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Time to Fix It: Developing Rules for Internet Capitalism

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Introduction

“Modern technology platforms such as Google, Facebook, Amazon and Apple are even more powerful than most people realize,” Eric Schmidt wrote in 2013 when he was Executive Chairman of Google’s parent Alphabet, Inc.¹ In the years since, that power and its effects on society has only increased – as has the public’s apprehension about the power of technology.

Multiple times daily, each of us experiences the benefits offered by these platforms. From the ability to search the world’s knowledge, to communicating with friends, to hailing a taxi or ordering a pizza, the digital platforms – enabled by digital networks – have transformed our lives.

At the same time, these digital platforms have aided Russian interference in the electoral process, impacted child development, and propagated disinformation, bigotry, and hateful speech. Economically, these platforms have also devastated the economic underpinnings of quality journalism and established a level of marketplace dominance not seen since the early Industrial Revolution. These results were never imagined in the halcyon early days of “Move Fast and Break Things.” Today, such threats are alarmingly manifest.

Things have indeed been broken. The question is what can be done to fix it? More specifically, will the leaders of the technology companies that created this new reality take the lead in resolving these challenges?

Roughly half of the public believes the major tech companies should be regulated more than they are now.² Another study found that 53 percent of Americans support regulation of the internet’s major platforms in a manner similar to the regulation of big banks.³

Such sentiments make it unsurprising that in Washington, tech companies taking fire from both sides of the aisle. Democrats are concerned about market power. Senator Elizabeth Warren, for instance, accused tech companies of trying to “snuff out competition.”⁴ On the other side of the aisle, *Politico* headlined, “The GOP’s Midterm Playbook: Beat Up On Big Tech” for allegedly pushing a progressive agenda. “I think it’s a real issue,” commented Senator John Thune (R-ND), Chairman

of the Commerce Committee that would oversee any legislation, “but I also think it has some political value.”⁵

While Washington is gripped with gridlock, Silicon Valley’s leaders have their own standoff regarding the appropriate response to these concerns.

Mark Zuckerberg, CEO of Facebook, told CNN, “I’m actually not sure we shouldn’t be regulated.” He went on to explain, “the question is more ‘what is the right regulation’ rather than ‘yes or no, should we be regulated?’”⁶

Eric Schmidt, on the other hand, combines the ability of companies to do good things with being free of regulation: “The internet is the greatest force for good in the world. We should not have regulation ahead of innovation.”⁷

A different “not us” approach comes from Morgan Reed, CEO of the App Association, an industry group. “Our message,” he says, “is, watch out for overly broad legislation that tries to capture all the business models.”⁸

Where you stand depends on where you sit. Zuckerberg’s interview was just before he spent two days explaining his company’s activities before Congress (where he went further stating, “I think it is inevitable that there will need to be regulation”⁹). The App Association, representing 5,000 application companies, doesn’t want to get trampled in a legislative stampede created by others. Meanwhile, Alphabet/Google sits as King of the Hill, dominating search with Google Search, video with YouTube, and mobile with Android, the operating system for 85 percent of the world’s mobile devices.¹⁰

The go-to argument in opposition to public accountability is the assertion that oversight will kill innovation. Time and again, we have heard that regulation would thwart digital innovators’ “permissionless innovation.”

Without a doubt, such “permissionless innovation” has delivered wondrous new capabilities. At the same time, however, it has also resulted in “permissionless *invasion*” of personal privacy; “permissionless *injury*” to once free markets, and “permissionless *interference*” with the democratic process.

While innovation may occur without permission, it does not occur without consequences. “We didn’t focus enough on preventing abuse and thinking through how people could use these tools to do harm,” Mark Zuckerberg admitted.¹¹ The absence of such forethought is both understandable and unfortunate. It is not, however, unprecedented. The history of new technology is also the history of society creating structures to deal with the consequences created by the innovations.

Criticism of the social and economic effects of the internet platforms is increasing like a pressure cooker. Early investors and employees lament what they begat. Media outlets and thought leaders increasingly question the operation and results of the digital economy. Governments, from supra-national structures such as the European Union, to state governments from California to Connecticut.

