Eakinomics: Tech and the Campaign Trail

As I was re-reading Jennifer Huddleston’s second installment of tech policy positions and the presidential candidates, Apple reached $2 trillion in market capitalization and the juxtaposition couldn’t have been starker: Right now is a high-water market for tech financials and a nadir for tech policy.

Start with Section 230, which is a great phrase to drop at a cocktail party – if we still HAD cocktail parties – outranked only by “42 CFR Part 2” (look it up). “Section 230” is Section 230 of the Communications Decency Act (47 U.S.C. §230). It limits the legal liability of online platforms that host/publish user content and also moderate that content (e.g., pulling down pornographic posts and so forth). As Huddleston notes, “This law has been incredibly important to the growth of a wide range of online platforms, from social media and review sites to less obvious examples such as Wikipedia and blog comments. Unfortunately, both candidates have been critical of this law, which allows new opportunities for speech and keeps barriers to entry low for new online platforms.”

President Trump’s approach is reflected in his May 2020 executive order (EO). He perceives a bias against himself and other conservatives and the EO called for changes to Section 230 that would require every platform to moderate content to the point of viewpoint neutrality. But the whole power of Section 230 is to allow the entry of any new platform and its choices in moderation – including conservative voices. The ironic outcome of this modern day “Fairness Doctrine” would be to “silence many online voices (including conservatives), particularly on controversial topics.” Candidate Biden is critical of the EO, but he has called to revoke Section 230 protections. That would be a nightmare, forcing platforms either to let everything stay online – creating, in Jennifer’s words, “an internet most of us would not want to be on” – or to zealously take down content and likely (even if only inadvertently) squelching free speech in the process.

Strike one.

Meanwhile, on data privacy both candidates favor federal legislation that pre-empts the patchwork of state-level data privacy laws that are springing up. This patchwork threatens to balkanize (further) the internet and reduce its utility. Unfortunately former Vice President Biden prefers something like the European Union’s unworkable and costly General Data Protection Regulation. On the other side of the presidential race, the Trump Administration stated they were working on federal consumer data privacy legislation, but it is unclear what exact principles would be in such legislation. So, while both favor a federal policy on this still-important topic, one has not put out a full proposal while the other would use this legislation to take a firm step in the wrong direction.

Strike two.

Finally, that tech perennial – network neutrality – re-appears in Groundhog Day fashion every four years. Candidate Biden would restore the Obama-era network neutrality regulations, while the Trump Administration
revoked them in the Restoring Internet Freedom Order. This might appear to provide a clear contrast, but the fundamental problem has been that the Federal Communications Commission (FCC) does not have clear authority to regulate the internet on such issues and *every* set of rules (or their revocation) just ends up in court. It is time for candidates to stop promising one thing or the other and instead call on Congress to *pass* legislation on a bipartisan regulatory regime for the internet and give the FCC the appropriate authority to implement and interpret such rules.

Strike 3.