Antitrust Matters Episode 1 Transcript

Jeff Shinder ([00:08](https://www.rev.com/transcript-editor/Edit?token=Xjv-HujnsWVC-KWQ2S0pNPj9ZXcCsYx5Ku-loVWa44SVDsfzQMlJ11u5Ko0-sXIfnHzzu_5oTagW-3tGnp9zyFPVKXU&loadFrom=DocumentDeeplink&ts=8.12)):

Welcome to Antitrust Matters, a Constantine Cannon podcast where we have engaging and timely conversations about competition policy in the digital age. My name is Jeff Shinder and I'll be your host. Antitrust has always mattered to consumers and businesses, but today, it is also in the public discourse more than ever. From how we get our food on our plates, to how we travel, to the way we interact daily using digital apps and platforms, antitrust touches each and every one of us in ways we may not even realize. In Antitrust Matters, we bring you perspectives of experts and visionaries in the field who discuss where antitrust law has been, where it is going, and why it matters today more than ever before.

Jeff Shinder ([01:03](https://www.rev.com/transcript-editor/Edit?token=NN0KnegdRKb8LWc9TEeMGpVn7V-r3iJRNEK0Pn04emrKHOL7-BsNnmn79ANgMFbbEBCbvTxkRP63WwKiVqLS1yqMaEY&loadFrom=DocumentDeeplink&ts=63.4)):

In today's episode, I am joined by my partner, Taline Sahakian, and we talk with antitrust professor par excellence, Harry First from New York University about why antitrust matters so much today. Hello, everyone. We are now embarking on our inaugural podcast of Antitrust Matters where the operative theme is that antitrust really matters in this moment in time. Antitrust has always been important and has taken on especially heightened significance, and I'm grateful for the participation of an old friend and a professor who taught me antitrust as a student in the early nineties, truly one of the best professors and teachers of antitrust that I have seen, professor Harry First. Welcome Harry. Welcome. You get the gold star as our first guest.

Harry First ([02:05](https://www.rev.com/transcript-editor/Edit?token=QjNuv8w8gpsmKh8MxR3OPKu9cw0dH8JRl2wbUnViRbQiK9B-gU5jK8trH-hDjFCTCVheClgIpsGneu_hZYjguTqTRpc&loadFrom=DocumentDeeplink&ts=125.6)):

Thank you, Jeff, for the kind words.

Jeff Shinder ([02:07](https://www.rev.com/transcript-editor/Edit?token=Ts6mIdijaguV8bJQrA9ILApNNv20sfPCtSuaEYGd-RmL3mdbtHY_EJyZT9WiYsGxepyTaI_jQVp5tM0ZPKxv0t0b0ek&loadFrom=DocumentDeeplink&ts=127.7)):

And I'm joined by my colleague Taline Sahakian.

Taline Sahakian ([02:13](https://www.rev.com/transcript-editor/Edit?token=NBXrtV0gBBTQguSwl5ZCSGtswMX_-eDSxbSX1XVZeyY1DIqGVbThpuwHFz3ti0HYUW-nP_eny74hF4ZxK_0c5WtSdC4&loadFrom=DocumentDeeplink&ts=133.25)):

Hi. Hi. Very nice to have you.

Jeff Shinder ([02:14](https://www.rev.com/transcript-editor/Edit?token=6kixIlfNUwxcEWbF8Yj6jiWNeG8gGllfU0j0GZPr1NofOOxkXzYxtRn25x6WPcagdDOc8yehfJF7-DJY88lvBsVWIRM&loadFrom=DocumentDeeplink&ts=134.3)):

And Taline and I are going to talk to Harry. So Harry, if you could, situate for us this moment in time that we're in, in terms of the history of antitrust and what it might mean going forward for antitrust.