Amidst these challenges, the companies struggle to deal responsibly with the world they created. Responding serially to each issue like a carnival Whack-a-Mole game is not a solution – either for the companies or for the public. The best way to reach a solution that is good for everyone is to develop a new set of ground rules through open debate and discussion.

Corporate Citizenship

Responsible corporate action must now extend beyond the voluntary commitments that have governed the first decades of the digital era. Gone are the days that self-regulation alone can in-and-of-itself assure the necessary protections to consumers – Cambridge Analytica’s harvesting and use of Facebook data being just one high profile example of abuse. The dominance of the digital platforms and networks in our economy and our lives calls for common, legally binding policies governing the provision of digital services.

Public policy decisions about the internet economy are complex and interwoven. Three principles provide the bedrock for such public accountability: individual privacy, marketplace competition, and operational openness.

Privacy – The business model at the core of the consumer-facing internet is premised on the capture of personal digital information to resell for targeted messaging. Starting out as, “give us relevant information in exchange for service,” the business model has expanded to, “we want all your information, and while you’re at it the information of your friends.”

Ninety-one percent of Americans feel they have lost control of their private information, according to a Pew Research study.¹² Losing control of personal information means losing control of the economic equilibrium that originally established the exchange of “free” services for targeted information. The solution is not to eliminate the exchange of information for value, but rather to give consumers control of how their information is collected and how it is used.

Competition – In the course of amalgamating behavioral profiles through the uninhibited collection of personal data, the companies created a bottleneck to a freely functioning marketplace. Google and Facebook control over 60 percent of the total U.S. digital advertising market simply because the granular targeting of their aggregated data holdings is greater than that of others.¹³ This means that not only do the platforms stifle local media, but also potential competitors whose newness limits their data holdings. Even established companies are vulnerable when the dominant data companies unleash what they know about each person to move into a new market.

While antitrust laws have a role in this situation, lying at the heart of this erosion of the marketplace is the privatization of personal information, locked away by a handful of companies creating a bottleneck that enshrines an unassailable market position. The solution is to think anew about how digital technology has changed the way markets work and to respond with new expectations regarding the ownership and exchange of data.

Openness – It was the openness of the internet that produced its much-heralded “permissionless” attributes. Based on openly-developed protocols, an open “network of networks” was created by which any computer or network could become part of the internet by simply following a common set of rules. Yet, at either end of the internet, that openness falls prey to gatekeepers – operating without rules – whose business plans rely on the ability to discriminate.

Where the internet connects to the consumer, the wired and wireless networks that deliver users to and from the open internet won a decades-long Net Neutrality battle and are now free to discriminate amongst the traffic that arrives from (or that they take to) the internet. At the other end of an internet connection, the internet’s openness allows platforms to easily and inexpensively reach users to siphon-off and aggregate personal information that becomes their discriminatory bottleneck. While the Net Neutrality battle continues, the push for open data is just beginning to gather steam.

Since the earliest days of the internet, policy makers have been afraid to touch it, subscribing to the mythology that somehow they could break the magic. But the effects of digital dominance on privacy, competition and openness are now clear for all to see.

The time is ripe for digital technology companies – both the platforms that create services and the networks that deliver those services – to seek an alliance with government to develop a 21st century approach to public accountability in the digital marketplace. While such a proposal may be a philosophical anathema to some, the alternative to not meaningfully engage not only flies in the face of public opinion and corporate responsibility, but also exposes the companies to the political reality that if they are not “at the table” working collaboratively to make policy, they will be “on the table” as their business practices are dissected by others.

Historical Analog

There is an “old pattern in American economic history,” observed historian John Steele Gordon. “Whenever a major new force – whether a product, technology, or organizational form – enters the economic arena, two things happen. First, enormous fortunes are created by entrepreneurs who

successfully exploit the new, largely unregulated economic niches that have opened up. Second, the effects of the new force run up against the public interest and the rights of others.”¹⁴

This pattern has repeated itself often in the first two decades of the 21st century. The entrepreneurs that delivered innovative new products and services now confront the consequences of how their unilateral actions collide with the common good.

