BYU Law School | Global Business Law Program

The Future of Antitrust Series, Webinar #1:

Debriefing the American Innovation and Choice Online Act

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Participants:

- Clark Asay (BYU) – **Moderator**
- Darren Bush (Univ. of Houston)
- Megan Hunter (Boston College)
- Adam Kovacevich (Chamber of Progress)
- Katie McInnis (DuckDuckGo)
- Daniel Sokol (USC)

Transcript:

[00:00:04 - Clark Asay]

Hello and welcome to this webinar on the American Innovation and Choice Online act. My name is Clark Asay and I'll be moderating this panel. I'm a professor of law at BYU Law School and before kicking things off, I'd just like to acknowledge BYU Law School and Amazon, who both have provided funding for this webinar, which is part of a series events that we're calling Future of Antitrust that BYU Law School is putting on. So, stay for additional upcoming events.

Let me introduce our panelists, who I'm thrilled to have us join today. I think we're gonna have a great discussion about this bill, The American Innovation and Choice Online Act. I'm not going to be able to do justice to their experiences in the short time I have to introduce them, but let me give you a brief snapshot of each of them. I'm going to go in alphabetical order.

First off, we have Darren Bush, who is the Leonard B. Rosenberg College Professor of Law at the University of Houston Law Center. And Darren's teaching and research is focused on antitrust issues and so I'm sure he's going to have a lot of great insights for us today on this on this topic of the American Innovation and Choice Online Act.

Next, we have Katie McInnis who is currently the senior public policy manager in the United States at DuckDuckGo and has also worked at Consumer Reports, The Center for Democracy and Technology, and the FCC. Katie's experience in the industry, impacted by this bill, I believe, will be a great benefit to our discussion today as well.

Next, we have Adam Kovacevich. He's the founder and CEO of The Chamber of Progress: A New Center-Left Tech Industry Policy Coalition promoting technology's progressive future. The organization works to ensure that all Americans benefit from technological leaps and that the tech industry operates reasonably and fairly. So, Adam's work is very much relevant to what we're going to discuss today. I think he'll have a lot of great insights for us as well.

And finally, we have Danny Sokol, Professor Danny Sokol, who's the Carolyn Craig Franklin Chair in Law and Business at USC. He teaches in both the law school and the business school at USC. Danny's written a ton of really interesting stuff about antitrust law, generally, including about this bill. So, also looking forward to his contributions to today's discussion as well.

I'll note that unfortunately, Megan Hunter, who was previously scheduled to join us today, will not be able to join us as previously planned.

So, let's get into the bill and I want to start out with a little bit of context because this bill, Senate Bill 2992, is just one of several current efforts that is, not only domestically but internationally as well, meant to more forcefully regulate what we'll call big tech. So, Amazon, Apple, Facebook, Google, maybe Microsoft. We'll get more into that definition here in a minute. So, I want to ask the panelists, what is going on? Why is there this big push currently to regulate more forcefully big tech? Does anyone want to take that on? Kick us off?

[00:03:30 – Katie McInnis]

Yeah, I'll start. One thing that's happened is that we've seen people on both right and the left of the aisle say that we really need to rein in big tech and they're responding to people's overwhelming concerns about the way that these technology companies have started to impact our lives and have started to undermine some previously conceived freedoms and choices. It's also kind of making sense as far as this media. We've had over 30 years of the internet economy affecting the US, and now it's time to regulate it. Now people are agreeing with the with the lawmakers on this and survey after survey has shown overwhelmingly that the public does want the government to act on big tech and rein in some of the worst abuses. Not only to protect the kind of choices we have online, but also to protect our democracy and protect the kind of freedoms that we have long seen as very close to our hearts as Americans.

[00:04:26 – Casey Asay]

Thank you. Yeah, and one thing I'll note is that this bill has bipartisan supports. Klobuchar and Senator Grassley, Republican, Democrat, are sort of the leads in moving this bill forward. Any of the other panelists want to jump in on that question? Thank you, Katie.

[00:04:46 – Darren Bush]

Sure, I'll jump in. First of all, you know my university requires me to say I don't speak for them and I can actually say I don't speak for anyone but myself. But when you say that there's a sudden push to regulate big tech, I tend to take a historical perspective on that. When you think about the push against IBM in the 70s and the breakup of AT&T and its eventual getting back together in the 80s. You think about the DOJ and the discussions in the 90s about B2B platforms and all of those, and of course Microsoft in the late 90s early 2000s, and you think that maybe this isn't just an isolated incident where people are concerned about big tech. It's part of a larger picture and part of a larger concern about dominance. So, I don't view this as an isolated intrusion into the tech platforms. I think this has been around a while in terms of thinking. And people may not like it and I know the companies do not like it, but the patterns of behavior that we're seeing in those companies is something all too familiar in antitrust.

[00:06:14 – Clark Asay]

Great. Yeah.