Harry First ([02:34](https://www.rev.com/transcript-editor/Edit?token=5O3_J4Bp4LzwsVlZ-sTYXthNNsKboYyAjJw8H3kEPpjjnxdC4AWbOqzem0r1LDjavADzFnSL9yJ_49qRWN0ms-nQxPY&loadFrom=DocumentDeeplink&ts=154.02)):

All right. So Jeff realizes and knows that I've been teaching for a long time even before Jeff was a fabulous student. So I go back a bit, so I want to start out the conversation even a little further back from where I started in antitrust because I want to sort of capture the moment that we're in, and a lot of the moment that we're in has been a focus on big tech, but I hope, Jeff, that we talk not only about big tech, but other aspects of why antitrust matters, not just to the major companies, but in general to how the economy runs and the opportunities entrepreneurs have, and to consumers and the prices they get, but we can talk about that as we go along, but to situate the moment that we're in, I want to go back to 1962.

Harry First ([03:30](https://www.rev.com/transcript-editor/Edit?token=tx-cLRU73Uo9WK7yNK3ibXTgEJN9eT02Ng72qaJhM_gwmiWKxAnQNtk9LmbDDzz1u5fcrMoQvLXSDMmJ_I8MI3HaeT0&loadFrom=DocumentDeeplink&ts=210.34)):

Everyone remember what they were doing in 1962? Don't answer that. I never asked my students that question because they say, I remember what... No, of course I don't. So that's the year that there was a guy by the name of Licklider, who was a psychologist and engineer, and he came to Washington to the Pentagon to head up the advanced research projects agency, which was then known as ARPA, later as DARPA, defense advanced research projects agency, and one of the ideas that he had was to net together some computers. You had these big mainframe computers and they sort of operated all on their own, but he had this idea of netting them together, somehow putting them all together, and from that and a lot of effort, of course at DARPA, developed the basic idea and the structure of the internet.

Harry First ([04:24](https://www.rev.com/transcript-editor/Edit?token=G5Q5gj0PZ6mYMjXrNE6-kciFaTMRE3TMOlJohi5_CRPBKPaapkJUhN9RYZuj6OnMfpGeWw8uDAIJJj2BT4b9Y5iyGvY&loadFrom=DocumentDeeplink&ts=264.24)):

And there were two key features that engineers designed into it. One was that messages wouldn't go directly from this like in a telephone from one person to the next and be switched. They'd go in packets around the internet, they'd be distributed. So it was a decentralized technology, and the second is that the kinds of messages that you could send, that the system wouldn't be set up to favor any one particular kind. So it was sort of agnostic with regard to data and basically, what people say is this set up the structure of disruption. This allowed for entrepreneurs and inventors to use this system that was just designed. Their first message was lo, meaning hello from one academic computer to another.

Harry First ([05:24](https://www.rev.com/transcript-editor/Edit?token=TnKYQEX57uBgZnn6Sia-vcudaHJggFVbnFqXgeq8wE1JSAIPygPuC9CPjlzMDaakRKCRMLEHfrQlqhn_wCuWEo0bDZc&loadFrom=DocumentDeeplink&ts=324.84)):

That was the first message. Unintended consequence of all this was to disrupt numerous industries, and you can think about it from publishing, music, entertainment, now money, all disrupted by this technology by what I like to think of as the internet of change. Now it's our turn in antitrust for disruption. So we always, all of our models were developed. The models we're basically using developed in the fifties, the idea. We're thinking the steel industry, hard goods, you know exactly what the inputs were, what the outputs were. You knew what the goals were of the sellers. Everything has been changed by this, and to me, what symbolizes that change is that in 2017, a third year law student wrote a note in the Yale Law Journal. It was called Amazon's antitrust paradox, and that was Lina Khan. Four years later, she's chair of the federal trade commission and being interviewed in the New Yorker, profiled in the New Yorker.

Harry First ([06:33](https://www.rev.com/transcript-editor/Edit?token=glnJf5Jb6rKcUczj9p22Pba7zsIPhotoIHoxunQSQjXIfKEVyC61BO330-RIpR4hPyXXogxjksPTgoteaK51iFHNTFg&loadFrom=DocumentDeeplink&ts=393.27)):

The people who had been in charge of antitrust, who has been their life's work, let's say me, had lost control of the narrative in a way. We've all been disrupted and we don't really know where the disruption's going to go. A lot of questions about that and we can talk a little bit about what we might predict, but one thing we can predict is the old models, everyone's going to have to try to figure out how to use what we've done in antitrust and apply it to just a radically different economy, and that's going to be a challenge to all the doctrine we have, to the way we do things, and to the people who have basically been in charge technically of this very interesting field, but they're not being profiled in the New Yorker. It's Lina Khan being profiled in the New Yorker, and that's really important. So how's that for start?

