Introduction: How to Think About Tech Regulation

WILL RINEHART | JANUARY 14, 2019

If there were ever a year that changed the course of technology regulation, 2018 was it. In mid-March, the *New York Times* released a report detailing how the marketing firm Cambridge Analytica exploited Facebook's consumers leading up to the 2016 presidential campaign, sparking congressional hearings with Facebook CEO Mark Zuckerberg. At the end of May, the long-awaited European General Data Protection Regulation came into effect. On June 25th, the Supreme Court issued a major ruling in *Ohio v. American Express*, the first time the Court had directly addressed the economics of platforms, opening up the possibility for companies such as Facebook and Google to face scrutiny by courts in the future. On June 28th, the California Consumer Privacy Act (CCPA) was introduced and passed within a week.

The shifts in the legal and political environments could translate into this Congress legislating new federal regulatory policy for technology. Even the presidential campaigns could encourage action, as presidential hopefuls such as Senator Amy Klobuchar and Senator Elizabeth Warren have made tech regulation a central part of their platforms. But how are policymakers to tackle these difficult and broad topic areas?

The essays that follow are meant to help clarify the goals and implications of tech regulation. Since this topic is so broad, the essays are similarly expansive, but what unites them is their focus on innovation. If innovation is the primary challenge facing effective tech regulation, then it is critical to understand how legislative proposals either encourage or inhibit it.

The first essay comes from Ryan Hagemann of the Niskanen Center. Many assume that the best way for the government to address new technologies is through proactive and specific federal legislation. In contrast, Hagemann makes a case for a "soft law" approach. As he details, a number of agencies have worked alongside industry, advocates, and the research community to produce de facto governance through green papers, advisory circulars, guidance documents, and a range of other materials. This multi-stakeholder approach has been especially effective for fast-developing markets, such as autonomous vehicles, medical devices, and the Internet of Things. As policymakers consider legislation to deal with new and rapidly evolving technologies, a soft-law approach that supplements or even substitutes for statues should be the priority, especially if the goal is to ensure continued innovation.

In the second essay, Jennifer Huddleston of the Mercatus Center lays out the state of play in privacy regulation. California may have been the first to adopt a privacy law, passing one in 2018, but other states are following closely. As she explains, there will surely be problems if all 50 states pass some form of privacy legislation. The California legislation will not go into effect until 2020, giving Congress time to debate a federal privacy bill that preempts it. The only real solution to this legislative confusion will be a federal law that allows for innovation while also protecting consumers.

While many have turned their attention to privacy law, Ryan Radia of Lincoln Network explores how the broad consensus around antitrust regulation has similarly shifted. For decades, there was a bipartisan and empirically grounded agreement that antitrust laws should focus on consumer welfare. More recently, however, a "big is

bad" approach to regulation is gaining ground as a solution to nearly every problem with tech companies. Radia argues that a change in course for antitrust would come at a steep price for consumers while not achieving the lofty goals of antitrust advocates.

But Congress and the agencies aren't the only places where the action is happening. The Supreme Court has tackled some tough tech issues as of late. As Ashley Baker of The Committee for Justice explains, the highest court has considered several tech-related issues, but some recent decisions leave many unanswered questions that Congress will need to address with legislation.

It is hard to have a conversation about technology today without mentioning artificial intelligence (A.I.), and in my own contribution to this volume, I highlight the areas where A.I. is having the biggest impact and provide a simple framework for understanding the technology. Countries and firms across the globe are racing to capitalize on this new tech, and policymakers should recognize that premature regulation is likely to stifle innovation and progress in A.I.

If it is the case that A.I. will revolutionize how we work, live, and connect, it will be imperative that government support this transition. In the final essay, Caleb Watney of the R Street Institute outlines some concrete steps policymakers can take to encourage the development and adoption of A.I. in the economy. To this end, he suggests passing immigration reform, encouraging the creation of open datasets, and avoiding political instability to international supply chains, among other proposals. Ensuring the United States remains a world leader in technology innovation and use may not require regulation, per se, but it will require proactive government engagement.

Watney's closing sentences reflect just how connected these seemingly disparate issues are. As he explains, "To ensure a competitive and innovative ecosystem going forward, policymakers should prioritize reducing the barriers to entry as our first line of defense." Indeed, the agenda Watney lays out to spark A.I. adoption could just as easily be an agenda to increase competition writ large. Technology policy in 2019 has become narrowly stuck on the old methods of regulation and enforcement, the sticks of government. But policy makers shouldn't deny how powerful carrots can be in ensuring better outcomes for all.

For years, the United States was the envy of the world because our light-touch regulatory regime created a dynamic and innovative ecosystem for today's tech companies, yet in the past year, the regulatory climate around tech and tech companies has notably changed. While shifting sentiments offer an opportunity to pass sensible laws, policymakers should be cautious about redesigning the entire system. The following essays should help to ground the discussion around how, and whether, to regulate technology in the United States.