When headlines blare warnings such as “Tech Giants, Once Seen as Saviors, Are Now Viewed as Threats,”¹⁵ and “Silicon Valley is Not Your Friend,”¹⁶ it is time to take note that the new digital force has, indeed, run up against “the public interest and the rights of others.”

Mark Twain is reputed to have said, “History doesn’t repeat itself, but it sometimes rhymes.” Such a moment has arrived for the barons of the information age.

Speaking at his 1905 inauguration at the height of the Gilded Age, Theodore Roosevelt discussed the industrial economy, but he could have just as well been describing 2018. Technology, he said, had produced “marvelous material well-being,” yet had also generated “care and anxiety” that were “inseparable from the accumulation of great wealth.” Voicing concerns of the average citizen buffeted by technology-driven, market-concentrating change, Roosevelt observed, “Modern life is both complex and intense, and the tremendous changes wrought by the extraordinary industrial development of the last half century are felt in every fiber of our social and political being.”

Change “industrial” to “information” and Roosevelt’s observations are as current as the latest tweet.

Roosevelt’s solution was to “approach these problems with unbending, unflinching purpose to solve them aright.”¹⁷ From such an attitude emerged a progressive era of political rebalancing that strengthened regulation and expanded antitrust authority. These policy decisions helped create the economic and social stability that underpinned the growth and prosperity of the 20th century – stability for both companies and consumers.

Today, we are once again confronted by the “old pattern of American economic history” where technology and economic forces ultimately run up against the common good. The effects of permissionless innovation, permissionless invasion, permissionless injury, and permissionless interference demand attention and a positive solution. It falls to the leaders of the digital economy to determine whether to fight the rebalancing initiatives as threats or embrace them as a new digital responsibility with the potential to create new digital opportunities within a commonly accepted framework.

Regulatory Uncertainty

Ignoring the gathering policy storm is not an option. The current absence of regulation by the U.S. government does not mean deregulation. It only means that the rules will be written by other governments.

Individual nations are zeroing in with policy decisions. “Germany’s top telecommunications regulator has US tech groups in his sights,” the *Financial Times* reported.¹⁸

Supra-national organizations such as the European Union have aggressively asserted themselves to define the structure and behavior of digital companies. The EU’s Competition Authority levied record-setting sanctions against Google for abusive dominance of shopping search and mobile operating systems.¹⁹ Facebook was fined €110 million for misleading regulators about planned data linkages between users of Facebook and WhatsApp.²⁰ The General Data Protection Regulation (GDPR) has forced even non-European companies to reassess their privacy practices.

In the absence of American policy on such issues, the initiatives of other nations are replacing what has traditionally been American leadership of international technology policy. In an interconnected world, the consequences of such a buffet of regulatory actions reach far beyond their countries of origin. The result for American technology companies is uncertainty.

In the United States, multiple federal regulators have yet to meaningfully assert themselves. Their available tools are blunt but effective. The Antitrust Division of the Department of Justice

possesses vast but targeted authority to address specific monopolistic and competitive dangers in the marketplace. Arguably, such an action against Microsoft in the late 1990s created the opening for today's platform companies. The Federal Trade Commission (FTC) also has antitrust authority, as well as the ability to bring enforcement actions against "unfair and deceptive practices." Since there is no explicit national policy, the FTC's limited authority has been further limited to only looking at whether companies have adhered to their self-developed corporate statements and policies. The Federal Communications Commission (FCC) has something neither of the others possess: rulemaking authority to dictate industry-wide behavior; but its power is limited to the networks that deliver the internet and recently has been hamstrung by Congress in regard to protecting network privacy.