Taline Sahakian ([07:31](https://www.rev.com/transcript-editor/Edit?token=NNFa_xrlvTAkjaOqK7xEYGtMp4QjN2Qg2aMc1Lcae8m6p69SSO3Ll_amjjM-s5gANZJcs11xAcWxkWrNjjCfAT2bSrg&loadFrom=DocumentDeeplink&ts=451.86)):

That's good. So can you think of another time in the history of antitrust in the US where you've seen this much kind of interest in antitrust and not just interest from academics, but the public and everyone?

Harry First ([07:49](https://www.rev.com/transcript-editor/Edit?token=0nZyeCPSqceSe1budnWqR-O-jeik8s5P9i5w5mlKyf6vqFL8Wthk3YqrKdNh9NGohtBggx1vaGFedsEqr7pTn2lq2v8&loadFrom=DocumentDeeplink&ts=469.43)):

No. So no, I really, I can't think of... People in antitrust who have been handling what has been called the antitrust enterprise have always wanted to be politically salient. We always wanted this to matter. Some people say, we've always wanted to be able to go to a cocktail party and when we say what we did, they would glaze over and spill their drink on us, that sort of thing. Now it's happened. We've sort of, we've chased the bus for all these years and now we've caught it. Don't really know what to do with the bus. So I don't remember a time that's been this busy, active. I taught a seminar on cutting edge issues in antitrust and it was like teaching... Well, first of all, I taught it out of the newspaper because there's always something every week.

Harry First ([08:41](https://www.rev.com/transcript-editor/Edit?token=ZUA3AsORFNrb4CU984RAfQ6op3dHuwtrMT92tgjLJLYNhtPFwzfwOp4IjUpPcNCAkrs52opdof2IIxBRA9yq3RqW3aM&loadFrom=DocumentDeeplink&ts=521.26)):

About the exact thing I was interested in talking about and it was like drinking from a fire hose is the expression. It's just been constant and it's still going on and will be going on for a while. So I haven't seen... Another way of putting it is that it's been a while since I've had a waiting list for my seminars, even though they know, as Jeff said, that I'm just a fabulous antitrust teacher, but people are really interested in it, but what we've also realized in losing control of the narrative is people think about it differently. People don't even think about monopoly the same way as antitrust lawyers do and it's hard when you've built up this analytical structure of how we deal with it in economics.

Harry First ([09:29](https://www.rev.com/transcript-editor/Edit?token=deQv6joL5dwQvK3xpT3m3OA1mRETGjCDGhohSovhsyF88DspVhav4kvZGtZqF2E7vDvhzgoyViAJYrvOpgJ0-Le8zxQ&loadFrom=DocumentDeeplink&ts=569.64)):

And all of a sudden, people are saying, well, Amazon's a monopoly and you go, well, no, no, Amazon's not. Tell me in what market Amazon's a monopoly, and they just look at you and say, give me a break, and this came out in Judge Boasberg's opinion in dismissing the Facebook complaints and trying to figure out what the product market. He says, everyone thinks they know what the market is from watching the movie The Social Network, but that's not how we decide what a market is in antitrust in the law. We have a different way of doing it, but he's wrong because that movie helps to shape what we think social networks are and it's just a different process than we're used to, I think. So the basic terminology and the basic concepts that we've used are all in a way up for grabs in particular areas, not in every area of antitrust, not for price fixing. That's still relatively stable, although not completely.

Jeff Shinder ([10:32](https://www.rev.com/transcript-editor/Edit?token=Y8M3h8pIXqSEZ4nrQz_MrbpCq0fRlP42B2o7nm0sGAey7kCdrfI1z49fqCRXvyBd8yDyGzChOLNI5YyyrVbdBjImuuM&loadFrom=DocumentDeeplink&ts=632.48)):

So Harry, let me jump in and go back to losing control over the narrative, and you mentioned the internet and it's power to disrupt. So the internet has been around for a while now, going on three decades, and it's disrupted, as you noted, scores of industries. So the question is why now is antitrust in the crosshairs, and I take your point about Lina Khan and her significance and she's now chair of the FTC. That's an extraordinary achievement, three years out of law school, but let's take this a little deeper. Why now?