[00:06:17 – Adam Kovacevich]

So, Clark had kind of asked why this is happening now and I think there's a kind of a confluence of a couple things happening. First, I don't think there is any denying that particularly big tech platforms have a lot of power. That's just undeniable. And frankly, I think you know in their wiser, more candid moments they acknowledge that truth because I think that is a truth. They're big, they're powerful. They have a lot of influence over what people see and learn, and that's just, that's power that they, I think everybody wants them to carry responsibly. From there, what you're seeing in the last couple of years is that various policy proposals, in antitrust, but also in privacy and content moderation, they all sort of trickled down from what is really, I think, a shared bipartisan anxiety about the power of big tech. I also think there's a couple things going on there as well. First, you know you have this sort of the rise of this neo-Brandeisian movement. Progressive thinkers, like Lina Khan, at the FTC leading a new anti-monopoly movement. You're seeing smaller companies, Epic Games, Tile, Spotify, Yelp, filing lawsuits, lobbying aggressively for action to guarantee their access to what you know, it may be an important platform for them, Apple, you know, operating system. In the case of Apple or Google search results in the case of Google, Amazon's marketplace for others. That might affect their distribution costs or ability to reach people. And 3rd, I think you've seen you know foundations led by folks like Pierre Omidyar, Chris Hughes, funding, amplifying some of this work as well. I do think, though, that there is an important distinction to make here, which is that when you ask people, "Do you have concern about big tech, and ought they, should they be more regulated?" Generally, people say yes, that's generally, you know, every survey I said, including surveys we've done, people say yes, but the details really matter, right? And so, for example, when it comes to this bill, once a poll that we did last year described the impacts to everyday conveniences that people use, Amazon Prime, Amazon Basics, voter sentiment flipped from support to oppose. And so, I do think, you know, we're kind of entering this stage where the tech regulation conversation is moving from "should we?" to "how should we?" And "let's have a debate about the pros and cons of specific regulatory ideas," rather than just "ought big tech be regulated" because I think it ought to be.

[00:08:42 – Clark Asay]

OK, great, thank you.

[00:08:44 – Daniel Sokol]

So. I'll make a few observations. At a broad level I agree with what everyone's said. I'm going to give my own spins. Before I do, I do want to disclose a few things. Number one, though I'm full time at USC, I am part time at White & Case, where there—and previously at a different law firm—I have represented big tech. I've represented companies against big tech. I've represented companies that are tech but not technically under the definition of this bill big tech. So, the ones that aspire to be big tech, which is everyone who's not big tech. Plus industry associations as well.

With that set of disclosures, so, I'll say that there's three big currents. How did we get here? Number one, anytime we're in a period of industrial transformations, we're are part of yet another industrial revolution, there's a lot of anxiety because of technology changing the way people run their lives. And we've seen this iteration after iteration before, only because the Queen of England happened to have

her jubilee, I thought about the prior Queen of England who had who was the most longstanding, Queen Victoria, it's in that period of massive industrialization and displacement of workers from traditional industries. We saw the rise, for example, of the science fiction literature and a lot of the kind of anxiety that we saw in the writing of the great science fiction writers at the time. We see similar type anxiety for a lot of what Katie suggested about broader concerns.

So, there are broader concerns that are not about antitrust. They may be adjacent antitrust, but it's not antitrust. So, I care about deep fakes in elections. So, one thing that, it seems to be the case. It seems still that the evidence suggests that Russia intervened, at least with regards to the Brexit vote. It seems to be the case that there are real concerns about legitimacy of elections around the world. Those are very, very real concerns. These are not antitrust concerns, but there are antitrust adjacent. We have real concerns about "what does privacy mean?" These, again, are very real concerns. They're adjacent interest, but they're not antitrust.

Then we have some of the concerns that Darren raised. Darren talked about actual antitrust enforcement cases based on actual market power. Then we have, you know, what this specific bill looks at and this is where I sort of tease out what Adam meant, which is, it sort of depends what we mean. So, we should all be concerned about the unlawful exercise of monopoly power. We could say that, at least at DOJ, there really wasn't much Section 2 enforcement in recent decades, and we've seen case law shift. In some ways, correcting for bad earlier case law, in some ways moving too far. I think that's the majority position and that's before we get to populists of either the left or the right, we have this bizarre Baptist bootlegger coalition of people on the far right and far left. So, on every other issue hating each other, but on this issue, sort of, coming together in ways that seem very weird. But there's something else, which is a frustration that somehow antitrust isn't solving problems.

Now, are they antitrust problems? Or they broader problems? This is where the devil is in the details. So, how did we get here? There's an overall frustration. It could be either we don't have the right tools for antitrust, we don't have the right resources for antitrust, or simply, in the case of the populists of both sides of the political spectrum, we want certain outcomes and what matters is the outcome more than anything else. And it's just a tough time.

So, here's what I would say broadly, not just in the US but around the world, the center is collapsing, politically, everywhere. And when the center collapses and people coalesce on extremes, we also get much more heated discussion. This had been a fairly technocratic area full of nerds, right? As sexy as the Surface Transportation Board. We're not in that world anymore. All of a sudden everyone is an antitrust expert. Sometimes a self-proclaimed expert, but this is the world we live in, but everyone for the first time actually cares about what I do. I liked it better when I was as boring as the person who did work in front of the Surface Transportation Board, but this gets to, you know, broader, you know, really difficult policy questions that I think are broadly about competition policies.

So, this is called an antitrust bill, but it's actually, in my sense, many of these bills, in fact, they're not antitrust, as we know antitrust law. This is sort of quasi regulatory, which I think we see real regulation elsewhere in the world and that, sort of, is the world we're in right now. Sort of, what does antitrust mean is up for grabs. And I think that's where we are. And this is just one of a number of manifestations of "where do we move?"

[00:14:28 – Clark Asay]

Thank you, Danny, and thank you all of you for your thoughts on that. So, it sounds like I mean, we're in agreement that there is this sort of societal sentiment regarding these tech companies. They have a lot of power which can manifest itself in a lot of ways that some people don't like. Let's get into the sort of boring stuff as Danny might put it, or the devil in the details of this bill, because this bill is sort of responding to the sentiment that all of you have so well articulated. So, I'm just going to read from my notes because I want to make sure I get this right. In terms of who this bill targets or covers.

