that was potentially becoming more competitive, and you had -- so, you had dual track work, all promoting competition principles.

So, here, I think Fiona nailed what it really wrong in the market, besides waiting a long time in a very dynamic market to see how litigation unfolds, and is resolved, you have problems here of networks, network effects, and tendencies to tip, because of scaled economies, and so, with digital platforms, we don't have that thing that's comparable to financial regulators, or the Federal Communications Commission, and the idea here is to try to fill in those gaps, that either antitrust doesn't touch well at all, or where the process is too slow to get at ways to keep entry barriers down, opportunities to enter, opportunities to challenge a market, even if it looks like there is a dominant player, competition for the market, and Fiona's description of an addictive quality here.

Again, this is not -- this is not an assault on any one company, or a claim of necessarily misbehavior. If the nature of the use of the technology brings an addictive nature to it, the idea of consumer choice has to be reflective of that. It's not just like you and I going out to the store, and buying one kind of lettuce versus another kind of lettuce, or deciding to go to a different store. There's

something else going on here, and so, we're seeing attributes of the market, that are really not well fashioned for speedy antitrust resolution.

MS. OVERTON: Well, and -- so, recognizing that -- how long any particular antitrust action will take depends on the facts, depends on the circumstances, but there is due process built into that, and so, due process can sometimes take some time, but, presumably, there would be some due process built into a regulatory agency, as well, and so, couldn't there be litigation of regulatory decisions that would take time, and could lead to -- lead to negative impacts on pricing, negative impacts on innovation, and harming consumers in the interim?

MR. KIMMELMAN: Absolutely, and we're not saying regulation is a panacea, as you'll see. Actually, in the proposal, we're trying to create incentives for all the stakeholders, in the market, to come together, develop standards, develop norms, with just a regulatory stick over their head, but sometimes you need the stick to apply, and so, of course, there could be challenges, but I think, the major point is a proposed regulation with input would set a -- an objective standard out to the marketplace of what the agency is considering, even if there is litigation around it. So, it would set new norms around the market.

MS. OVERTON: Got it, okay.

MR. KIMMELMAN: So, I think, we now need to turn it back to Tom, to drive the conversation.

MR. WHEELER: Now, it's my turn to remember to unmute. Well, let's -- let's put Fiona and Leslie in the same screen now, and give them a chance to talk. You know, there -- I think we can all stipulate that the digital companies have delivered wonderful new capabilities, to us, and new economic growth. The challenge is that they have, in the process, been able to make their own set of rules, and have their own determination as to what is in the public interest.

And, so, the question that I would ask Fiona to respond to is Leslie's observation about the fact that antitrust is sufficient to get to all of the issues that are involved, when these companies make their own rules.

MS. SCOTT-MORTON: Yeah, that's -- that's a key point, Tom, and I -- we started off in such an exciting fashion, I forgot to make my own disclosures. I do expert witness consulting for both Apple and Amazon, among other companies.

But it's like saying we invented the car. The car is great, and let's not bother with stop signs, seat belts, air bags, or speed limits. I mean, obviously, cars would, then, be super dangerous. They'd be useful, but they'd be super dangerous, and I think society has made good choices, by putting seat belts in cars, and stop lights on roads, and, as a result, we can all drive around safely and quickly.

So, that's the kind of image, I think, we have for regulating a brand new industry, is acknowledging how marvelous it is, and wanting to keep all the marvelous bits, but also wanting to take the edge off the danger, and I think, as Gene eluded to, the industry, itself, gains, from taking the edge off the danger, because that makes everybody happier, and makes society function better and be more supportive of the industry, and if they all come together, and help choose those rules, then that -- the rules will be yet more efficient.

So, I think, this is the kind of mindset we want, and when you think about antitrust in cars, you can't imagine that an antitrust case is going to solve the problem of, you know, putting air bags in cars. So, we -- there's a lot to -- there's a lot to do here, that is outside the purview of anti-trust, and I, too, spend most of my day worrying about antitrust, and love it, and think it a great set of laws, and a great tool kit, but we just have to recognize what it's for, and what it's good at.