Harry First ([11:16](https://www.rev.com/transcript-editor/Edit?token=8xiCNSQMPhbkfamZ5OIUPio-6hOwlYCSBAYuPQ6KW2CpJyXBRKhVdY5sX_1iiAd-oyrgiVTRr5wUJ-bAj2IdqgRH4uc&loadFrom=DocumentDeeplink&ts=676.83)):

So what the internet served us up was these, I mean, it's really five companies who seem to dominate our lives in a popular sense, and I say popular sense because we don't read about on the front pages, the impact let's say of Qualcomm, whose technology is in everybody's phone and to whom everyone pays a royalty. That's harder to understand, but what we do understand is Facebook, Google, Amazon, Apple, and popularly, we seem to have forgotten about Microsoft, although they are still number two in market cap in the United States, but these are all technology companies. Interestingly enough, so they have grown because of the internet into the companies they are and we in the United States haven't done anything until the two lawsuits were filed in 2020, not two, but by the federal government against Facebook and Google, and then lots of suits by the states and by private parties.

Harry First ([12:31](https://www.rev.com/transcript-editor/Edit?token=e_tnXfpxSf_Ihotmv_9boDd6B4R7z13-wm1IGNbrcBEbIDIHZyEL6MDQVl2GUNNgpfkcV-1BW6Ob2XfE1zl3XGOei3o&loadFrom=DocumentDeeplink&ts=751.35)):

But we basically, they have grown without much antitrust restraint and now, we are seeing what the consequences are because of this technology, what they can do. While we were focused on Microsoft, they were all starting. So Amazon was incorporated in 1994, the year the justice department filed its first antitrust case against Microsoft. Google started in 1998, the year that the federal government and the states filed their Windows case against Microsoft. In 2004, when the European Union was suing Microsoft, Facebook started and Apple came alive with the iPod, if you can remember the iPod, and the iPhone. The iPod was introduced the year that Microsoft and the justice department and nine states settled their case. So as we were focused on Microsoft and what they had done, which was Jeff, you had asked earlier, have we seen anything remotely like the interest today in antitrust?

Harry First ([13:46](https://www.rev.com/transcript-editor/Edit?token=V_b7rIRutCqdhE7kC403W92vRwHAyYCYVM7J2MyP20GK7SnT8BQr6tW_9WfrFkDALy559fQT5D1wHEYE2gCb7Vdx5eE&loadFrom=DocumentDeeplink&ts=826.29)):

And that was probably the last time that we saw that intense interest. I measure intense interest by what's on the front page of the New York Times, which shows how out of date I can be today, but in 1998, when the Microsoft trial was front page news every day, that was a big change for antitrust. So that's really the last time, but it was a case and eventually, it was dealt with and went out of public view and these other companies grew and grew. So that's sort of the look back to a time that antitrust was in the public eye, but not as much as these companies and I think because these companies have a reach into our day lives beyond what we thought Microsoft had with the Windows operating system.

Taline Sahakian ([14:43](https://www.rev.com/transcript-editor/Edit?token=SkBuoF6FAb_k95aZHTsJgMTHjp_5qMm70zJEugX-3_QVJhHdZFlg3xM4DKgDwqhXLcrYVU7_8dfrS9bowrdgGLzCvYs&loadFrom=DocumentDeeplink&ts=883)):

So with antitrust being more in the news, and as you mentioned, your students more interested in the topic, what are the things that you see people having misconceptions about antitrust and what it can do and what it can't do?