So covered platforms are those with a lot of monthly users, either 50 million per month, or 100,000 business users. Annual market cap or net sales over 550 billion—it's a lot bigger than my stock portfolio—so very big, well-resourced companies, and that serve as a critical trading partner, which is defined in the bill that their online platform basically has the ability to cut off third party services from those third-party users. Then the DOJ and FTC rely on these criteria to jointly designate who counts as big tech, and that designation lasts for seven years, unless the covered platform successfully gets it removed through a process specified in the bill.

So, one thing I wanted to ask folks on the panel, why or why doesn't this approach make sense? So, one way to go about it would be to specify these are the types of activities we don't like and just prohibit those activities in general. The other approach is what happens in the bill is just to say, these are the types of entities that we don't want engaging in this type of behavior, and we'll get to the prohibitions later in terms of what I think Danny was referring to, as some are sort of squarely on harming the market competition, and some are maybe adjacent things, so we'll get into that. But the first question in terms of, is this a sensible approach in terms of how the bill says who is covered and who is not? Any thoughts on that question from any of you?

[00:17:13 – Adam Kovacevich]

Sure, so I mean, I think one thing it's important to say is that the bill was written after the House Judiciary Antitrust Subcommittee held a series of hearings in 2020, that was expressly targeted at the four big tech companies—Amazon, Apple, Facebook and Google. They wrote a report that didn't target any other companies. They didn't talk about Microsoft; they didn't talk about TikTok. It was very much aimed at you know, identifying concerns that people surfaced about those four companies. So, this effort has always been target driven rather than behaviorally driven. So, I think they investigated the four companies, they found behaviors that some of them disagreed with. And then they went about writing a bill in this definition in a way that was aimed at those four companies.

Now I think in the process of doing it, they do incorporate a couple of other companies, most notably Microsoft. But I do think this whole enterprise of writing bills to capture only certain companies has been highly political. It's also been prone to erroneous lobbying by companies to lobby themselves in or out. Certainly, Microsoft made an attempt to do that last spring when the bill first came out. The first draft included some language, and then it was amended like two or three days later to include language that might, I suspect, Microsoft may believe could help them in the future, although they've said publicly, they think they're covered by it.

Most recently about a month ago, Senator Klobuchar's, introduced a new version of their bill that expressly carves out banks, credit card companies, telcos. I believe that was at the behest of some of the Republicans who had heard from some of those industries saying, oh, we don't want to be included in this bill. So, the bill doesn't ban behaviors for everyone, it takes aim for example, at vertical integration.

But it doesn't prevent Costco from favoring the Kirkland Brand or Walmart from favoring the Sam's brand products. It only prohibits that for those companies. So, I do think that it's clearly a target driven approach. For some people, that's a virtue of it, right? If you're focused on it for other people, I think that's a concern.

[00:19:27 – Katie McInnis]

I'm going to respectfully disagree with Adam's point of view on this. Though the sixteenth month report was looking at dominance in the tech industry, and if you're going to do that, you're going to look at these big four to five or six tech companies. If I was going to look at dominance in the chicken market, I would also look at obviously Tyson's. So, the kind of target driven approach I think is not exactly the way I would portray it, and indeed governments around the world have written very similar reports to what our House subcommittee has written, also looking at these big tech companies.

I will say, though I think that one weakness of the sixteenth month investigation is that they were looking at broad-based platforms and did not, for instance, look at the gaming market which is one area in which Microsoft is a very dominant player, or in the enterprise market which is another area. And I also think that the rumor that Microsoft is trying to be in or out of the bill is a little bit sounded. Especially since they were always within the scope of the bill, and indeed have released their own principles quite aligning with another antitrust bill that gets in a lot of their services the open Apps Market Act, which obviously deals with the gaming app stores that Microsoft controls.

So, I disagree in those two points, I think that this bill is just trying to do what a lot of the governments around the world have been attempting to do in their own ways and fashions. I would just describe and define a gatekeeper. What this bill is really aimed at is big tech companies with critical training partners that have the ability to cut off oxygen to small and medium sized tech companies who are looking just to compete. And indeed, this bill is just going to level the playing field, allowing for what we perceive as the American dream to continue. But for someone with the next big idea to succeed, instead of having to be acquired by one of the big tech companies or forced to kind of give them a lot of data, give them a portion of the revenue just for the ability to compete on their merits and attract new users.

[00:21:29 – Clark Asay]

Thank you. Darren, Danny, do you have any thoughts on this particular issue? Oh, I think actually Darren, sorry I didn't—

[00:21:39 – D. Daniel Sokol]

Darren had his hand up first, so I'll let him speak first, although I do need to disclose something else. Darren has a black belt in Kung Fu, I don't.

[00:21:50 – Clark Asay]

So if there are any vigorous disagreements between you two then I'm putting my bet on Darren, I guess.

[00:21:58 – Darren Bush]

Well, I never make those assumptions. So, we are very comfortable in antitrust with screens and safe harbors, and we do that all the time. And I hate to be the one to say there's nothing new and exciting in

this bill, and we've done this historically throughout time through the ages, with a variety of different interests and parties, but I'm here to say that.