MR. WHEELER: Leslie?

MS. OVERTON: So, I -- so, I'll say, I meant to say it earlier, when I'm speaking today, I'm speaking about the proposal for a regulator to do competition regulation, and so, I'm not speaking about any privacy or other issues, and just because I'm not a privacy lawyer, I'm an antitrust lawyer, and so, you know, I would imagine there are some cautions about regulation that could extend beyond an antitrust regulator, but I'm speaking specifically, that I don't see a need for an antitrust regulator, given the -- given the robust potential for antitrust enforcement, given the capability of the antitrust agencies, and, also, given the ability of -- of companies to self-regulate, which is already going on in various aspects, and

so, but I'll just -- I'll just make a quick point.

You know, I think we look, and we say, gosh, or some people say, I don't say, some people say, oh, you know, we've got these companies, and they've got these -- they've been successful, and they're wonderful, as Tom said, but they've been successful, and is that going to change without some kind of intervention. But, I think, you know, there is robust competition in spaces where digital platforms compete, and we have seen changes over time, and I'll just remind everyone, because it's easy to forget now, as the economist Andres Lerner has identified, the internet is filled with examples of so-called dominant firms, or platforms, or providers, that, subsequently, were displaced by new firms, such as in social media. If people can remember when Myspace seemed like they were -- were very, very, very durable in their position, Myspace to Facebook, social networking, GeoCities to Facebook, WordPress, and search, Yahoo, Lycos, Alta Vista to Google, and so, so, these faces are very competitive, and there are -- there are changes over time. You -- and I just --

MR. WHEELER: Leslie.

MS. OVERTON: -- think it's important to remember. Yeah?

MR. WHEELER: Leslie, I think you're probably -- I think you're probably engaging in a little revisionist history there, though, I mean --

MS. OVERTON: How so?

MR. WHEELER: -- you know -- let's go back -- let's go back, and talk about my Myspace, and a guy by the name of Zuckerberg, in a dorm room at Harvard. I mean, yes, Myspace was dominant, and it was owned by Rupert Murdoch, right? So, there was some clout behind it, and --

MS. OVERTON: And it was displaced by somebody in the dorm room.

MR. WHEELER: -- so, but how did -- how did he --

MS. SCOTT-MORTON: Can I just say, though --

MR. WHEELER: -- but how did he win? He won, in the old fashioned American, my product is better than your --

MS. OVERTON: Yes.

MR. WHEELER: -- product.

MS. OVERTON: Yes.

MR. WHEELER: If -- but if you and I, today, decide that we're going to create a new platform, social media platform, to take on Facebook, we do not have the assets necessary to do that, because since the Myspace activity, the world has been redefined, as the fact that people pay for access, for targeted access, and Zuckerberg has a third of the world, on his platform, and you and I could get a 100 million subscribers, and go, wow, what a great success, and not have the ability to deliver what people pay for because Facebook has sucked in all of the essential information and then hoards it, and so, we have to recognize the reality that exists today, not, you know, just --

MS. SCOTT-MORTON: And can I jump in?

MR. WHEELER: -- what was the nice story that happened a while ago.

MS. OVERTON: I'll say -- I'll let Fiona jump in.

MS. SCOTT-MORTON: Also, that everybody --

MR. WHEELER: Fiona.

MS. SCOTT-MORTON: -- loves to talk about Myspace. Myspace was a decade ago, okay? So, one of the things that is very, I think, in all seriousness, telling about people who tell me that this is a very robust and dynamic industry, is that the example they point to is a decade old, right, and why is that? Because network effects are very serious entry barriers. They create a real difficulty to an entrant starting up, a new -- imagine somebody trying to start up an email service that could not connect to everybody else's email, okay?