Harry First ([14:56](https://www.rev.com/transcript-editor/Edit?token=MuFIHN-GyOLWOJpZp9SV1oOKTxVDS8BLw4d-TaoZmGQNxfKc5Ryqc7_wUsXNt8KapH4QePADJ-qU65yc5S-n1CnzehA&loadFrom=DocumentDeeplink&ts=896.88)):

Well, the real question is what it can do and what it can't do. So why antitrust now? A lot of people turn to antitrust because hey, they think antitrust is about monopoly. They think that that Facebook's a monopoly. Yeah. Okay. Google, these are monopolies so antitrust should be able to do something about it, but the idea of what can be done, I think for people who have to actually, let's say, go into court and use antitrust today, and this is the difference between sort of a popular narrative and someone having to do something about it is a great gap. So people are concerned about a lot of things with antitrust and reasonably so, privacy, for example. Well, I'm sorry, not with antitrust, but with these big companies, privacy, the impact they have on, and Jeff, you mentioned this, on democracy, on how it's not necessarily the price of goods.

Harry First ([15:54](https://www.rev.com/transcript-editor/Edit?token=s66O_eyLj2U0tHhfDHCFWYdf2GrDEfPl7zSsV9y8_aeWGGqu6vPisxNXoDVGdbR-8bpC1ufvljCV6qKje2m7U3jA3e8&loadFrom=DocumentDeeplink&ts=954.67)):

After all, as we know, search is nominally free. We're not charged for it and we're not charged for linking to our friends on Facebook. So it's not price, but it's a concern that all the things that these platforms can be used for, that affect elections, affect public debate, misinformation. Some people think fake news is a redundant term, but the ability to spread God knows what sort of misinformation, non-information. So it goes way beyond the sorts of things that we would nicely in the fourth lecture at antitrust, I always wait till the fourth lecture so students beyond drop/add. So when they see that I put a graph on the board and I'm mentioning something about economics, they can't leave anymore. So that's where I put the supply and demand curve and all of that, what's bad about monopoly.

Harry First ([16:47](https://www.rev.com/transcript-editor/Edit?token=x0WcxDY3bnQ-EQehfoKAkF9qcN6s-s4e8-T_1cW_qTVkiNqLlt36f-fwIuwNG_oDprzJF2q3M1YiXp_e2tlLM1hoK0A&loadFrom=DocumentDeeplink&ts=1007.75)):

This doesn't really have to do with that stuff. The whole monopoly story is we to raise price limit output, we're worse off. Google doesn't want to limit your searches. They want you to do more searches. Facebook doesn't want you to have fewer friends. They want you to have more friends, more connections. So what can antitrust do something about your privacy, about how data's used? Maybe something, but as much as what people want the current antitrust laws to do, that's a heavy lift, but we're in a period of disruption.

Harry First ([17:21](https://www.rev.com/transcript-editor/Edit?token=OKqbWAc3VDsUFyqwKTRd_EfAQRFwCzsQK4e6Zky5hK9ZkVj7xLyPsE1VcV7X9b0IHpGoUx_cPsUiFe6UuXxCwQGTPJA&loadFrom=DocumentDeeplink&ts=1041.33)):

One of the disruptions may be those nice laws that we've been developing since 1890 bit by bit. Congress can pass new ones. Oh my God. And what my might be in them. So we've got this slew of proposals and we don't really know what'll come out of them, if anything, and maybe something to do with data or we don't know maybe, or of a regulatory enterprise than we're used to for these companies to deal with their operations.

Jeff Shinder ([17:52](https://www.rev.com/transcript-editor/Edit?token=Lo3VjWlT5kxM_Vp4UeHCAKikoxhJG1NlJqlZiX85bZqJ5q89J7zvd4POmQxmdz4VpAjwwoalvjrQJ01akzyptg_G6Og&loadFrom=DocumentDeeplink&ts=1072.1)):

Harry, can I jump in there? I have two questions for you. One is about what's happening in Washington and do you have any views on the legislation and there's a bunch of bills floating around. Who knows whether any of it'll get passed, but if you could sort of speak to it and I especially want you to speak to the focus on tech and address whether there are other things, this moment of when antitrust really matters, is it just tech or are we missing some other things that we need to be focusing on?

