NEW RULES FOR BIG TECH: A CONVERSATION FOR CHANGE

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During a time when Facebook is being used as a tool of genocide and ethnic cleansing, Amazon is striking deals with Apple to put iPhone refurbishers out of business, and Google is manipulating search results to promote its own products, it is still difficult to find a group of experts willing to admit that Big Tech has a problem—much less to define and explore what that problem is.

But this past November, the Roosevelt Institute and the George Washington Institute of Public Policy gathered a group of experts in Washington, D.C., to do just that. The panel series, titled "Crafting Effective Rules for Internet Platforms," sought not to grapple over whether a problem exists, but to discuss real solutions to unchecked market power in the tech space. Facebook, Amazon, and Google each pose their own threats to competition and require their own antitrust and regulatory remedies.

The first panel focused on Facebook, which, according to a new study from the Open Markets Institute, controls 72 percent of the social networking space. LinkedIn is its largest competitor and captures only 11 percent of the market; Twitter controls just 6 percent. Facebook has continued to expand its market power and adapt to trends in the space by acquiring potential competitors, such as Instagram and WhatsApp. Antitrust regulators have failed to understand how these platforms are nascent competitors and thus waved through a series of mergers that greatly diminished consumer choice of social media platforms. **Sally Hubbard**, Senior Editor at *The Capitol Forum* and a former antitrust enforcer with the New York State Attorney General's office, explained that consumers "don't have a way to vote with their feet. After the Cambridge Analytica scandal, I had lots of smart people tell me, 'Oh, I'm stopping using Facebook, but I'm still on Instagram'—not realizing that it was the same company." To remedy this, **Sandeep Vaheesan**, Legal Director of the Open Markets Institute, proposed bold steps. "Under the Clayton Act, the agencies do have the authority to go back and undo deals," he said. "So, at a minimum, we should ask the FTC to unwind Facebook's acquisition of both WhatsApp and Instagram."

Facebook has expanded its market power by using its vast access to user data to dominate the digital advertising market—**Jason Kint**, CEO of Digital Content Next, mentioned that 99 percent of Facebook's revenue comes from advertising. "People are handing over their own privacy, and that has immense value," he said. Gathering a plethora of personal data and using it to monetize platform users is extremely lucrative, but dishonest to consumers. **Kint** further explained that, "If a user is giving data on Facebook, you shouldn't be able then to go use it in a completely different environment, which is the core of the Facebook business model." Users unknowingly give away

their data to private companies that launch targeted advertisements, influence elections by propagating fake news, and essentially surveil the citizenry on a massive scale.

To stop this, **Vaheesan** mentioned that the FTC has, "a huge residual source of authority called Section 5 of the FTC Act, which allows them to prohibit unfair methods of competition." If acted upon, this could be a source of enforcement power. **Hubbard** also pointed out the power that the FTC could wield over Facebook. "There is this consent decree violation that the FTC is investigating right now—and there were trillions of dollars worth of damages," she said. "[The FTC has] a lot of power to do something real; whether they're going to do something real is a question." Barring decisive action by the FTC, **Kint** added, "we probably do need another Sherman Act . . . and one that isn't purely tied to the consumer welfare standard."

Facebook acts as a virtual public space, where anyone is free to post dog photos, share memes, incite genocide and ethnic cleansing, or auction off a child bride. It has become increasingly clear that Facebook's global reach and inability to monitor incendiary content leads to real-world consequences. **Vaheesan** asked the obvious question, "Why do we allow this single company to dominate a global common space?" and made the case for a public solution to tackle Facebook's public forum. "We wouldn't accept a public park where someone can shout obscenities and spew conspiracy theories [without] demanding the local government take action," he said. "I think we really need to do the same with Facebook. I think the antitrust laws offer a partial solution here, but I think we'll have to go beyond that too."

The second panel's focus was Amazon, which, according to the Open Markets Institute, controls 49 percent of the e-commerce market. With such dominance over the available online marketplace, Amazon poses the unique threat of both owning the market and participating within it. By wearing these two hats, Amazon can leverage the data it collects on both buyers and sellers in its marketplace to better inform and promote its own products, and it can also favor larger, preferred sellers. **Stacy Mitchell**, Co-Director of the Institute for Local Self-Reliance, explained that the result is a biased and skewed playing field. "Trade is happening in a private arena, controlled by a private actor, that controls the rules and regulations," she noted. "It's a governing, public function that Amazon is assuming."

