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Election 2020: Antitrust and Privacy in the Age of Big Tech

By Marietje Schaake and Rob Reich

ANTITRUST AND PRIVACY CONCERNS are two of the most high-profile topics on the tech policy agenda. Checks and balances to counteract the power of companies such as Google, Amazon, and Facebook are under consideration in Congress, though a polarized political environment is a hindrance. But a domestic approach to tech policy will be insufficient, as the users of the large American tech companies are predominantly outside the United States. We need to point the way toward a transnational policy effort that puts democratic principles and basic human rights above the commercial interests of these private companies.

These issues are central to the eight-week Stanford University course, "Technology and the 2020 Election: How Silicon Valley Technologies Affect Elections and Shape Democracy." The joint class for Stanford students and Stanford's Continuing Studies Community enrolls a cross-generational population of more than 400 students from around the world.

The Oct. 28 class session on "Policy Approaches" featured guest experts David Kaye, a clinical professor of law at UC Irvine and former United Nations special rapporteur on the promotion and protection of the right to freedom of opinion and expression, and Lina Khan, an associate professor at Columbia Law School and former counsel to the U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law.

KEY TAKEAWAYS

- The market power of large tech companies stifles innovation and poses risks to democracy, individual liberty, and other social values.
- The EU's General Data Protection Regulation is a landmark piece of tech policy, establishing data-protection and privacy rules for online data collected on citizens.
- A large and globally-based democratic coalition could offer a meaningful alternative to the two existing models of technology governance – the privatized corporate model and the authoritarian state model.

Introduction

In 2018 the European Union passed the General Data Protection Regulation, which included groundbreaking policies on privacy, data minimization, oversight and accountability. The momentum is growing in the United States for significant progress on tech policy at the federal level.

To curb the unbridled power of globally-reaching technology firms, we need something new – a global alliance that puts democracy first.

Antitrust concerns about large technology firms have also risen to prominence as U.S. policy makers increasingly weigh measures to regulate these companies. CEOs from Facebook, Google and Twitter testified the week before the Presidential election in the U.S. Senate about content moderation policies, and the federal government recently pursued antitrust action in a lawsuit against Google. The latter is the government's most significant attempt to protect competition and innovation in the tech world since its groundbreaking case against Microsoft more than 20 years ago.

While antitrust laws were mostly designed in the "pre-Silicon Valley" era – the first one, the Sherman Act, was passed in 1890 – the central question now is determining how technology firms present a different set of antitrust issues compared to those monopolistic companies that faced such regulation in the past.

Antitrust law and policies date back to the first Gilded Age and the rise of network monopolies, such as railroads. The legal framework evolved in the late 19th century to focus on harm to consumers. But in today's world, where the large tech companies often provide services without financial cost to users, the issues are more complex. How do we measure harm in this context? And where does harm to society or democracy fit within a set of policies intended for fair economic play? What's more, tech companies are operating with extraordinary network power on vast scales and global reach, while collecting an enormous amount of individual user data.

Some remedies have already been undertaken, but mostly by levying fines. In the European Union, regulators sanctioned Google $5 billion in 2018 and $2.7 billion in 2017, for example. Antitrust law offers regulators the unique opportunity to dig more deeply into the business practices of corporations suspected of having violated laws. Such an investigation into

Amazon is ongoing, with possibly record high fines on the table.

What kinds of illegal practices are newly under scrutiny? A company like Amazon is able to discern everybody's purchasing behavior, and therefore may pinpoint exactly which products might be profitable so that they can put those products into the market under their own brand. Also, large and wealthy companies can easily buy up rival or related start-ups, squelching innovation and curtailing competition.

Another antitrust issue is the ability of these very large and wealthy companies to buy up potential competitors – before they can grow – through mergers and acquisitions.

Discussion

Different legal interpretations of U.S. antitrust law offer a historical grounding to view the current anti-competitive problems associated with the large tech companies. Scholars from the "Chicago School" advocated that antitrust should have one clear goal – the maximization of economic welfare, with a focus on consumer welfare in the form of pricing. Other scholars have sought to revive the earlier "Brandeisian school" of antitrust, which holds that antitrust laws were not meant just to protect economic welfare, but social and democratic welfare as well. Just as concentrated political power is a threat to individual freedom, so too, argue the neo-Brandeisians, is concentrated economic power.