So yeah, it targets folks of a particular size and actually so does the Hart Scott Rodino act when we look at how merger enforcement is undertaken, right? We have safe harbors and collaborations among competitors' guidelines. The reason that this bill targets certain actors is a recognition that those online platforms have a bunch of power. We can dispute whether what we mean by that and whether we mean it in the classic antitrust sense, or whether we mean it even more broadly. And as Danny pointed out, one of the biggest issues that we're facing right now is whether antitrust law has reached to where it had before, or whether the consumer welfare standard—which the Chicago School of Economics brought into the field in the 70s and 80s—has limited it too much. So, the focus on a particular you know, particular platforms or particular sizes is pretty much how it's always been done. Nothing new and exciting there.

It makes sense, since Danny mentioned my black belt, it makes sense to limit people who are bigger, and have greater power in their ability to engage in anticompetitive practices. If I were to punch a five year old, I think I would probably have a lot of people who would be upset with me about that because I am bigger and more dominant, right? Whereas if the five year old punched me with all their might, it would probably not do much damage. I think this bill takes into recognition that you can be a big bad bully in this market.

[00:24:22 – Clark Asay]

Thank you.

[00:24:23 – D. Daniel Sokol]

So, I'll Jump in at this point now that Darren has confirmed that, in fact, he does have a black belt. So, there is something, Darren, I think that is fundamentally different than anything we've seen before in antitrust, and that is the stock market valuation being the function of somehow being connected to a company's ability to restrict innovation and choice online. That is different. It has nothing to do with market power. It has to do with stock market valuation. We've never seen this before. I'd like to understand better, what the connection is to market cap and then why setting this arbitrary limit and actually, if it is this limit, here is one thing that would emerge.

If in fact the law was not passed this year, but would be passed next year, as I understand the law, meta no longer applies as one of these companies that would be covered because it doesn't hit the stock market cap. So again, what is the issue? Is the issue some kind of exercise of market power that should be unlawful? Or is it essentially some kind of big event. This is different. What else is different here as opposed to say guidelines? This is not by an agency, a guideline, this is by legislation. And if it's something that's regulatory again, I'm not against regulation. Regulation has to be well thought out. I've written elsewhere, for example, we need certain guiding principles.

So, what's the scope of regulation here? It's not so clear. The language is not linked to either what we understand with certain words in case law, you know, if the regulation isn't clear, to what Darren's saying, if Chicago school and post Chicago Economic analysis is really fundamentally about tying outcomes to some kind of economic analysis, and here I focus on the economics rather than the legal

application of what Chicago school means, is the regulation clearly pinned to objective economic outcomes? That's regulation that tends to help.

And it's not just here, it's in any number of other areas. There are certain other dirty words outside of interest called cost benefit analysis, but there is a similar theme to cost benefit analysis. I'm not saying that we try as best we can to make it objective across a number of factors, right? And what's missing here is that once you're covered, that's it. It seems to be the end of competitive effects analysis. And to a certain extent it means certain kinds of blanket rules, sometimes it covered some companies in their business models, but every company and their business model, even among the larger companies that have different ways of value creation and monetization, and to a certain extent this is not quite what we know. Empirically, there are some roughly 800 empirical papers in the platform literature and A journals, so this would be for example, the Utah Dallas list of top journals or the FT 50 list of top journals. And if you look at those papers, the majority of papers show, again to the extent that empirical work is very specific to certain factors, the majority of the work first of all is not in economics. It's in strategy, in information systems. It's in marketing a little, and a bit in finance. Econ isn't more than 15% of these papers, most of the Econ work is fascinating—how do we look at different sides of a platform and pricing? But that's literally 15% of all papers.

What we know economically and empirically is, there tends to be more value creation than anti-competitive effect. So, regulations should be based on what we know, and actually there's quite a bit we know over the last 20 years of empirical research that didn't get put in. If you look at the House report, they don't mention any empirical work. Certainly, I look and I think anytime people have work and they're pushing an agenda, it's like law professors or a lot of journalists—there's an outcome that they know that they want, and they cherry pick examples, and it's whatever sort of supports their position and that they push harder than what it might make their position look weaker. But when we regulate, or even when we're doing a true antitrust type analysis, there's complexity and we haven't really addressed some of this complexity, and sometimes we have unforeseen consequences. That's what troubles me about the bill. If someone could explain to me the market capitalization, I'm all ears. But I haven't heard a defense of “why market capitalization”, for example.

[00:29:57 – Katie McInnis]

Danny, I have a couple follow up questions. It seems to me that the definition of gatekeeper or cover platforms and those bills is just an effort by the legislators to kind of define the market of what they're looking at as far as dominance for these activities. So, to me that seems very helpful. In addition, I obviously agree that the bill is in itself a legislative effort and not an agency driven effort, but the bill does give the FTC and DOJ, in addition to designation of these core platforms—which is not forever, it's only for seven years—does give them the ability to do that designation and also create enforcement guidelines jointly, which I think you know is a nice common sense, sort of middle of the road way to advance any sort of changes to our market.

And then third you mentioned empirical analysis with regards to the 16th month investigation that the House initial subcommittee underwent. I'm not really sure what you mean by empirical, I think you're talking about economic analysis and I'm not familiar with those papers, but what they did show is how these gatekeeper companies have changed their policies or affected effective changes in the market that led to other companies losing money in the market, losing the ability to compete. For instance, you know you have the example of Apple stealing the IP for Tile, which Tile testified about in Congress.