While inaction at the federal level may be the desired goal of many in the tech community, American federalism reserves to the states the right to operate in a federally unregulated space. In a nation in which the internet is oblivious to state boundaries, a lack of uniformity between states can impose significant burdens and uncertainties on companies. Forty-one state attorneys general have begun actions or investigations relating to the practices of the networks and platform companies. In the past year, 31 state legislatures, as well as the District of Columbia, have considered the enactment of statutes. The California legislature has adopted far-reaching privacy protections that are impossible to isolate within its borders.

The uncertainty and confusion of contradictory international and domestic initiatives is bad for innovation, and for marketplace competition. And it need not exist. The Congress of the United States can impose certainty and uniformity for the American market and, in the process, resume the nation's leadership through a regulatory template for the rest of the world.

Embracing Certainty

The author has twice before been involved in groundbreaking legislation that achieved policy certainty for new technology companies and policy oversight for consumers. It is an opportunity that is currently available for the tech companies. Now, like then, success begins with industry leaders indicating support and getting in front to push for the establishment of such policies.

In the early 1980s, as cable television was emerging from rural America into metropolitan areas, the absence of federal statutory authority began to expose the industry to increased risks. The industry discovered there was actually nothing more uncertain than an absence of a consistent regulatory regime.

It was a period of tremendous growth and innovation as CNN, MTV and HBO revolutionized television in an early iteration of the expanded choice of the internet. Yet, as the cable companies expanded into new areas, each city, as a condition of local operating permission, made up its own rules. As a condition of doing business, cable operators were forced to agree to locally-imposed and wildly different regulation of rates, programming decisions, and even giving the cities an ongoing slice of the revenue. The lack of regulatory certainty whip-sawed the companies: they needed new territories to grow, yet the price for gaining local operating permission could border on usurious and was decidedly non-uniform.

The cable industry's solution was to seek federal legislation. Achieving the legislation was a risk; mayors and city councils had significant political power that could move the debate in ominous directions. The industry was split about the wisdom of seeking legislation. City councils and mayors were no less divided.

The legislative process forced both the industry and the cities to confront fundamental issues, both within themselves as well as in their relationship with each other. The threat that the wrong kind of legislation posed for each created a dialog that ultimately led to a stable middle ground. When Congress finally enacted the negotiated solution, neither party got everything it wanted. But both got the regulatory certainty – stability – they so desired, and consumers received greater protections against commercial harms.

Rather than “a deadly race between politics and technology,” the certainty created by the 1984 Cable Act opened an era of unparalleled prosperity for the cable companies, permissionless technological innovation, and expanded consumer services (including the expansion of their offerings into high-speed internet access). The Act also put consumers at the table; twice Congress has fine-tuned the statute to address competitive or consumer harms, and to reflect new realities.

A decade later, the nascent cellular phone industry faced a similar uncertainty problem. State public utility commissions (PUC) were regulating the new business. Even though cellular had two phone service competitors, the state regulators were imposing rules designed for the old wired telephone monopoly. Beyond the fact that the airwaves did not respect state borders, the innovative two-competitor market was kept from being competitive because regulators had to approve every change to pricing and services. Different states assessed those questions differently.

The wireless industry sought federal legislation to end this uncertainty and confusion – even though it realized the political price would be to submit to federal regulation; specifically, regulation as a common carrier, a strict and specific layer of federal regulation it had previously avoided. Having crossed that Rubicon, the industry was able to work with Congress and the Federal Communications Commission (FCC) to develop policies that protected consumers while reflecting the more competitive nature of cellular so as to encourage price competition and product innovation.

The results speak for themselves. In the years that followed, the wireless industry soared on this certainty, investing hundreds of billions of dollars in infrastructure. Consumers, likewise, benefitted from the new competition as prices declined and services soared.

Most important and informative, the regulation did not thwart innovation. The industry evolved from analog networks to digital networks – including fighting a divisive intra-industry technology war – without governmental involvement. Demonstrating that “permissionless innovation” was possible even under government oversight, the mobile industry embraced the advent of the smartphone and the creation of the current internet ecosystem all without the need to secure government approval.