Why would I be interested in that product? I can't communicate with anybody. So, network effects are really a big entry barrier, and that, in my opinion, is why you haven't seen movement in this space, in a long time, in addition to the conduct that is well known, that I've written about with David Danneli, about Facebook's acquisition of potential competitors, and so forth.

MR. WHEELER: Okay, Leslie if you would -- a quick response --

MS. SCOTT-MORTON: Going back -- just going back to one more thing, that Leslie --

MR. WHEELER: Yeah.

MS. SCOTT-MORTON: -- said, she said antitrust was robust. I actually disagree with that, quite strongly. I think, for the last 25 years, we've seen the courts chip away, and away, and away, and antitrust raised the burdens for plaintiffs, so that there's a lot of conduct today, that is not actionable, that yet causes consumer welfare harm, and harm to competition, and if that's the world we're in, then we either need to change it, and have an antitrust statute, that clarifies to the courts what we want covered under antitrust law, or pick up the slack in some other way, through, for example, a regulatory agency. Sorry, Tom, back to you.

MR. WHEELER: No. So, Leslie, quick -- quick response, if you want one, and then we'll go on to a different topic.

MS. OVERTON: Right, so, I'll just say, you know, I hear a lot about, oh, the law's in such a difficult place, but, you know, I think that -- I think there have been changes in the law, for example, in the Trinco decision that came out, when I was at DOJ, the first time. You know, there were -- there were real concerns about imposing a duty to deal, and I think, sometimes -- sometimes people look at antitrust way back in the day, and don't necessarily acknowledge some of the concerns that the courts have had, over time, that have caused them to land where they are.

MR. WHEELER: Okay, let's move on to another point that Leslie appropriately raised, and that is the impact of regulation, and I think, Leslie, you said something to the effect of the impact the regulation has on innovation --

MS. OVERTON: Yes.

MR. WHEELER: -- and at the FCC, I used to hear, all the time, innovation and investment --

MS. OVERTON: Yes. Okay.

MR. WHEELER: -- and so, that was one of the things that we tried to wrestle with, in this paper, and our conclusion was that the reason that it has this impact is because we are trying to do industrial era style regulation, which is rigid and slow moving, in an era of digital dynamism, in which the

companies, themselves, are managed by putting out what they call an MVP, a minimally viable product, and so, we proposed a new regulatory structure to -- that would continue to encourage innovation and investment, and, Gene, why don't you walk through that concept?

MR. KIMMELMAN: Yeah, so, the -- we agree, all of us, that there are definite downsides to regulation. You don't want to automatically turn there. And we've seen pitfalls with it. We've also seen benefits of regulation, where it can actually bring people together with standards, interoperability, portability, inter -- interconnection, and so, how to do that in this environment?

We thought the best way to do it was have experts from across the community, the companies involved, themselves, those with tremendous tech skills, the public interest community, all drawn together, as panels of experts, to look at whether standards can be set, whether there are norms that can be developed, whether there are ways of improving the way the market functions for everyone. So, if you have network effects, if you have a dominant platform, how can you make it viable for everyone, to innovate, to invest, to compete on the merits?

We recognize that this won't automatically happen. So, the idea is to empower an agency with oversight authority to drive that process, itself, if the Code Council can't come together with these kinds of norms and standards, but also to take those recommendations and implement them, if it can be developed through this process. So, the idea is to try to avoid all the traditional utility regulation, price regulation, and focus, very much, on tools that have worked in the past to actually open markets to entry and better competition across platform environments. That's the framework, and we're open to any suggestions about how to make this work. We wanted to put it out, as a first step, with opportunities for inputs to really make this function well in a digital environment.

MR. WHEELER: Gene raises a really good --

MS. OVERTON: So, Gene --

MR. WHEELER: Go ahead, Leslie, go ahead.

MS. OVERTON: Oh, go ahead, I'm sorry, Tom. I was just going to say --

MR. WHEELER: Well, I was just going to say -- go --

MS. OVERTON: Go ahead, Tom.