You have examples of both at both App stores bullying people on their on their App Store frameworks, which is indeed a little bit outside this but has a lot of overlap with the OpenApps Market Act. And even the company that I work for DuckDuckGo can show a 10% drop in user acquisition numbers just based on solely on a pop up that Google has been instigating on Chrome. So, to me, obviously these aren't in economic analysis to say like we have regulated here and it led to this. But there was indeed a huge amount of innovation following the Microsoft decision, that Darren referenced earlier, in the late 90s to 2000s that led to the rise of some of the dominant tech companies that we're dealing with today.

So, I see that as we made the point several times, enforcement under the Sherman Act has been a little lax. As we all know, that's up to some of the political feelings of the moment. Whether or not the administration sees this as a priority, what this bill is doing is basically defining a bunch of activities which the DOJ has enforced against in the past. In addition, with the Microsoft case and saying that we are not going to tolerate this at a certain level dominance. Here's the market. Here's the kind of gatekeeper power we're talking about, and FTC and DOJ, please craft some guidelines and enforce. I think that that's a kind of a middle of the road way to go forward. Even though we can quibble about whether we should be following the Chicago School of the NEO Brandeis Ian School of Antitrust Enforcement, I still think that these kinds of rules are trying to effect changes in the market so that we have a more level playing field and thus will have more innovation in the market generally.

[00:33:10 – Clark Asay]

Anybody else want to jump in on that? Thank you all for the insights there. I do have one question from the audience that relates to this question. It's about the likely, so what's the likelihood of consensus between the DOJ and the FTC on, you know, designating which companies fall within the law, the law's ambit, because FTC and DOJ, they're different bodies and obviously have, in some cases disparate incentives and things affecting them. The question asks, we see occasional disjuncts between agencies and who gets to review a merger under the HSR Act. Are there any similar dynamics that we would be worried about here in the context of this bill? Darren, your backdrop is a yellow ceiling and the hand is also yellow and I keep missing it.

[00:34:21 – Darren Bush]

My bad. This was remodeled after the great freeze. Regarding the HSR Act, I've been involved in a couple of those battles myself when I was at the DOJ. The whole point is that we want to take a look at some industry in some matter, and there's some overlap and we have to find out who wants to have that. That's a different policy question than whether we can agree on tech platforms. And I would imagine over, you know, there have been times in the history of the FTC and the DOJ where they greatly disagree about things, and the DOJ has had a reputation of intervening in FTC cases before—in filing amicus briefs and doing all sorts of fun things to disrupt. But I think in the current climate, with the current appointees, I think you will see the DOJ agree with, you know, maybe three of the Commissioners. So. I think there'll be some good agreement there.

[00:35:33 – Clark Asay]

Thank you. Adam did I cut you off earlier or? Were you going to jump in?

[00:35:36 – Adam Kovacevich]

No, I didn't have a lot to add on this, but I do think the fact that the reality is that I don't think there's going to be a lot of disagreement. I think the fact is, if this bill were to pass, I hope it doesn't, but if it were passed, I think you'd see the majority of prosecutions against the four big companies. I don't think you'd see many prosecutions against Microsoft and Tik Tok because I think most of those will be driven by politics. And that's just where most of the political focus is right now.

[00:36:05 – Clark Asay]

Great, thank you. So, let's get into the—

[00:36:07 – D. Danial Sokol]

One quick moment, so actually I'm inspired by some other work that Darren has done, really focusing on politicization of the agencies and Darren, particularly I think of your work in terms of what was passed post-Watergate to review DOJ. Remember this is not self-preferencing on preferencing somebody else on the platform so it's OK. I think one thing that Darren has noted in his work and this is a way to get Darren to give me his census, normally we had judicial review of the Department of Justice because we were concerned about increased politicization of enforcement and really, were they doing the right thing. And I think what we're seeing now between the agencies is different than what we've seen before, so I can't think of a time, at least in the last 50 years, where we've had as much executive Agency influence in the Federal Trade Commission than we have today, that's different. And in terms of outs, and certainly this was true when Darren was a staffer at the DOJ. DOJ liked to think of itself in its own little world, both on criminal matters where it just behaved differently than the criminal division and on just antitrust enforcement. It just was like a little island unto itself, so think of the Galapagos—it's developing its own separate beak, if it's a Finch.

We're seeing much more, the new system would be integration, with the main DOJ and with other parts of the executive branch that I don't think we've seen before, and certainly much more influence of the executive branch into the FTC. some people say great, we're seeing uniformity. But I'm not sure that this is the kind of politicized world that we like. You know, I think of the cases that inspired some of Darren's work, like Nixon and ITT. I see this as generally not a happy place, and so when the question is asked between DOJ and FTC, "What would enforcement look like?" I think the answer is political. And again, in a world where it was less political and certainly less political than other agencies dealing with economic regulations, say FCC, or the FAA, or any number of the 8 different financial regulators that have either unique, overlapping, or gaps in enforcement relative to DOJ? I'm not sure that this is a good thing and I'll just leave it at that. And see if Darren, who's writing has inspired me on this, either thinks differently or the same.

[00:39:13 – Clark Asay]

Katie and then Darren I see your hand.

[00:39:19 – Katie McInnis]

I think Darren was first.

[00:39:21 – Clark Asay]

Oh, OK. Go ahead then.

[00:39:25 – Darren Bush]

Well, I feel little baited so. So, look, I'm going to say something that has gotten me in trouble, often when I give talks and the answer is antitrust—

[00:39:36 – D. Daniel Sokol]

No, but the but the disclaimer is you have tenure, so it's OK.