Harry First ([18:33](https://www.rev.com/transcript-editor/Edit?token=XNM9Z4FLvqVTUzrvMcO2aZcs2EWknlc_VQQPbD6BTWTvOgZs4XFKiilKvbdFvBGxPLlO8WUDUnHOdu9U6eejjs0tQ_I&loadFrom=DocumentDeeplink&ts=1113.17)):

So on the first question, of course, I'm going to say who knows what's going to happen in Washington? The safer prediction is nothing, but drilling down a little bit, there was a really good article in the New York Times recently by a really excellent tech reporter, Cecilia Kang. Basically said, well, now we're past the point where the senators don't understand how to use these apps. Now they just don't know what to do and now we're to political gridlock. So interestingly, a lot of these bills, I would say all of the bills have been introduced with bipartisan support and first reaction would be, whoa, this is different. Bipartisan means you're not stuck at 50 in the Senate.

Harry First ([19:21](https://www.rev.com/transcript-editor/Edit?token=0Hy-7iXJ4MI5oLVqIIFYBmjW3iHJRwUnTk8gjs3TKiwNwFPgA9lQTIxPUZKamQNfQy2fw9ZdlAYGBJ1-ay-nbFTtnAc&loadFrom=DocumentDeeplink&ts=1161.38)):

And even you get something done, but I have a sense this bipartisanship is superficial because I'm not sure the Democrats and Republicans want the same things, even though they're signed on to sponsor the same bills. So they're odd, shall we say odd? We say bedfellows, bed people in these bills, some of whom are concerned because of they think that conservative speech is being threatened and others are concerned because it's a traditional concern of the power of major corporations. So whether this will produce legislation with a vote, I'm a little skeptical politically, particularly given the general view of gridlock in Washington, but also I'm not sure that we really know what the best policy solution is.

Harry First ([20:19](https://www.rev.com/transcript-editor/Edit?token=DzBuidJBWHlMnu4HAuY5-y3y1geYmU69cXdyyOwcZOVhM38MCjSGdEn4s1uzJoKeIm6hC9jbrQkU96b62afCgIWYEMI&loadFrom=DocumentDeeplink&ts=1219.09)):

Now maybe that's in the end, not going to be the question people will ask, but there are real problems about trying to figure out what to do and whether these bills appropriately address things. Now, other jurisdictions have gotten through their own gridlock. South Korea passed an app store bill, its law dealing with regulation of app stores and they gave it to their equivalent of the federal communications commission as a first matter to enforce. Europeans are well on their way, but not really there completely with a digital markets act, which is a much more regulatory approach. So we're still in the lots of bills are floating around, as you said, in a Congress that has trouble raising the debt ceiling. So whether they're going to do something on this, I don't know.

Harry First ([21:13](https://www.rev.com/transcript-editor/Edit?token=GVudqPjP-hTIQFMhJARVCNlS1Y6nrH-o6-BOfBP7YRGxXbGW_O34YcpMVLPMY32dVqgEXRlwxMnXvmlZDPmw481o6z0&loadFrom=DocumentDeeplink&ts=1273.05)):

My second thought about once they do something and pick out these bills, you all are going to have a lot of work because these are not self-executing. All of the bills that have been proposed envision, enforcement, eventually in the courts and all of the, when terms are changed, language is changed, lawyers are going to argue over them. So it's not clear what a lot of these bills actually mean or what the language is. You sort of have an idea of where Congress wants to go. So we have a long distance between lots of bills being proposed and what might pass if anything and what it'll mean. So that's a real issue. Now when I mentioned that South Korea and Europe, I don't want to forget. I've talked all so far about the federal government, but as we know, it's not just the federal show. There are state governments. New York state has considered a rather sweeping change to state antitrust law, which would prohibit abuse of dominance like the Europeans do. The states in the Epic case, the case that Epic, the maker of Fortnite. I always forget Fortnite. Yeah.

Taline Sahakian ([22:25](https://www.rev.com/transcript-editor/Edit?token=itRR009h0kNlMl_MJnoUOueT_TLAw83pddUl0wAu5NAPPJxfocP7F8y3Ae1F_gKg6tSErqT3KlPQ0flYG1IbUcyYKG8&loadFrom=DocumentDeeplink&ts=1345.94)):

Fortnite. Yeah.