MR. WHEELER: Leslie, it's you, go to you.

MS. OVERTON: Okay, so, I was just going to say, Gene, so, are you talking right now -- are you talking about the code of conduct concept that's in the paper or something else?

MR. KIMMELMAN: Yeah, yeah, and so, there are a variety of functions that could come from this set of stakeholders, but developing a code of conduct, I mean, we focus on a duty of care. I mean, this is not new, as a concept in law. It come -- draws from common law. It's driven most of our regulatory statutes, with different standards for different sectors, so, with that guidance from Congress, to try to develop what is the reasonable duty of care for companies, like Amazon, with a marketplace and their own inhouse products, with data gathering process, Google, across the entire display advertising market, then with YouTube and search, social networking with Facebook and their variety of acquisitions practices, and how they've treated those who could be potential competitors, Apple, with all its app store practices, and then its own apps and payment system.

I mean, these are the kinds of companies, I think, we want to see subject to broad inputs from the entire marketplace, and a regulatory agency that could set fair rules of the road.

MS. OVERTON: So --

MR. WHEELER: And I think our -- one of the things that, Leslie, that we've felt strongly about is that industrial era regulation was based on micromanagement, the so-called utility style regulation, where everything got dictated, and that's not appropriate in the kind of rapid paced technological advancement that we're seeing now, but there needs to be a public interest component. So, how do we set out to say we are going to identify risks and try to manage to outcomes. You -- with -- in cooperation with the industry, and so, we looked back, and we said, hey, building codes have worked, electric codes have worked, we've got power codes, as to how the industry works together to figure out who gets power in various emergencies, and how do we bring that kind of a more flexible concept into this environment?

MS. OVERTON: So, I appreciate, very much, that you all are envisioning something that

would try not to micromanage business. I mean, I think there's -- I think with regulations, they're still bad. That risk, there's still the risk of -- with the code of conduct, if it's mandatory, still the risk of false positive errors, of higher prices, and inadvertently chilling innovative activity, but, I guess, would you all consider a voluntary code of conduct, and so, would you all consider that as something? And I know you all envision working very closely with industry.

MR. WHEELER: But, Leslie, everything is risk. Fiona, you wanted to say something. Go ahead.

MS. SCOTT-MORTON: Yeah, I just want to remind the audience about the error cost balance. Yes, there's a chance that regulation leads to higher prices or less innovation. There's also a chance that it preserves democracy, or lowers prices, or increases innovation. So, we need to, as a society, think about both the risks and the actual value of the thing we're getting, and one of the nicely explained elements of setting some kind of standard of the form, that Gene and the others are talking about, is in the Competition Markets Authority Visual Report, where they explain that if you have standardization, yes, you don't get competition on the elements you've standardized, but you get lots more competition on everything else because there can be entry, and so, let's say you took social networks, you'd have a standardized format for images crossing the social network, so I could receive posts from Facebook or from anybody on my new social network, and my new social network could compete on privacy, could compete on the quality of news, could compete on not having an addictive format and having child controls or something, anything, but the point being that you intensify competition on one dimension, even as you may limit it on another, and, therefore, saying this is a bad idea is not -- we can't say that ex ante, but it depends on how much we value those two kinds of innovations.

MR. WHEELER: Okay, we've got -- we've got hundreds of people out there watching this right now, who are sending in questions. Let me reiterate, if you want to email them, it's events@brookings.edu, and if you want to Tweet, it's #TechOversight, but let me -- let me ask Phil to respond to one of the questions. You've worked at the Justice Department, the FCC, and the State Department, dealing with technology policy issues, and one of our questioners asks can't the existing

Federal agencies be reformed to accomplish this enhanced regulatory role?

