



UNITED STATES OF AMERICA

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How (Not) to Regulate Technology

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Introduction

Thank you, Harold for that introduction. And thanks to the Hudson Institute for inviting me to speak. Hudson has a proud legacy of influential thought leadership, on technology policy and other issues. Earlier this week, the House passed the Foreign Merger Subsidy Disclosure

systematically about the policy conversation that has surrounded it over the last four and a half years. Consistent with a political zeitgeist deeply suspicious of a handful of eonr hapd Td [()]han th pog (c)4

(intended and otherwise) that flow from our proposed solution. All of this may sound obvious; but I do think it needs to be said because too much of the policy conversation surrounding technology lacks even that much.

On a podcast earlier this year Yuval Levin described the difference between the Right and the Left on economics as the Right believing that the short term is the function of long term conditions and the Left believing that the long term is the function of short term policy. Progressives will spot what they believe is a problem and react with policy in an attempt to solve it, while conservatives will look to create the conditions for growth. You can quibble with the contrast Levin draws, but it resonates with me. In thinking about how to regulate technology, one thing I have always tried to keep in mind is the long term. If you ban acquisitions, what will that mean for exit by entrepreneurs and venture capitalists? And what will that mean for the investment and innovation that have driven the American economy, and our soft power around the world?

Defining the Problem(s)

Before we get to tradeoffs though, let's examine how "rein in Big Tech" fares on our regulatory flow chart. The frequency of the use of the phrase "Big Tech" seems inversely proportional to its utility. We hear it all the time, but it is just not a useful descriptor.

Sometimes as in proposed legislation to modify the antitrust laws to bar Alphabet, Amazon, Apple, Meta, and Microsoft from engaging in conduct their competitors can, "Big Tech" is defined by the number of users and market capitalization that characterize a company. In substantial part, however, these are very different companies. That is, they do different things. So why we talk about them in the same breath and propose the same solutions to the problems they purportedly cause is far from clear. Microsoft's business is very different from Meta's; and Alphabet's from Amazon's. Some sell ads; some sell devices; some cloud services.

One often hears other companies described as "Big Tech", for example TikTok and Twitter. Those companies derive revenue from advertising, like Alphabet and Meta and to a lesser extent Amazon and Apple. Although the FTC claims in court that these companies do not compete. But is Twitter really "Big Tech"? It's much smaller, for one thing, both by user number (of) numco

And “rein in”

Content Moderation

Conservatives are concerned that technology platforms are censoring them, specifically de-platforming, tagging, demonetizing, and otherwise quieting voices with which they or their employees disagree personally find it hard to explain some of the editorial choices I have seen, especially in light of some of the other speech not subject to similar treatment. the complaints. Above all, this cuts to the deeply problematic issue of how to moderate content at scale. More commonly on the political Left, we hear moderation concerns, but in the opposite direction. These are calls not for more content, but for less: concerns about the spread of hate or misinformation or the like.

The complaints here, not enough content and too much content, are diametrically opposed. But we often hear agreement on the solution. How can that be? However it is and however it works, no solution can solve both problems

Take repealing Section 230 of the Communication Decency Act, which the President of the United States recently endorsed. A Section 230 scholar, and the FTC does not administer the provision; but at the same time it limits liability for hosting speech. Liability is a tax. When we increase liability, we get less of something. When we limit liability, we get more. That is how liability functions in the legal system. If you repeal Section 230 and increase liability, you will see less speech. So how does repeal result in less censorship? The argument makes little sense. That you might cudgel some companies that have made decisions you don't like seems, on some level, beside the point. How will the solution address the problem?

And likewise antitrust. It is not clear to me how breaking up big tech companies would result in the desired content moderation outcomes when we have little social consensus around what level of moderation is optimal. If anyone assumes that a market functioning without whatever impediment they perceive would yield the moderation decisions they want, that is not clear. How to moderate content at scale is a terrifically difficult problem, with most regulatory responses fraught with First Amendment peril. But ultimately, is it a competition problem? People have a lot of issues with Twitter's moderation calls, but how exactly do they stem from monopoly power? And why does anyone think that, were Meta to sell Instagram and WhatsApp, conservatives would get more favorable treatment? And if competition is not the problem, then antitrust is not the solution.

New Agency?

The "Big Tech" conversation has also given us an odd variation on the old Washington joke that, when you don't want to deal with an issue, you create a task force. Every few months, there is a proposal to create a new agency to regulate "Big Tech" that may sound good to

⁹ See Steve Nelson, Biden announces push to end Big Tech immunity 2 years after Trump attempt, NY POST (Sept. 15, 2022), <https://nypost.com/2022/09/15/biden-announces-push-to-end-big-tech-immunity-2-years-after-trump-attempt/>

¹⁰ See, e.g., Ramsey Touchberry, Lindsey Graham says social media may need to be licensed amid whistleblower allegations, WASH. TIMES (Sept. 14, 2022), <https://www.washingtontimes.com/news/2022/sep/14/lindsey>

some, but it simply punts the critical set of questions we've been discussing. What problem would a new regulator solve? A new set of authorities might solve problems the law today cannot reach. That is a fair discussion to have. But a new entity, in and of itself, solves nothing.

Privacy

Another problem we hear about is privacy. And to be clear: I do see a problem. But one thing I hear a lot about that doesn't seem like a solution is antitrust. I like competition, and I like privacy. But the argument that antitrust will get us the privacy we want is something I've heard repeatedly, and it's wrong for several reasons.

Antitrust and privacy have different goals and are often at odds. Antitrust is focused on protecting competition, and privacy is about protecting information about people. Advancing privacy interests can decrease competition by limiting access to an asset from which value can be derived. When companies like Apple or Google restrict third parties access to data they have about customers, that might enhance consumer privacy, but it stops companies from being able to use that data to build applications and services that benefit consumers. That likely decreases competition. I'm not saying that's bad, not at all: sometimes we want to displace competition in favor of other values. It is a choice, between two mostly competing goals.

Would greater competition yield better privacy? It might, if the competition is over privacy; but that ain't necessarily so. TikTok (the most downloaded app in the world) appears to offer less privacy than Meta or YouTube, but they're competing along different lines. And, if popularity is any indication, it's not clear that many consumers care much about what TikTok does with the data it collects. And, as a result, it's not clear that consumers care much about what TikTok does with the data it collects.

Privacy Protection Act (ADPPA)¹⁴:

("ANPR").¹⁷ I dissented for a variety of reasons including legal and philosophical.¹⁸ But one big concern for me is that the ANPR acts as if there is such a thing as a free lunch. There isn't, which is to say that regulation necessarily results in trade-offs. In fact, the ANPR fails adequately to recognize the points common

Antitrust and consumer protection unfairness law command us to recognize tradeoffs. Prudence also dictates that we do. My firm belief is that, when we do, we get the right result. My concern is that, when we fail to do so, we get the wrong one.

Conclusion

Technological development disrupts, improving lives but often also presenting challenges. That is generally true, and particularly notable with the development of communications media. Some of those challenges warrant regulation, but regulatory efforts be thoughtful. Much of today's conversation around regulating "Big Tech" falls short. Sensible regulation is not a headline. If we want to get it right, we need to consider clearly articulated problems, tailor solutions, and recognize tradeoffs.

Thank you again for inviting me. I look forward to our discussion.