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Why Google's Search Results Must Not Be Regulated

by

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On Aug. 28, shortly after a tweet by President Trump claiming that Google's search results are "RIGGED," Larry Kudlow, a top economic adviser, said the Trump administration is "taking a look" at whether Google should be regulated by the government.

Two days later, at a campaign-style rally in Indiana, Mr. Trump again lambasted Google for exhibiting bias against conservatives, declaring: "I've made it clear that we as a country cannot tolerate political censorship, blacklisting and rigged search results."

Given Google's history of hypocrisy, it's tempting to agree that the government at least ought to "take a look" at regulating Google's search engine.

After all, any company that, for over a decade now, has led the fight to have the government impose "net neutrality" mandates on Internet service providers (ISPs) like Verizon and Comcast, while simultaneously resisting calls that such neutrality requirements be imposed on its own search engine, epitomizes hypocrisy.

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With Silicon Valley's acknowledged left-leaning philosophical disposition, the claims that Google's search results are biased against conservatives are doubtless worrying. In April 2018, Facebook CEO Mark Zuckerberg conceded Silicon Valley "is an extremely left-leaning place."

Still, the temptation to heed calls for government regulation of Google's search engine should be resisted.

First, it would be unwise, as a matter of policy, to lodge the power to police search neutrality in the government's hands. Even assuming benevolent intentions, there is no reason to suppose the government has the technical expertise required to create algorithms that would deliver search results any more "neutral" or "unbiased" than Google's. You don't need to be a computer scientist to understand that Google's algorithms, in order to deliver results most relevant to a search query, are incredibly complex, sophisticated and ever-changing.

Second, there is no reason to assume the government would not abuse this power if it had it. Because search results may be manipulated easily by those who design the algorithms, it would be foolish to risk giving government officials control over them. The temptation for government to abuse this power to promote its own messages — its own version of what is most "relevant" — is evident.

Of course, this is why the U.S. Constitution's First Amendment protects freedom of speech by private entities against government control or censorship. There is widespread agreement among scholars that search results are protected speech under traditional First Amendment doctrine. Eugene Volokh, a respected First Amendment scholar, explains that "each search engine's editorial judgment is much like many other familiar editorial judgments" that are fully protected by the First Amendment.

While I agree with this position, a small minority of scholars nevertheless have argued that Google's search results should not be accorded First Amendment protection because, given its dominant position in the search market, Google is akin to an "essential facility." Frank Pasquale and Oren Bracha, in a seminal 2008 article in the *Cornell Law Review*, argued that in light of what they call Google's status as an information "gatekeeper," it should be regulated as a public utility not subject to First Amendment constraints. Ever since, Mr. Pasquale has continued to beat the drum for "utility-style" regulation of Google.

Here's where Google's hypocrisy manifests itself. While dismissing suggestions that it should be subject to public utility-style regulation, Google has had no qualms in assuming a leading role before the Federal Communications Commission (FCC) and courts in arguing that Internet service providers should be subject to just such utility regulation to ensure they adhere to "net neutrality." Google argues that the ISPs, in public utility fashion, must carry all messages and allow access to all content without any discrimination.

In a 2007 law review article, "*Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*," I was one of the first to argue that government-imposed net neutrality requirements "are, in effect, speech restrictions that infringe ISPs' constitutional rights." I concluded that ISPs

“possess First Amendment rights as entities entitled to use their facilities to convey messages of their own choosing.”

To its credit, in its December 2017 *Restoring Internet Freedom* order, the FCC, now led by the Trump administration’s Republican majority, repealed the Obama Administration FCC’s public utility-style net neutrality regulations. It’s worth noting that when the now-repealed Obama FCC’s rules came before the D.C. Circuit appeals court, Judge — now Supreme Court nominee — Brett Kavanaugh dissented from the court’s affirmance of the regulations. He reasoned that the net neutrality mandates violated the ISPs’ First Amendment rights.

To be clear, in light of the First Amendment considerations, I do not favor government-imposition of neutrality mandates on either Google or the ISPs. And, as a matter of policy, the Internet services marketplace is now sufficiently competitive that there is little need to worry that ISPs will risk alienating subscribers by acting in ways inconsistent with subscriber preferences. Likewise, even with Google’s present dominance in the search market — as of July 2018 Google controlled 86 percent of all U.S. searches — it’s still possible that the technological and marketplace dynamism in the Internet space could erode Google’s position.

So, I’d urge Mr. Trump to refrain from calling for regulation of Google’s search engine. At the same time, I wish Google, perhaps in a moment of self-reflection, would acknowledge the hypocrisy involved in calling for neutrality regulation for others with a far less dominant market position than its own — while fighting to protect itself from such neutrality regulation.

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