MR. VERVEER: I think the answer is it's certainly possible. The -- the reason to prefer a new agency, I think, is that every institution has its own culture, and these cultures have developed over time. They can be pretty deeply entrenched. That certainly was true at the Antitrust Division, when I worked there some time ago, and it was certainly true at the State Department when I worked there recently.

Yeah, the entrenched culture issue turns out to be a, potentially, a real obstacle, if you're trying to accomplish a somewhat different approach to regulation. Likewise, the status that one would attempt to amend have been encrusted with all sorts of determinations that tend to be limiting. We have had -- we have had, as we averted to briefly, 40 more now of really quite conservative judicial approaches to business regulation, and so, the encrusted nature, if you will, of the legal structures, that these agencies deal with, also can be an innovation if you're attempting to do something that's a new approach.

MR. WHEELER: So, so, let's -- let's go to how that -- how we would possibly get there. We get -- and another one of the questions, Gene, is how realistic is it to expect the Congressional Committees, with jurisdiction over the FTC and FCC, the agencies, themselves, and the companies that would be subject to a new regulator, to get behind the creation of the proposed new agency?

MR. KIMMELMAN: Well, nothing is easy, but we structured the proposal this way for precisely that dilemma. If you've picked a winner up front, you would have losers, and they would be fighting with each other, whether it's Congressional jurisdiction or the agencies, themselves. We decided what was important was to start with what is the actual gap in public policy engagement, if it needs to be addressed, that antitrust, we believe, doesn't do adequately or quickly enough. What are the tools and skills that are necessary to do that well? And that's the debate we want to take to Congress. If they think, in their wisdom, that there is an agency that can be built out to do that, that would be one way of approaching it.

But we thought, rather than picking winners and losers, the idea was really to figure out, first, what is it you're trying to accomplish. Do those skills exist anywhere? We're skeptical of that, as

Phil described the culture and the history, and, frankly, the past practices, we have not done with -- whether you liked one particular case or not, whether you thought one particular merger should have been challenged, whether you think the FTC didn't investigate well enough on one matter versus another, we have not seen robust action here to get at the kind of problems we're describing, and we're seeing persistent power in social networks and in search and in now growing digital advertising, maybe online marketplaces, and on.

So, it hasn't been done very well. Someone needs to do it. I think we're envisioning the same committees that have grappled with this in the industrial age, should now look at it for the digital marketplace and make that determination. Is it a new agency or they -- can they totally revamp one that exists, but that can be done within their jurisdiction? The companies, I think, will try to gain whatever suits their own purposes, and that won't matter whether it's call the FTC, the FCC, or, you know, the new digital platform agency, will have to deal with that and the political power that's there, but I think the starting point is get the concepts right, and get the tools and skills right, and we can figure out the rest later.

MR. WHEELER: So, Gene, a follow up to that, from a very thoughtful individual and a former government leader, who was a champion of the multi-stakeholder process and made the multi-stakeholder process work in many ways, who asks can't the FTC encourage the development of codes of conduct utilizing all manner of public participation that would become enforceable, as undertakings by the companies adopting them?

MR. KIMMELMAN: 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 over it. The FTC has very limited rule-making authority, hasn't applied it in a meaningful way in modern history, and has a million other things to do, at the same time, that involve consumer protection across all other markets. So, without quadrupling their resources or something, you know, that's a heavy lift, but still needs, I think, a change in the law. So, again, if the committees of jurisdiction see these needs, and see that there's a way to do that in an existing agency, and puts in the, you know, the power, and the resources, and the right direction from Congress, that could work, but we think, at least starting first with outlining what needs

to be done, and how it needs to be done is the right place to begin the conversation.

MR. WHEELER: Fiona and Leslie, either one of you want to jump in? We've had a couple of really good questions here. Either of you want to jump on those?

MS. OVERTON: I'll just -- again, I appreciate how well intentioned everybody is. I just worry about unintended consequences, and I look to history, and I look to a couple of examples that FTC Commissioner Christine Wilson noted in a recent article of hers, where -- that are an important lesson on the risks of sector specific competition regulatory regimes, and that they present for consumer welfare and innovation.

