

REGULATION

# A New Digital Social Contract Is Coming for Silicon Valley

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Last month, the British parliament released a detailed and forceful report on the disinformation - or “fake news” - problem. The report examined what it described as overreaches of an internet industry comprised of leading Silicon Valley firms that, in the committee’s view, is responsible for perpetrating tremendous harms against British citizens.

This report is only the latest incident marking a trajectory toward regulation and legislation that will constrain how these and other firms operate on the web in regard to not only disinformation but also increasingly broader social and economic concerns including transparency, privacy, and competition. Businesses need to know what is coming, and what is at stake – and come to the table in Washington ready to contribute to these efforts in an honest negotiation.

My experience as a computer scientist, internet technology researcher, and public policy advisor leads me to believe that this report accurately portrays tensions at the heart of this industry, and accurately places responsibility for the problems on leading internet firms – which it describes as “digital gangsters.” It has become clear that these businesses have harmed consumers and damaged the public trust; whether we consider the disinformation problem, the spread of hate speech, or the emergence of systemic algorithmic discrimination, the array of negative externalities prompted by this commercial regime is seemingly endless. I believe that rather than leaving U.S. firms to endure fines from foreign enforcers, it is time for the U.S. government to come forward with its own fair and meaningful regulatory solution to these problems.

It is also time for the industry to take part in these conversations. Indeed, it is in its interest to do so: its failure to participate could well result in overbearing regulation for businesses beyond the “gangsters.” The U.S. policymaking community need not look far to see models that would have heavy implications for businesses: the world’s most rigorous privacy regime, the European General Data Protection Regulation, went into effect last May; the California legislature built on the principles of the GDPR to pass the most stringent U.S. privacy law to date; and similar rumblings have emerged from Illinois and New York among other states as they consider taking action as well.

Instead, we need a sensible “digital social contract” to rebalance the implicit power held by the triumvirate of the internet industry, the government, and the individual consumer. Such a framework should address the following three principal elements:

## **Transparency**

Consumers of online media often are unaware of the provenance of the online content they see, and how they were chosen to see it. This is a root cause of the disinformation problem, and is viewed by many as the simplest of the digital giants’ offenses to regulate and a good starting place for legislators.

That's all the more the case for political communications specifically, as an arena in which many regulatory policies already exist. Since the American presidential elections in 2016, members of the U.S. Senate have called for greater transparency for the individual voter into online political advertising. Whereas broadcast television and radio operators must make it clear within political ads themselves that the viewer or listener is being subjected to a political ad (thus the common refrain, "I'm Senator so-and-so and I approve this message"), no such requirement exists for digital political advertisements.

A bill introduced in the Senate known as the Honest Ads Act would begin to address this critical gap in the United States. It would also impose further requirements such as requiring clear disclaimers demarcating political ads; full disclosure about who is disseminating and paying for the ad; and how much they paid. Further measures could require disclosure of who else has seen the ad.

A bill that truly promotes this kind of disclosure would represent a major step forward in protecting consumers. But such legislation must be balanced with the need to protect intellectual property rights. The commercial success of internet companies hinges on their ability to develop and implement tremendously sophisticated - but currently opaque - machine learning models that infer consumers' behavior and use those behavioral profiles to rank and curate content, and to target ads at users in their social feeds. Any transparency imposed on their algorithmic ranking regimes would go some way in exposing the ways that their algorithms work.

In the medium term, a fair compromise might institute such measures only on content that particularly affects the functioning of democracy - including, for instance, content that is political in nature, or content that is covered by civil rights protections. Facebook, for instance, has made voluntary commitments to this end earlier this month after lengthy negotiations with public advocates including the American Civil Liberties Union.

## **Privacy**

The protection of individual privacy has long been considered a fundamental human right by jurisdictions such as the European Union, but the United States offers no such protection. Thus the consistent breaches of privacy, security, and public trust perpetrated by American internet firms has ignited a real conversation about bridging this gap for the U.S. consumer.