Evidence of this control is plentiful. For example, Amazon recently struck a deal with Apple whereby Amazon gained rights to sell Apple products on its platform in exchange for Amazon eliminating small, independent iPhone refurbishers from its site, because these refurbishers threaten Apple's new-product business. Roosevelt Research Director and Fellow **Marshall Steinbaum** aptly pointed out Amazon's hypocrisy in publicly claiming to champion small business while privately cutting deals to eliminate them, all the while appealing to antitrust regulators by claiming that eliminating small business is efficient. "In a world where everything collapses into a single channel, [small businesses] have no way to introduce new products," **Mitchell** added. "Amazon is great for search, but it's terrible for discovery. If you're a small company with no 'sway' with Amazon, your product becomes lost."

To combat Amazon's control of the online marketplace, **Steinbaum** suggested a two-part approach. "Neutrality rules—common carriage rules that we impose on that platform so we ensure that everyone doing business on that platform has a fair shake—that's a regulatory approach," he

explained. “The other necessary piece is structural separation—the antitrust approach. That is to say that if Amazon’s core business is to operate this platform, it cannot be in competition with the other sellers on the platform.” To enact an antitrust take-down in this case, **Steinbaum** identified necessary changes to antitrust law: “Establish right-of-market access for suppliers so that we could then bring a monopolization case against Amazon; presumption of illegality of vertical mergers, which would apply to the Amazon and Whole Foods merger; and enforce against Amazon’s use of predatory pricing.”

Importantly, Amazon can prioritize different sellers, and itself, through its proprietary search and pricing algorithms. How do you regulate something as complex and specific as an algorithm in this context? **Steinbaum** made the case that “algorithms setting prices between sellers has potential for liability under Section 1 of the Sherman Act.” If each seller is to be treated as independent, and Amazon imposes a set sale price, this is considered a cartel. If Amazon considers sellers to be a part of its business, then price-setting is an exercise of monopoly power. Both should be enforced through antitrust. Professor **Frank Pasquale**, of the University of Maryland Francis King Carey School of Law, added that we must reject the idea that “machine learning is too complicated to regulate.” He suggested that there be “a small group of people called the Internet Intermediary Council that could try to understand what was going on in the same manner as the Office of Financial Research was set up by Dodd-Frank.” His solution is thus not to accept the curtain of complexity that tech platforms often hide behind, but to put together a group of experts that can lift it.

Panelists also discussed Amazon’s contested labor practices. **Denise Hearn**, head of business development for Variant Perception, pointed to Amazon as a prime example of how concentration harms workers. “[Amazon] warehouse workers aren’t able to take bathroom breaks because the building is so large, and you only get 15 minutes and you can’t walk to the bathroom and back,” she said. She also noted that “10 percent of Amazon contract workers in Ohio are on foodstamps.”

Even as Amazon has loudly raised its minimum wage to $15 per hour, **Mitchell** noted that “if you look metro-by-metro, average warehouse wages for similar kinds of work at other companies across that job category are higher than $15 an hour. So this is still very much a company that is using its market power to hold down these wages.” **Steinbaum** expanded on the misleading notion that Amazon’s wage increase would benefit all of its workers. “They are not going to be paying that to all of the workers,” he said “The idea that they will have employees of Amazon working alongside contractors or employees of contractors raises the possibility that they can continue the threat of outsourcing work, to create disparate working conditions for people doing essentially the same thing.”

Amazon is not the only Big Tech firm guilty of cutting benefits through third-party contractors; Google’s training guide for managers clearly outlines the mandated disparate treatment of Google employees versus contract workers. Contractors don’t get t-shirts, gifts, or access to all staff meetings, though they work intimately with Google employees. The intent is, of course, to avoid the costly status of ‘joint employer’ and to reduce benefits costs for payroll employees. For Amazon, the trend of minimizing the number of employees on its payroll is not likely to end anytime soon—**Mitchell** noted that, “Amazon’s long-range strategy for cutting labor costs is to get rid of workers, to automate . . . so as they grow, we’re actually losing more jobs than we’re gaining.”

The solution here requires changing the minds of consumers and workers, thereby creating the labor activism needed to tackle a giant like Amazon. **Steinbaum** suggested starting with regulation—for instance, having regulators review companies that offer disparate wages for the same work. "There are already ways in which that would be considered a violation of labor regulations," he said. "There's also an argument that those should be considered antitrust violations, as a monopsonist using their market power to maintain and prolong their monopsony." **Mitchell** stressed the need for a larger cultural shift, through which people begin thinking of themselves as citizens who can effect change through policy, not just as consumers who can cancel an Amazon Prime membership. The latter is not strong enough action to tackle the enormity of the Amazon problem.