We look back at the railroad and airline industries, which were the platform industries of their day. They were subjected to regulation under the Interstate Commerce Commission, the ICC, which was -- has since been abolished, and under the Civil Aeronautics Board, the CAB, also abolished, and there were all sorts of just problematic issues that these agencies -- these agencies were trying to get rates that were reasonable and just, and avoid unjust discrimination, but that, that goal, ended up being very, very complex, and really getting out of control, and Brookings, itself, estimated, in the 1960s, that there was -- the ICC regulations were costing consumers at least \$500 million per year in 1960s dollars, and if anything --

MR. WHEELER: And you know --

MS. OVERTON: -- ICC regulation would create benefits far in excess of cost.

MR. WHEELER: So, you know, Leslie, I'm -- I am the self-styled amateur historian on this, on this group.

MS. OVERTON: Yeah.

MR. WHEELER: If the best argument that we can make is a study in 1960, but the point -- the point is this, that I would ask, you talk about unintended consequences. Are there unintended consequences of doing nothing and allowing the platform companies to continue to make the rules? Are we not, today, are we not, today, living through 20 years -- living through the indu -- the unintended consequences of 20 years of a failure of public interest oversight over these companies?

MS. OVERTON: So, I don't -- I don't think that this is a matter of regulation or doing nothing because, again, we do have -- we do have antitrust enforcement. The Antitrust Agency Heads are confident in the ability of the agencies to take on digital platforms without --

MS. SCOTT-MORTON: Of course, they are. I'm seeing much happening. I mean, I don't know what newspaper you read, but I'm not seeing much happening, myself.

MS. OVERTON: Well, well, you know, they're certainly -- there are certainly all sorts of public reports of activity going on in this space, by the agencies, and I think it is -- I think -- I just don't think we are there yet, at the point where we're seeing that --

MS. SCOTT-MORTON: Yeah, but if -- but, look, if you're going to wait for a victorious agency, you're waiting seven and a half years. So, now, you're doubling Tom Wheeler's, you know, how many decades do we have to live through an industry structure that's not thinking about the public interest. I mean, certainly --

MR. WHEELER: And --

MS. SCOTT-MORTON: -- we can, if you count up only the harms of a regulator, then you're going to get numbers, for sure.

MR. WHEELER: So, just think of -- think of this lesson.

MS. SCOTT-MORTON: -- the benefit.

MS. OVERTON: But, but, Fiona, you acknowledge, yourself, that these other -- these concerns about false positive, about the impact on innovation, and the impact on investment, that those are -- those are real, that there are, you know, there are other considerations, as well, but those are real. So, I don't look at it -- I mean, I think that if going ahead with regulation raises those particular costs to, and then if there's litigation over those costs, then there's that many years that those costs are on consumers.

MR. KIMMELMAN: So, think of it this way, the paper was designed with an understanding that there could be cases filed. So, let's assume, there is a case filed against Google, by the government, DOJ, and the states, a case filed against Facebook. Let's say there's movement against

Amazon for dominating the growing online marketplace, and Apple for its behavior with the app stores. If we have a -- some portion of a seven-year process to go through, even with cases filed, what we're suggesting is it's time for Congress to look at these areas, see if there would even be gaps to -- regardless of how those cases come out, and think about whether anything needs to be done, in less than seven years, to make -- to promote innovation, more competition, entry in these markets, that would work well with whatever the antitrust resolution is.

You're absolutely right. There can be downsides, and we need to be mindful of it, but we're saying launch the process to consider these things, unless you're comfortable feeling that -- like you just file these complaints in court, and everyone goes to sleep until it's finally resolved by, ultimately, the Court of Appeals or the Supreme Court, nothing else needs to be done, in the tech sector. We think that's dangerous, and so, here's a proposal to change that process.

