FTC Must No Longer Ignore Silicon Valley Bias

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One of the "most sinister manifestations" of monopolies, President Theodore Roosevelt warned in 1910, was their "tendency to interfere and dominate in politics." In 2016, the Donald Trump presidential campaign invoked Roosevelt's trust-busting when it promised to use antitrust law against oligopolies which are “destroying an American democracy that depends on a free flow of information and freedom of thought.”

In contrast, on November 27, Federal Trade Commission (FTC) Chairman Joe Simons, responding to Senator Ted Cruz's question about the power of the large internet companies to control speech online, stated that he doubted the agency “should be addressing that at all.” Chairman Simons thought the FTC should only play a role if there were a clear “competition issue or it's unfair or deceptive.” His fellow Republican Commissioner Noah Phillips made similar comments two weeks earlier. The Chairman also likened the Senator Cruz’s suggestion that the agency consider censorship and political bias to the FCC’s long defunct “fairness doctrine.”

The FTC Chairman ignored a key distinction between broadcasters and tech companies. Broadcasters had finite time and resources to host content, sometimes devoting only a few hours a day to public affairs, and many stations explicitly appeal to certain ideological segments. Forcing them to present both sides imposed major practical and financial burdens. In contrast, social networks are platforms, which can accommodate virtually infinite content with negligible marginal costs.

A more apt comparison is the FCC's former "net neutrality" rules, which, along with more complex economic regulations, prevented ISPs from blocking or slowing down content. Last year, the FCC repealed the rule and transferred jurisdiction to the FTC.

In contrast to Simons and Phillips, former acting FTC chairman Maureen Ohlhausen saw a role for the FTC to protect free speech online. She responded to claims that net neutrality was necessary to prevent ISP censorship by noting that antitrust enforcement can "safeguard nonmonetary goals like free speech." In May, Simons similarly testified that the FTC has the authority and capability in certain circumstances to prevent "blocking" and "throttling" by ISPs—which is akin to censorship and algorithmic "shadow bans" by social networks and search engines.

And concerns about dominant platforms blocking free speech are well-founded. In fact, many dominant platforms appear to block competitors who appeal to free-speech-oriented consumers. For example, Google, which owns YouTube and controls over 90% of the U.S. search market, does not display Bit Chute—a platform which appeals to consumers dissatisfied with YouTube's content restrictions—in its video search function.

Google may have a legitimate justification for this policy, but it certainly implicates competition policy.

Additionally, as Senator Cruz responded to Chairman Simons, the tech platforms portray themselves to the "public and customers as neutral public forums" but "are actively engaged in hidden censorship." Both Twitter and YouTube list "free expression" as part of their corporate mission. Facebook describes itself as "an open platform for all ideas." However, all have fine print in their terms of service that allow them remove content and users for any reason.

The FTC has sanctioned platforms for privacy violations for engaging in the same type of bait-and-switch. For example, in 2009, the agency filed a complaint against Sears for tracking passwords and credit card numbers of its consumers, even though its privacy statement and license agreement explicitly acknowledged it could do this 75 lines down. As then FTC Chairman John Liebowitz noted that same year, "we all agree that consumers don't read privacy policies"

The FTC has no rule-making authority, so it cannot impose public utility status or any quasi-First Amendment type regulations on Silicon Valley. Given the many complex antitrust and privacy questions in the digital age the agency must tackle, some reluctance to tackle politically polarizing issues is understandable. However, that's no excuse to turning a blind eye when dominant companies deceptively claim to be open platforms and use their market power to exclude free speech competitors.

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