[00:39:41 – Darren Bush]

Right, I mean I could. Yeah, I'm thinking I can kill students and that's fine. But uh, so antitrust has always been political. It's always been political. We can go back to, yeah, Danny mentions the Tunney Act, and the reason for the Tunney Act, you know the issues, the scandal with ITT. It's all in the game and that's part of the reason why the size of the platform matters. Microsoft started to directly influence whether the DOJ's trial budget, when I was there, it was seeking to do that through its senator, from Washington. We've had that happen before. We've had political influence in both Republican and Democratic administrations.

I'm very fond of the airline industry as Danny knows. And we've seen some massive cases abruptly halted due to political influence, so I'm not as concerned that this political influence is any different. I suppose what Danny is suggesting is because of the friends the Chair keeps now inside the White House, that there might be some dialogue taking place. But the FTC is always engaged in dialogue with the administration and is always engaged in dialogue with the DOJ. I've certainly been in meetings where we've had interagency cooperation and discussions. And the President gets to appoint, gets to nominate, and get confirmed his nominees for the position. So that's not any different than it's always been, so I don't think it's any more political than any other time in life.

And by the way, it's not like the courts haven't engaged in that politicization, and this is a bad time to mention this, but one recalls when the DOJ was litigating against Microsoft, Judge Kollar-Kotelly in her settlement order cited September 11th as a very good reason for the two parties to settle because she was unsure whether the economy was going to collapse, right. That's how dominant Microsoft was at the time. So yeah, I think this kind of ties in the two questions. Why are these platforms being targeted because they're so large and the answer is Danny is right, they are very large. They have a tremendous impact that no one else has in the economy. And that will lead to some politicization, but it's not different than what we've had in any other industry.

[00:42:34 – Katie McInnis]

Yeah, I agree with the Darren's points. You know he mentioned the appointments that the President makes the FTC and other agencies we saw the politicization of those appointments really hang up, kind of the regular business of the Federal Trade Commission for many, many months while they're waiting on a full bench. So, this has always been a weakness of enforcement. But we've seen some interesting cases brought recently. I know that we've mentioned cases brought by companies against the big tech companies. But there's also been the case that under the Trump administration, the Department of Justice instigated a case against Google. That was obviously a politically motivated decision, and one that we weren't sure if the Biden administration would endorse when they came into office, and luckily, they did, so that was great and well written complaint.

So, there's always been a weakness with our system here. I think we'd like to think that we have these kinds of objective arbiters both in our agencies and in our judiciary. But you know the judiciary is not apolitical either. We've seen over the past few years a number of judges appointed to the federal bench for lifetime appointments that do not see the Chevron doctrine, which is a doctrine of some sort of deference to the agencies, says something that's necessary going forward. So that's kind of hanging up our agencies in general to enforce the markets.

I think someone also mentioned how we have a number of financial regulators who are bringing "apolitical cases." Well, we've seen the Securities and Exchange Commission, for instance, do some actions recently that are highly political and will likely lead to further degradation of the Chevron doctrine with regards to that agency, as we've seen with the FTC as well. And so, I think this is just a wrinkle of the system that we have to proceed with, but you know, we often compare ourselves to other nation states, other groups like the EU. One thing that the US does exceedingly better than the EU is enforce our laws, and so I think continuing to have a robust history of enforcement will be important here. And allowing for more guidelines for not only the judiciary but also for the agencies kind of take actions against these big tech companies that are abusing their gatekeeper power will only work in our interest.

[00:44:49 – Clark Asay]

Thank you. So, we haven't gotten to the substance of the bill yet, which I think we will. Let's talk about that. So, we've talked about sort of this context, who this bill regulates, now let's talk about what it would do if enacted. There are 10 prohibited behaviors from covered platforms. Several of you in your comments have mentioned the self-preferencing provision, that's I think one of the most talked about. There's been a lot of buzz recently about how some of the provisions might affect content moderation by these platforms. There was an op-ed from several prominent law professors in the Washington Post saying, you know, content moderation would be very difficult for these platforms. There was a response and in Wired saying you know that's actually not a credible concern. So, I just want to open it up to the panelists. Which of these—we're not going to be able to cover all of them—but there are 10 prohibitions for covered platforms. Which of them do you think are the most important and why?

[00:46:05 – Katie McInnis]

So, Danny mentioned earlier in this discussion that there's a lot of sort of ancillary concerns that surround or touch on antitrust, but are not exactly antitrust concerns, and content moderation is one of them. So, this bill does not at all effect section 230, it's just requiring the non-discriminatory enforcement of platform's terms of service against users, business users, I should note which is not the same thing as an individual user and so will not touch content moderation or section 230 in this sense. But that is another underlying concern just like privacy and security that has not been addressed in the past 20 to 30 years of legislation and is being brought up again because there are other ills in this market that we have not fixed.

Regarding which section I think is most important, one of my personal favorites is 3A4, which prohibits gatekeepers from barring groups from interoperating with services on their platforms. That's particularly exciting to me, because for a long time our computers, our desktop computers, our laptops have been highly interoperable. But more and more our new devices like phones, smart speakers, etc. lack that

interoperability and that is really hampering the kind of choices that consumers have in the market, and the kind of choices that consumers are making on their own.

Another one that works very closely with that is the bar against companies named barriers in place for users to change their default services. I really see those two as working together to allow people to be more innovative with their services that they're using on their phones and devices. And also kind of use these devices more to their own wills. We own the phone that's in our pocket is a very personal device that's with this all day long tracking us as we go, but yet we're not allowed to kind of download whatever software we want, but we can do that on a laptop.