The third and final panel focused on Google, whose parent company, Alphabet, controls 91 percent of the search-engine market. As such, it behaves as our global public library, but one that is controlled by a private company serving its own interests. **Sally Hubbard** pointed out the immense power that a search engine of this size can have. "I'm most concerned about Facebook and Google controlling the flow of information worldwide," she said. "It's controlling what is discovered online." Because Google has the ability to manipulate search results so that Google properties or products appear first, while competitors are hidden on subsequent pages, "it is like Amazon controlling the arena in which the game is played *and* playing the game."

Because Google is not refusing to work with its competitors or outright excluding them from its search results—it is only making them harder to find—proving that Google is behaving in a discriminatory fashion is a unique challenge. Panelists grappled with whether this was a job that could be accomplished through antitrust or if a new approach was necessary. **Hal Singer**, Senior Fellow at the George Washington Institute of Public Policy and an adjunct professor at Georgetown University, pointed out that bringing an antitrust case against the platform is much harder. "Google is not refusing to deal," he said. "They're just showing their own results higher. You'd have to show that [manipulating search results] is tantamount to a refusal to deal in order to make an antitrust case." He presented sector-specific regulation as an alternative, noting that it is a more direct approach to curbing discrimination, though not mutually exclusive from antitrust enforcement.

Singer outlined three key steps for Congress to take: "Congress would have to create, number one, a private right of action. This would allow independent edge providers to come forward and bring a discrimination complaint against the tech platform. Second, Congress would have to create a forum; you need to be able to go somewhere to file the suit. One place that seems to be getting some currency is at the FTC's ALJ, but you could also do this before an Article 3 judge. Finally, you need a new standard. I'm advocating for a nondiscrimination standard and an evidentiary standard that would differ from the one that currently prevails in the antitrust court." President and CEO of Public Knowledge, **Gene Kimmelman**, echoed **Singer's** sentiment, pointing to an unfavorable political climate and Supreme Court as strong barriers to winning an antitrust case.

Hubbard, on the other hand, thought that antitrust could and should play a strong role. She advocated for the U.S. to follow the E.U.'s lead in antitrust enforcement. In particular, she noted, we can use the E.U. antitrust case against Google Android as a model. In that case, Google had required phone manufacturers to use Google's search apps, map apps, and 30 some other apps as the default apps in their phones, if they wanted to make an Android phone and wanted access to

Google's Play store. "The E.U. fined Google for prioritizing its own comparison-shopping services and putting its competitors on page four of the search results," said **Hubbard**. "These same claims could have been recognizable under U.S. law."

Another of Google's problematic behaviors is its habit of buying or imitating edge innovators. As start-ups develop new ideas, Google will offer to buy their business or threaten to imitate their intellectual property and put them *out* of business. As a result, the number of companies entering the venture-backed pipeline in industries that are in direct competition with Google have steadily declined. Financiers don't want to back new companies that will soon be overtaken by giants like Google. **Singer** described this practice as "reverse free-riding syndrome, where the incumbent is actually stealing ideas from edge innovators and then appropriating those ideas." In addition, Google has expanded its original focus on search and branched into several commodity verticals, such as maps, math, and weather. These verticals arguably require little creativity and offer little opportunity for differentiation between providers—once an app can solve a math problem, there is no need for competitors to solve the same problem a different way—so Google's presence in these markets quickly overwhelms smaller players.

What can be done to halt Google's growing appetite for new (and stolen) ideas? **Frank Pasquale** doesn't think we should shy away from the task of undoing anticompetitive mergers. He pointed out that, "given that most businesses are 'tech' today, we need to stay away from the idea that there is something magical or special about the tech firms that is particularly resistant to separation." His take is in direct opposition to the tech-specific allowance for vertical integration that the courts created in the *United States v. Microsoft Corp*. He also advocates for Google to be more transparent about the extent of its ownership. "There should be a way in which people are immediately notified that what they're dealing with is Google property," he said. **Singer** pointed out that lawmakers such as Elizabeth Warren have even floated the idea that, "structural separation should go beyond just rolling back prior mergers." In addition to break-ups, they want to clearly define a platform's core mission and then prohibit the platform from expanding into different functions. If search is the platform's core business, they argue, then creating tools that solve math problems is outside the core business and should be prohibited.

Each panel was tasked with first naming the unique forms of anticompetitive action that Big Tech firms use to write the rules in their own favor. The goal was then to name, create, and brainstorm the regulatory and legislative tools that should be employed to curb such blatant expressions of market power. **Pasquale** put it plainly: "These platforms are not doing a good job." Acknowledging as much, and then collaborating to discuss pragmatic solutions, is the essential first step to taming the beast that is Big Tech.