MR. WHEELER: Okay, there's some other -- there's some other good -- there's some other good questions. There's another good questions that are -- that I want to make sure we get to, in our limited time here, but I also would add that what we have put forward is a policy MVP, that we expect will continue to evolve with the kind of discussion that we're having right now, but -- but let me see if I can put a couple of questions together, and, Phil, ask you to take first crack at this. One question, I would love to hear any of your thoughts about the concept of safety, and then another person adds onto that, saying the fake news free speech challenge exists, particularly as AI becomes effective at persuading personally targeted individuals. Are these likely issues for such an agency?

MR. VERVEER: I think these are easily answered in the context of the proposal we've made, which is that we have rescinded from any of the negative externalities that the platforms throw off, leaving that for others in the future to contend with. Our terms have been the competition issues, the, as Fiona had suggested, and I think (audio skips) as well. Our concerns have to do with competition for the market, I'm sorry, competition within the market, not competition for the market, and trying to figure out ways to enhance that.

Without a doubt, there are tremendously difficult questions that surround things, like the

safety of the use of the platforms (inaudible) foreign interference, or electoral process misinformation, and so forth, tied up in section 230, about a moment, wandering into that particular swamp.

MS. SCOTT-MORTON: Okay, but can I --

MR. WHEELER: Fiona?

MS. SCOTT-MORTON: -- amend that, Tom? I would say that competition is somewhat related to this, however. If you have, for example, multiple car companies, you can have the Volvo strategy of competing on safety --

MR. WHEELER: Right.

MS. SCOTT-MORTON: -- you can the Disney strategy of wholesome family entertainment. So, I do think that having a monopoly provider does not allow the -- whatever competition markets might deliver on the safety front to be available to consumers, and that's another harm.

MR. WHEELER: So, let me dive into this question. I'm sorry, Phil, go -- I'm sorry, Phil, go ahead.

MR. VERVEER: Yeah, I was going to say that's exactly right, and we do acknowledge that, that if you could get a competitive environment, you would get the possibility of variety over many dimensions, some of which would try to contend with some of these other issues, absolutely correct.

MR. WHEELER: So, there was another question that kind of follows on this, that says could the digital agency be used to determine in competitive payments by a platform to a collection of atomistic, very small, providers, such as news publishers or Facebook, news publishers on Facebook, app developers on Apple, merchants on Amazon, et cetera? So, so, can this agency get involved in price regulation, if you will? Phil, do you want to try that?

MR. VERVEER: Sure. If, look, one wants to be perfectly honest about this, if you get into requirements for nondiscrimination, if you get into requirements for regulatory access, at some point, there are going to be disputes about how much, issues about interoperability, who should pay, how should they pay, what exactly does interoperability mean, a whole series of issues like that. These are very serious questions, and eventually, you cannot avoid the notion that issues of (audio skips) will enter

into that.

My hope would be that these would be interventions that would be ad hoc and only in aggravated circumstances, where the parties, themselves, can't straighten out how much money should change for what, but it's a -- it's familiar in these. It's a familiar in these terms of disputes, both the judicial and regulatory, and if one takes care to say that these are things that arise only in aggravated circumstances, I think we can manage our way through that.

MR. KIMMELMAN: So, we -- we --

MR. WHEELER: So, and remem -- go, go ahead, Gene, I'm sorry.

MR. KIMMELMAN: Well, we've avoided and think it's appropriate to avoid focusing on any form of price regulation tools for this kind of a dynamic market. However, one of our analogies here was the cable industry, which Congress passed a statute, separate and apart from antitrust enforcement of cable, where it required certain nondiscrimination rules, and it required, without any pricing power, forcing arbitration of disputes. It didn't work as well as it should have, should have worked more quickly. There were things that could be refined there. So, there are tools that can drive resolution of the kind of problems that are being described there, as discriminatory practices, without the agency having to do any kind of direct price interventions.