Harry First ([22:28](https://www.rev.com/transcript-editor/Edit?token=u9cnLlVAgOtjerRX6Q9d6Wbcy8K9xb65oRo1Y7Jzj06BaY75hUv0U2KJ__gX4Xzd0Sr8bZpnNVZy_YNAaeX8cPTlW5Q&loadFrom=DocumentDeeplink&ts=1348.76)):

Even my children are too old to play it, but their children do, I think. Anyway, fabulously successful financially. In that case, the judge threw out their federal antitrust claims throughout the state antitrust claim, but said there's a state unfair competition claim in terms of what Apple was doing in their anti-steering rule to forbid people from going outside the app to pay or giving them information about how they could choose to go outside and enjoying them under state law. Now whether that'll hold up or not is of course a good legal question, but it is indicative of, I think, another underlying disruptive trend, which is the big enforcers, the European Union and the US DOJ and FTC are not necessarily even in control of enforcement.

Harry First ([23:24](https://www.rev.com/transcript-editor/Edit?token=s-v-aY0i2PVndxszguzlCAZj8B3NNQLkyoVoQx9PVPVvISp0XM7Qvas8ynsiajSVIlocIo9oWCHMbEfVDu7JFoVSExk&loadFrom=DocumentDeeplink&ts=1404.94)):

So you have a world in which lots of enforcers can come at companies and this is not just a high tech issue. It's a general issue with regard to mergers, certainly an issue in cartels that lots of jurisdictions can be and are involved in a very aggressive way. The competition and markets authority in the UK is very active, and this is the internet of change. This is a system that is de-globalized in a way that is decentralized and in which smaller units have the ability to reach out and engage in enforcement, and of course, private enforcement remains really important, and what was the first case that went after app stores in the United States? Who did it? Was it the justice department? No, it was private litigation. So it's a time when everything is being turned up and over and you can't just look at the challenges coming from one place. They really are strong challenges from all over and I would say the states are particularly challenging in that regard. Let's hear it for New York.

Taline Sahakian ([24:45](https://www.rev.com/transcript-editor/Edit?token=1HyEMdWShCXli1eCSoDJ5havJTW42oyc_Ie8EdjjJLJdBGHHgdIV2-RFFlQQ3SbBDMkhlHBKYmT1S-WasZqGa1dCH0Q&loadFrom=DocumentDeeplink&ts=1485.21)):

Yes. So in terms of Jeff's second question though, the focus has been a lot on tech. Obviously, like you mentioned, Qualcomm is in everybody's phone, but nobody's thinking about it or other industries like agriculture. So what do you think are the industries that are not being... The spotlight is not on those in industries when it should be?

Harry First ([25:07](https://www.rev.com/transcript-editor/Edit?token=5D-S3keC9ae0jyM7KfyKKQW4ZMMWMoWimPOPxcnOqWVEmsn1RNeMj4_sgCrnVR_OkZ_fKqN34gzl1mQOJTZJdef0ALM&loadFrom=DocumentDeeplink&ts=1507.81)):

Well, of course there's a spotlight, what do I know about them either, but there is a... I mean, obviously healthcare is a big deal and within that, of course, I want to try not to talk about tech, but there's a lot of tech there and a lot of merger issues, major pharmaceutical companies acquiring smaller companies that may be great innovators as small companies, but will they be when they're acquired by the major companies? There's big pricing issues and I think, of course we see it in pharmaceutical drugs where Congress is once again, struggling to try to figure out how to bring what is in some ways traditional competition approaches to this, an industry with just a crazy pricing system. So there really are major issues.

Harry First ([26:03](https://www.rev.com/transcript-editor/Edit?token=54b-7dzsJHlfEf2AWL5Suc1z5KG-UFD4exfaeSjinRLQyWa5X1NR1RD1EtAf37OtpOP-t0PxXml7ASRN3pKYsZ95h9E&loadFrom=DocumentDeeplink&ts=1563.85)):

And I think they've been spotlighted to some extent, but they really need consistent work and as we've let these companies get larger and larger, they're harder and harder to go after. I would say some of the traditional industries, how about OPEC? How about the private companies that are involved in fixing the price of gasoline and oil around the world? Where are enforcers there? How about a little attention to that? Straight pocketbook issues where we see high prices and where instead we should see competition. I always like the beer merger cases. I mean, they're probably over because everyone's merged, but I always thought that the justice department paid attention to beer mergers because justice department attorneys couldn't afford whiskey and they bought beer and they were worried about the price of beer.