The providers of digital platforms and networks currently have a similar opportunity to work with consumer representatives and government leaders to fashion policies that create stability in the market through the protection of consumers, competition, and innovation.

When Peter Thiel warns, “We are in a deadly race between politics and technology,” he is leading tech companies down a false path.²¹ Yes, the technologists had a head start, but what Thiel calls “politics” isn’t a handful of people in Washington, it is the polity – the people – that are now upset and looking for answers. Embracing policy solutions to practical realities is an opportunity for the digital companies.

Working with the peoples’ representatives in government, as opposed to clinging to the mantra that “regulation kills innovation” could usher in a new era of protections for consumers and stability for companies. It is simply an unrealistic assumption that internet companies can have such a substantial effect on people’s lives and livelihoods without the people demanding accountability.

New Challenge, New Solutions

There is another benefit to proactive engagement to develop public policy: the digital companies can educate policy makers to leave behind regulatory concepts developed for the industrial age in favor of policies reflecting the new characteristics of the information age.

Too often 21st century technology is discussed in 20th century terms and 19th century regulatory proposals.²² It is human nature to define tomorrow in terms of what we know today, and to look to traditional solutions; but many solutions, designed for another era, are inadequate to the realities of today.

Government oversight of economic power has been trapped in industrial age constructions. The instruments created to oversee the effects of the industrial era simply imported the rules-based bureaucratic management concepts of that era into government.

On the factory floor, each worker followed strict rules and was overseen by a supervisor with his own set of rules, who in turn was watched over by a manager following rules he was given. When it came time for governmental oversight of the corporations that employed those workers,

supervisors, and managers, the same management concepts were applied to create governmental rules-based bureaucracies.

Such industrial age concepts are inadequate for an information economy. Yes, the speed of digital innovation can outpace the ability of traditionally structured oversight to keep pace. The oft-heard argument that regulation thwarts innovation, however, imports industrial age thinking rather than seeking new insights.

Surprisingly, America's most technologically forward-thinking individuals only look backward when it comes to considering the proper oversight of the digital economy. There are, of course, two advantages to such a perspective: they know the old style regulation will never be able to keep up with business practices changing at internet-speed, and old style regulation enables them to continually warn of sluggish oversight hurting innovation.

The new realities of agile, fast-paced, continually-evolving digital activities require a rethinking of the proper approach to government oversight. It is very much to the advantage of the leaders of the digital economy to contribute to a reconsideration of how the activities of government need to change to reflect digital realities.

The solution is not to abandon oversight, but to adapt such oversight with digital economy concepts replacing industrial economy concepts. Digital economy concepts like agile project management, algorithmic decision making, and machine learning all have unexplored applications in government oversight. The people's representatives in government, by and large, have not internalized the new concepts of the digital economy. If digital economy companies overcome their resistance to governmental oversight, they can help educate policy makers about replacing the blunt instruments created for the blunt processes of an earlier era with more supple digital era substitutes. The industry's failure to seize that opportunity leaves the field to be defined by yesterday's rules and yesterday's thinking – a potential negative impact on the industry's long-term commercial opportunities, and definitely an outcome that won't help consumers.

Internet Capitalism

We have entered a new era in which internet capitalism has replaced industrial capitalism. The challenge faced by policy makers and digital leaders is to assure the workings of a digital economy while mitigating excess and providing stability and security for both companies and consumers.

During the industrial era, public policies were created that allowed capitalism to flourish while simultaneously protecting consumers and a competitive market. Publicly accountable industrial activity delivered stability and security for most of the 20th century. The challenge for the 21st century is how to reinstate stability and security while taking advantage of the life-changing, market-shifting qualities of digital technology.

“Winning is easy, young man. Governing is hard,” George Washington says in the musical *Hamilton*. Without making light of what has been developed by the leaders of the technology revolution, a similar observation is possible for the 21st century: Breaking things is easy, dealing with the effects is hard.

The opportunity exists for the leaders of the digital economy to be as creative and expansive in thinking about the response to the effects of their actions as they were in creating those consequences.

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