MR. WHEELER: Yeah, let me pile on that for a second. I think that's a really good point, Gene. The code process that we propose is not a price regulation process. As Phil indicates, eventually, you have to get to issues, but presumably we could also address those issues through that new structure, and the second point I would make is there was once a Chairman of the FCC, who said competition, competition, competition, and the solution to being able to have competitive prices is to have competition that keeps the other guy honest.

MS. SCOTT-MORTON: Yeah, so, that's what I was going to say --

MR. WHEELER: So, we've got -- so, Fiona?

MS. SCOTT-MORTON: -- set up the rules of the game, and there's entry, as Gene keeps emphasizing, then price regulation, really, never arises because there are choices. If people don't

like the price, they trade with somebody else, and that's the world we really want to get to, and then, as Phil said, your price issues become quite rare. So, I think setting the rules of the game and making entry barriers small, so that there's a lot of entry and a lot of choice for consumers, obviates a lot of these problems.

MR. WHEELER: So, we've got about three minutes left here, and, I mean, again, pick up a new topic that really relates to the -- a question that's come in, the political realities that we see today. So, the question is the referenced paper suggests that we have a three-person commission, with two people from a single political party. In the current climate, wouldn't such a commission become a tool for political meddling and censorship? Phil or Gene, do you want to take that on?

MR. KIMMELMAN: Well, I don't think so because I think it follows the pattern of all of our agencies, and to the extent we have that problem today, in today's world, we will have that problem tomorrow, and every agency will have to deal with that. That's not new. We're going to have to have political fights about how any one agency is controlled, but we have not got -- we have not wandered into content regulation with these proposals. These are tools for competition, and so, there's nothing dir -- there's nothing that should, in any way, enable censorship out of this kind of an agency.

MR. WHEELER: Phil, you want to add anything to that?

MR. VERVEER: Well, only that if one reads the paper, you see that we've included an aspiration that it's technocratic institution, more than a political one, in terms of selection of both commissioners and staff. Whether that can be accomplished in the world of time and space, only time would tell, but it seems to me that's the right place to begin, if this is a technocratic set of propositions that we're urging.

MR. WHEELER: So, just to pile onto that for a second, one of the reasons for having a new agency is to have an agency with specific domain expertise that extends beyond the legal/political background, that you represented so and so, or that you were on the Hill dealing with this issue, and it gets to having an agency that, at the commission level, has folks who have been involved, having to make managerial decisions, and can bring that kind of expertise, along with their digital expertise, to the

process, and then populating the staff of the commission with digital engineers, who, frankly, think different from analog engineers that, today, populate most of commissions, but the -- and so, the opportunity the -- the challenge, I think, that we have here, and I go back to this MVP comment that I made before, is that this is a work in progress, just like software is an ongoing work in progress, and that - - and that we need to bring a new thought process. What we tried, the TF, was a new thought process, that -- that then we welcome debate and discussion on.

And we are now running down to the top of the hour, but I would turn to Fiona and Leslie, who have been most patient while Phil, and Gene, and I have pontificated over here. Is there anything that you would like to add before we sign off?

MS. SCOTT-MORTON: No, thanks for the invitation, a great discussion.

MS. OVERTON: Yeah, I appreciate the invitation, and I appreciate you all hearing my concerns and cautions.

MR. WHEELER: Well, this is great. Thank you, Leslie. Thank you, Fiona. And it's a privilege to be able to associate oneself with guys like Gene Kimmelman and Phil Verveer, and the Brookings Institution, and we thank Brookings for sponsoring this. Again, if you go to the Brookings website, you can find a blog that Phil, and Gene, and I have written on this topic, and included in that blog is a link to the paper, up at the Shorenstein Center at the Harvard Kennedy School. So, thank you all very much for joining us.

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ANDERSON COURT REPORTING
1800 Diagonal Road, Suite 600
Alexandria, VA 22314
Phone (703) 519-7180 Fax (703) 519-7190