Legal scholars like Lina Khan point out that the consumer welfare standard fails to address services such as internet search, email, or social media, where services are provided with a fee, with the real price paid by consumers in data, lost privacy, and a consequent ability of companies to target users, often without their knowledge or consent.

Data makes digital markets different, too. Once a company like Amazon has amassed data on significant amounts of users, it can move into completely new markets and crowd out established firms that lack similar knowledge. The larger the digital network, the more useful and entrenched it becomes, which causes built-in advantages for larger companies. Buying up potential rivals, such as Facebook's purchases of Instagram and WhatsApp, or Google's purchase of YouTube and Waze, is another area of concern.

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Antitrust principles are similar between the U.S. and the European Union, but there are significant differences in their respective approaches to privacy protections. In the EU, the right to privacy is a fundamental right, and in the U.S. it is mostly considered a consumer right. It is also worth noting how many countries around the world lack data-protection laws while U.S.-based tech platforms roll out their services in those countries.

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The EU's 2018 General Data Protection Regulation is a landmark in tech policy, establishing data-protection rules for EU citizens. Since its inception, companies like Microsoft have opted to follow the GDPR standard globally, and the state of California even adopted portions of it for its 2018 California Consumer Privacy Act.

In Europe, the sensitivities around the abuse of power stem primarily from historical experiences with authoritarian governments. Under both the Nazi and the Soviet regimes, state intelligence services used census data and spying on citizens to repress and control. This historical context is absent in the U.S., though modern day surveillance practices led to shockwaves when Edward Snowden revealed the NSA's capabilities with the help of technology firms' data collection.

Still, the GDPR approach is not perfect – it has been justly criticized for lax enforcement and having offered the large tech companies a competitive advantage in their ability to mobilize the resources to meet a patchwork enforcement landscape in the EU. Only large companies can employ the necessary resources for data protection work – or sorting out all the legal aspects – while small companies cannot typically afford to do so.

There are important connections between antitrust, privacy protection, and content moderation. Successful antitrust action might bring about greater competition in content moderation approaches by companies and in different privacy policies.

But, as David Kaye points out, a key concern is determining whether regulating online expression should be done by companies, through industry-wide standards, government rules, or global agreements. The key question is how to establish content moderation practices that do not compromise human rights and democratic principles.

Final Thoughts

In the U.S., deep polarization makes bipartisan cooperation seem unlikely on key issues, but remarkably there is an emerging consensus around policy action on tech-driven antitrust and privacy issues. In October 2020, a majority report from the House Judiciary Committee described how four of the largest tech companies have successfully used the data they accumulate in one area of business to gain significant advantages when they expand into related businesses. The document also offered suggestions for reform, such as "structural separation" – forcing companies such as Amazon not to compete on the same platform that it operates – to giving new tools and funding to antitrust enforcement agencies.

While the Republicans did not sign on to that report, it issued a separate report that basically agreed with some of the findings, while disagreeing with others, perhaps giving hope that once the 2020 election is over, national policy makers could come together on bipartisan antitrust and privacy reforms.

Checks and balances on the tech companies could entail remedies or sanctions based on the premise that concentrations of economic power in the tech sector threaten individual liberty and the health of democracy itself. Merely fining the companies may not always produce the intended results, with large fines treated as the cost of doing business. So, structural tools – breakups of certain companies or blocking of future acquisitions – and corporate governance reforms are additional measures to consider as next-level checks and balances.

Finally, a large and globally-based democratic coalition could offer a meaningful policy alternatives to the two existing models of technology governance – the privatized corporate model and the authoritarian state model. This effort should involve countries that meet democratic standards, and could include an ambitious mandate for the governance of powerful technology behemoths.

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The Cyber Policy Center at the Freeman Spogli Institute for International Studies is Stanford University'' premier center for the interdisciplinary study of issues at the nexus of technology, governance and public policy.

The views expressed in this issue brief reflect the views of the authors.

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