Advocates for federal privacy legislation are arguing for increased options for consumers to control the collection and use of their personal data and robust security standards for the companies that collect this data, and for the Federal Trade Commission to be given greater enforcement authority. And indeed, increased calls for privacy legislation in the United States have already imposed pressure on internet companies on the state level.

But these restrictions challenge firms' continued commercial success in the face of competition originating from China and beyond. Increasing privacy rights also pose a problem for certain companies' business models. And certainly industries would rather comply with a single federal law rather than an array of independent state laws, particularly when some of those state laws might be inordinately stringent. As Congress begins to consider what should go into a meaningful American baseline privacy law once and for all, businesses will push for any federal privacy law to include a preemption clause that would override individual states' regulations.

Still, industry should be careful about fighting too harshly against the demands of American privacy advocates. There has already been a long and robust debate on privacy regulations—more so than for transparency or competition—and if business were to try to push the conversation back to square one, privacy advocates are more likely to simply walk out on legislative negotiations and leave U.S. businesses to face particularly harsh demands in this area from other jurisdictions such as the UK and Germany - markets that are too large to ignore for any internet firm.

Finally, while industry rhetoric such as Mark Zuckerberg's recently stated "pivot" to privacy might suggest that the "digital gangsters" will voluntarily make key changes to their platforms that favor privacy, these promises are likely superficial at best; lacking a new regulatory framework applied to the industry, the latent profit motives that have forced the aforementioned negative externalities on the consumer will persist.

## **Competition**

The internet giants have an outsize presence in their markets. Google dominates internet search; Facebook dominates social media and internet-based text messaging. Together, the two of them control over 60% of the digital advertising market, and have overtaken traditional broadcasters in annual advertising revenues. Meanwhile, we have seen that these two firms and others have consistently engaged in business practices that have been described as rankly anticompetitive - such

as spying on rivals to infer their commercial strategies, treating their own offerings preferentially on their platforms, combining data from disparate services (as in the case of Facebook's sharing of WhatsApp data with the company's core services), and swooping in to purchase fledgling startups without much regulatory scrutiny.

As a result, regulatory bodies in some jurisdictions have brought antitrust and competition policy enforcements against the industry. The German competition enforcer, for instance, brought a sweeping case against Facebook just last month, and the European Commission's competition policy division has similarly levied massive fines on Google for alleged anticompetitive breaches with respect to the company's practices concerning Shopping and Android, and last week, digital advertising. The Japan Fair Trade Commission and the Competition Commission of India have also taken recent antitrust actions against digital firms. These actions appear to go hand in hand with recent strong-worded reports published by an expert panel working for the UK government and the Australian consumer protection agency stating that far greater measures must be taken to rein in the implicit market power exhibited by the likes of Facebook, Google and Amazon.

In the United States, a broader reckoning is likely in the offing as well - particularly as foreign jurisdictions continue to confront market concentration in technology in the coming months. U.S. regulators have begun engaging in deep intellectual inquiry on these matters, and leading politicians from both the conservative and liberal sides of the Senate aisle have voiced concern over the dominance of these few firms.

In my view, the direction and nature of all of this examination of Silicon Valley is entirely fair; many have argued that the aforementioned three firms have tended toward natural monopoly, at times unfairly so - all of which appears to necessitate a resuscitation of the nation's anti-trust and competition policy frameworks so that their full force can be brought to bear against the industry. Pro-competition regulations for this sector would in fact encourage a more diverse and dynamic internet ecosystem - which would open up new business opportunities for younger and more innovative commercial actors to participate in our information and media ecosystem. For the American consumer, these changes to the market would be most welcome.

The United States now stands at a crucial crossroads. The internet industry and our national policymakers can let other nations like Germany or Malaysia write the rules that will apply to the leading U.S. technology firms - which would almost necessarily be more stringent than any rules that might be adopted in the United States - or they can, once and for all, earnestly come together and negotiate a fair regulatory regime for the industry that effectively protects the consumer.

And though the United States has throughout its history favored the freedom of the markets by enabling open industrial innovation, there is one principle that has forever trumped anything else: that the integrity of the American democracy comes first and foremost.



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