One of the things that this bill would do along with the open apps market out is really break open that system and also allow for other companies like Sonos etc. to interoperate with the big tech company services in a way that's extremely helpful. And I for one can't wait for a day when I can use a pair of wireless headphones and have it pop up immediately on my phone without it being a product that was bought from the phone manufacturer. That's the kind of interoperability that I think we all want and has been barred purely because the big tech companies have been permitted to abuse their status in the market.

[00:48:32 – Clark Asay]

Thank you, I think Adam I see your hand.

[00:46:35 – Adam Kovacevich]

I think the way to think about what this bill does fundamentally is prohibit the big tech services from vertically integrating products. The key provisions there are section 3A1 which prohibits self-preferencing and the provision 3A2 which prohibits services from limiting any other competitors' services either.

And so the way I like to think of that is, if you go buy a car today, that car comes with windshield wipers, car radio, seat warmers all included, and that's to the convenience of the consumer. If this bill were to be applied to the car industry, the prohibition on self-preferencing would prohibit the car manufacturer from including any of those services, those features. Because doing so would be disadvantageous to the aftermarket sellers of car radios and windshield wipers and seat warmers. Again beneficial for those suppliers, I completely understand why many suppliers like this bill because it does benefit them. But for the consumer who likes the convenience of the vertically integrated product, this will be a negative.

The second part though, the section 3A2 limiting or prohibiting big services from limiting anyone else's services, I think leads a lot of people to conclude—Randy Picker had a very good post on this recently—that one likely scenario is that you have nothing pre-installed on a new iPhone or Google search result, or that you end up with endless ballot screens, right? Europe has tried to implement these ballot screens in the Microsoft case and the Google shopping case, and there's all these negotiations about who should be included in the ballot screen. And so you imagine a scenario where you do a Google search and then you can say, OK, well, who do you want to be your map provider, and who do you want to be your shopping search provider? Again, for those competing services of local search, say Yelp for example, that's a plus, that's a benefit that they want. But again, for the consumer who just wants things to work seamlessly, I think that would be an inconvenience. And also you know consumers today don't

have any barriers to reaching competing services like Yelp. They're just, you know, just navigating to that competing website or app.

But the third thing I just want to highlight again is section 3A3, which prohibits the big tech services from discriminating against what's called, similarly situated business users. And this is the provision that many groups, Free Press Center for Democracy and Technology, and a number of academics have highlighted as having an impact on content moderation. That provision, I think was there to help services like Spotify and Epic games, who have their own apps, who feel that the platforms have hurt their apps. But the way that this similarly situated business users' language is written, I think has been identified by many of these experts as also threatening. For example, Apple's ability to keep the Parlor app off their service or AWS you know, to keep Parlor off their service, or Facebook's ability to keep Alex Jones Infowars off their service. And this shows, I think the perils of attacking discrimination, right? Because sometimes we want services to discriminate. We don't, most people don't want Apple or AWS to be required to carry Parlor, right or hate apps, and I think the proponents of the bill, the sponsors, have kind of just denied this, and frankly, they've been pretty explicit. They, the Democrats who've been for this, like Senator Klobuchar, have said that they will not fix this because doing so will drive away the Republican co-sponsors of this bill, like Senator Grassley. Him, Congressman Buck, Senator Cruz have all publicly said that one of the reasons they like this bill is because they think it will limit the ability of the big platforms to engage in content moderation.

We can debate the specifics, but this is a motivator for the Republicans who are supporting the bill and so far the Democratic sponsors of it has been just sort of in denial of that fact, or they don't want to disrupt what they sort of value as this bipartisan agreement.

[00:52:42 – Clark Asay]

What about what Katie references: the Communications Decency Act, section 230, in terms of content moderation because it does provide immunity for you know, platforms and removal of content, and this bill you know, talks about material market harm. So it seems to be the focus is you've got to, you know your sort of enforcement of these terms of service in a discriminatory manner also have to result in a material market harm. Does that provide sort of a cover for the platforms? In terms of, you know, removing misinformation or other types of objectionable content.

[00:53:29 – Adam Kovacevich]

I really don't think it does. The fact is the bill's term material harm to competition is an essentially new term. It's I think written deliberately to be a prospective alternative to the consumer welfare standard. And it's not defined, and the fact is, I think there's ample room under this bill for a Parlor to find a conservative State's Attorney General to file a case against Apple or AWS saying that they're, you know, kicking parlor off of the App Store and AWS hosting, was in fact an attempt to snuff out a nascent competitor. I'm sure that that argument will be made, and there's nothing really in this bill that prohibits that. And in fact, the language I think as many people, many academics and again organizations have expressed a concern about. I think the only reason this hasn't been changed frankly, is because if Senator Klobuchar changes this, she loses the Republicans who are on the bill. And that's not something she wants to do, but it is a problem for attracting more Democratic support for the bill.

[00:54:42 – Clark Asay]

Thank you. And so I mean going back to both Katie and Adam's early comment, I mean both of you sort of articulated a different type of consumer, right in terms of how this bill might impact one or the other. On the one hand, I think Katie's consumer is one who wants to make you know have more choices or make choices about which app to use, how to use it, what to put on their phone, their devices. Adam's, I mean, one of the consumers you are or the sort of the prototype you articulated someone who benefits from the curation of these tech companies provide in terms of the devices and services. And so is there like I guess what I'm wondering is, is there a reconciliation to be made between those two sort of prototypes of consumers?

