Are Digital Bills of Rights A Sound Solution to Conflict Among Tech Companies, Consumers, and Government?

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April 18, 2023

On December 15, 1791, ten states ratified the Bill of Rights to address concerns about competing interests in personal freedoms, federal power, and state sovereignty. Now, the concept of creating new "digital bills of rights" has become increasingly popular as a means of addressing the widening conflict among rapidly advancing technology, consumers, and government regulation.

This conflict has become increasingly prevalent and crosses party lines. For example, when TikTok CEO Shou Zi Chew joined the ever-growing list of social media executives to testify before Congress, he was grilled on TikTok's data, consumer access, and privacy practices. Chew faced criticism from lawmakers from both parties, and there is increasing pressure on Congress to ban the social media platform entirely in the United States. A potential ban of an app with 150 million American users and the proposed ways of implementing it have come under fierce scrutiny and sparked debate.

One response by lawmakers to tech-related conflict is the creation of "digital bills of rights." I define "digital bills of rights" as legislation specifically aimed at using government authority to create and protect new "digital rights" of individuals against third-parties, generally technology and social media companies.

Although the term is admittedly vague, it captures a wide variety of legislation being proposed. In October 2022, the White House published its "Blueprint For An AI Bill of Rights" that identified "five principles that should guide the design, use, and deployment of automated systems." In February 2023, Florida Governor Ron DeSantis announced his state "Digital Bill of Rights," to protect "Floridians . . . from the overreach and surveillance . . . [of] Big Tech companies." Other states have followed suit, with California, Virginia, Colorado, and Connecticut building a growing framework for data privacy rights and protections.

As lawmakers continue to propose and debate these types of legislation, the following questions must be addressed:

1. Which rights should be granted?

As the above proposals demonstrate, one open question is which rights should be explicitly granted. The White House's framework explicitly provided for rights to "safe and effective systems," "algorithmic discrimination protections," "data privacy," "notice and explanation," and "human alternatives, consideration, and fallback." In contrast, DeSantis's bill emphasized protections from "Big Tech surveillance," freedom from "unfair censorship," the ability "control personal data," the right to "know how internet search engines manipulate search results," and the right to "protect children from online harms."

These frameworks may have overlapping principles tailored to specific uses, and some measure of diversity among jurisdictions is appropriate. But it is very important that lawmakers be clear about which rights are being granted in a particular law. Second, as these proposals become increasingly popular and prevalent nationwide, a common understanding of which rights are most critical can prevent a confusing patchwork of competing laws and regulatory requirements.

2. What is the role of government in enforcing these rights?

A system of rights creates a system of enforcement of such rights. For digital bills of rights, this is one of the most controversial aspects of their creation.

One flashpoint on this question is with regards to banning the popular platform, TikTok, as a way of protecting digital rights. The potential banning of TikTok has raised questions about the scope of government authority in digital spaces. The Cato Institute has come out against such bans, raising concerns over market distortions and creating a "blank check" for government overreach. Others, including the ACLU, the Electronic Frontier Foundation, and lawmakers such as Representative Alexandria Ocasio-Cortez and Senator Rand Paul, have also opposed the ban.

Although an outright ban of one of the most popular platforms in the world may be an extreme case, it has become increasingly difficult to decide the proper scope of government interventions and restrictions even on a smaller scale. For example, DeSantis's bill also includes a ban on TikTok, and it would require search engines like Google to "disclose whether they prioritize search results based on political or ideological views, or monetary consideration." Similarly, new Utah legislation creates a parental consent requirements for minors to open social media accounts to protect children's privacy rights, but it does not make clear how government agencies will practically enforce these rights.

Additionally, these questions raise the importance of consumer choice and the ability of individuals to waive these rights. As reflected by the wave of new requirements instituted by data privacy acts such as the GDPR, federal laws like the Children's Online Privacy Protection Rule, or state laws like California's CCPA and CRPA rules, these new protections can create heightened requirements for both consumers and companies. For

digital rights specifically, it becomes unclear whether and how individuals can waive their rights in order to improve their consumer experiences.

3. How can we best balance the need for competitive innovation with a digital rights framework?

Ultimately, the creation of digital rights frameworks comes into conflict with the pace of and need for competitive innovation.

Social media platforms are the just the tip of an ever-growing iceberg. New AI tools are rapidly evolving and proliferating at a pace to disrupt industries and institutions as a whole. On April 11, the National Telecommunications and Information Administration released a public request for comment on policies regarding AI accountability. New machine learning and generative models have already begun to challenge and upend legal doctrines, as exemplified by the Copyright Office's recent guidance to address works created by artificial intelligence.

Simply seeking to ban or prevent whole areas of development is impractical and dangerous. For example, Italy temporarily blocked "ChatGPT," a powerful new AI technology, but new workarounds were quickly developed (such as "PizzaGPT," which uses the same API as ChatGPT but claims to not store user data).

On the other hand, letting new technologies run rampant without any oversight or protections also raises concerns. An open letter from several leaders in the technology world, including Elon Musk and Steve Wozniak, asked all AI labs to "pause . . . the training of AI systems" given the "profound risks to society and humanity." For a generation affected by the Facebook-Cambridge-Analytica scandal, concerns over improper data access and privacy concerns are especially apparent.

With these questions in mind, lawmakers must walk a delicate line between creating and protecting digital rights, and ensuring competitive innovation continues.

The Bill of Rights was the product of hard-fought negotiations, debates, conflicts, and compromises. Though only ten states initially ratified the document, it is now an anchor for our society.

From the initial flashpoints in this debate, digital bills of rights now seem to be following a similar path. Yet as we continue to face new challenges and opportunities from technological innovation, this spirit of negotiation, a willingness to address concerns clearly, and an openness to learning from our mistakes should be the true defining principles of how we enter this new frontier.