[00:55:38 – Katie McInnis]

I think so. I think for a long time you know big tech companies have been acting rather paternalistically saying, "Here we're going to present you with the best options. Don't worry about whatever is in the market." That might have been more appropriate when we were all kind of new to having these very smart computers in our pocket following us around all the time, but I no longer think that that's appropriate. And indeed, these sort of choices that Adam mentioned, the ballot boxes of choice screens, that's not new either. We had that as part of an ordered remedy in the Microsoft case in the 90s to 2000s to just present users with an easy choice screen to change their default browser to another. These kinds of choices have been presented for a long time on laptops and more traditional computers.

But now that we have a tinier screen with a more controlled ecosystem, these choices have been kind of divorced from consumer control, and indeed companies have been able to say, "Look, we know better than you. We're gonna put these apps on the phone. You're gonna really like them." And they've benefited from network effects and thus had really successful services. I'm not denying that they're useful, but the market has caught up and there are other options available to users and indeed options that are able to compete on privacy. Of course, I work for a company that is an internet privacy company that is working to try to make privacy simple and easy for users, and so allowing users to easily switch from a very, you know, surveillance tech browser like Chrome to another browser that's more privacy protective like DuckDuckGo, Brave, or Mozilla Firefox, should be easy for the user. But the big tech companies have put in multiple barriers to prevent users from making that easy switch.

So, I think that it's time for us now to put control back where it belongs in the users' hands. And there's been a lot of fear mongering about users being able to download software on their devices, but we've been able to do that for a long time on computers. I don't see why the discussion is so different when we're talking about our new smart devices like our phones or speakers.

[00:57:45 – Clark Asay]

Great thank you. Darren, I see you.

[00:57:51 – Darren Bush]

So, I'm going to tell you a story. It's going to be very short. And the story is that economists do not like regulation and they have convinced everyone that regulation is bad because we'll always make things worse through regulation than through market competition, despite the fact that we always have some rules to the game. What they don't tell you is we've done this with many different industries over time. If you look at electricity markets, electricity markets are now a thing today because we have nondiscriminatory access to transmission. We have a regulator who overseas that and that's something

that tech companies certainly do not want. And we do so because jet electricity companies will self-preference their generation in their transmission because they are vertically integrated. One confronted with this, they said, “Well golly, if we could have these competitive generation units the system will melt. It will blow up. Bad things will happen.” Right, you won't get two-day delivery of electricity. So those kinds of concerns followed in electricity, natural gas, we've had the similar issues with railroads, we've had the same similar issues with airlines in terms of these, what antitrust people might call essential facilities.

And so, the remedy here is one that is age-old. Instead of having regulators assure that those platforms are nondiscriminatory and Open Access, we have a statute. And yeah, the standard isn't consumer welfare standard, but neither are they in these other markets, right? Market manipulation was one standard. Just and Reasonable on the Public Interest was a standard. So, these are not new problems and the whole notion that this is some exceptionalism and this is something brand new that, you know, has never been done before is false. And in every single instance people have said that these, you know, if you bias against self-preferencing this system will fall apart. That defense is not new either. These are old remedies. These are regulatory remedies that have been tried and true and work.

[01:00:31 – D. Daniel Sokol]

I know that we're basically out of time, but I do want to quickly say two things. Number one, digital platforms are not essential facilities, they operate differently. But I do want to throw in one other part of the—into the mix of what, you know, what part of legislation is interesting from my perspective. Number one, I did a set of PowerPoint slides for The Progressive Policy Institute outlining some of my concerns. It's PowerPoint, so it's easier to look at than an actual piece of writing, so that is myself preferencing, sorry about that.

But I actually want to focus on something else which is the language of the affirmative defense is if the defendant establishes that the conduct has not resulted in, and would not, result in material harm to competition. That “would not” language puts the burden on the defendant to prove that wouldn't happen in the future for seven of the 10 different conducts. That includes, as Katie suggested, interoperability, data sharing, ban on conditioning access or preferred status replacement. You know to me that destroys Prime’s two-day delivery commitment if Amazon can't ensure that non users of its fulfillment services can meet the commitment, and a ban on treating products and services or lines of business cover platforms operate more favorably relative to the other business unit, that's the other language from the text, in search results. That to me, is also troubling as to what the affirmative defense means. Again, we don't know, Darren, what material harm to competition means. I'm concerned about that, it's not a standard in antitrust case law. I'm just troubled at that. I know we're basically out of time, but I do want to just leave you with those thoughts specifically, thanks.

[01:02:37 – Clark Asay]

Thank you Dan. Yeah, and we unfortunately we don't have, maybe fortunately for you all, but we don't have 3 hours to sort of delve into the rest of this. There's a ton there. As we're just mentioning the first 3 prohibitions include this term, a requirement of material harm to competition, the following seven do not. Although there's a defense to any of those seven to say well for, you know, one of these big tech companies to say, well there was no material harm to competition. But it's right, we don't have a

definition of it in the bill. It may be something that if this bill passes, will almost certainly be litigated and sort of defined over time.

I just want to thank all of you for joining today and taking time out of your very busy schedules. Some of you from vacation to contribute your insights to this discussion. I think it's a really important one, and you all have contributed some really valuable insights, I think for our listeners. So thank you very much and stay tuned for more from BYU Law School on this topic, as we hold additional events and webinars on the future of antitrust and where competition law and policy is going. So, thank you very much and until next time.