Harry First ([26:57](https://www.rev.com/transcript-editor/Edit?token=mr6FZBUjuDwTnrbbGFqGBe5xT38doDkef_cZMilMuuel27uY08c4S69RYx2A1XcR3RR7RgPpcPuJRZJF4qwI7oQhjJU&loadFrom=DocumentDeeplink&ts=1617.81)):

I don't know if that was true or not, but it's that sort of attention to what is in many ways the core of antitrust, which still is, let's make sure that prices are low so that people who aren't people of means can afford to buy things, and I think that's a way in which the disruptive world that's concerned about equity and income distribution can get together with the traditional antitrust world and look at extent to which there's price competition is being affected in various industries. So the case recently filed by the justice department against the book publisher's merger is not a high tech thing. I don't think they even mention eBooks in that complaint. This may not be a strength of the complaint, but now they've dressed it up in a different way, which is interesting. They're concerned about the advances paid to the highest paid authors.

Harry First ([27:58](https://www.rev.com/transcript-editor/Edit?token=ce5RcPsDLrWj10zihtXTm9QH2P8SlRJLUuKahrurUbLlmLZ_9bjZlUMfr4FslcjHp0IaIKIuDZG-ME1mGlC2gmvgZ1g&loadFrom=DocumentDeeplink&ts=1678.31)):

I wish I were one of those, but okay, but so there are things to be worried about beyond the high tech space, but it is obviously an important area and I think bank mergers are going to come back as a question and we do see that brewing now in various fights that are breaking out with the regulators of banks. So in some ways, you could say, okay, I love this other stuff because it is bringing students into class, but let's not forget there's a big economy out there and the things that antitrust really is best at doing, we shouldn't give up on those or forget about them and that would include making it easier for private plaintiffs actually to successfully bring cases that involve these sort of pocketbook issues and price raising issues.

Jeff Shinder ([28:51](https://www.rev.com/transcript-editor/Edit?token=v4AY3ad8y-Q8WpR_Zoczf_LTvjkLnU6lD1Iey7Rz-8ZJYulpSjNUTCjr7kcljRJPcO-syYuSxan_rSga4ZGYGlhU4FI&loadFrom=DocumentDeeplink&ts=1731.86)):

So I want to go back to something you raised before, which is the New York state proposal legislation that has not been passed that introduces that European formula potentially into US law abuse of dominance, and I want you to comment on the federal bench and its propensity to look harshly upon antitrust, the direction of the federal bench on antitrust cases, and whether you think if you are going to reinvigorate antitrust, that some legislative formulation is necessary to give new language and to force the bench to address different standards because the way the preexisting standards, especially with section two, the monopolization standard have been interpreted that the new legislation, new language is needed. You may agree or disagree with that, but I'd like you to whether that comes from the states or the federal government.

Harry First ([29:57](https://www.rev.com/transcript-editor/Edit?token=XU12cPIpmzP1TlzqI6FwKkOhYs-3ZHGY8Dg9FmdK3tZh8OIatJUFDbTg1n709gn6qjYytwCHk7kDD6v4hs7veX4Vuec&loadFrom=DocumentDeeplink&ts=1797.49)):

So two things on that. One, a potential advantage for state legislation is that it would be litigated in state courts. Now I sometimes talk to friends who have done commercial litigation in New York state courts and they say, don't worry about it. These are really good judges. They'll be able to understand these concepts. Maybe there'll be a little more freedom in terms of the way they approach it. I can't say that for sure and state courts vary around the country, but that gives a little chance at some variety, maybe experimentation. So state as opposed to federal may make a difference. The federal bench, we can do a little history lesson. It occurred to me in looking at this thing about this stuff a little while ago.

Harry First ([30:49](https://www.rev.com/transcript-editor/Edit?token=sH7rYyjSm1fLyhjIOxjBhksDfpdsf3QC7dyu7FdnjoHc28EkZkl31P8Gse_Srhy5KpTf2SzObFu7IqTEkDuwWuX8YNo&loadFrom=DocumentDeeplink&ts=1849.26)):

Every time there's a change in the antitrust laws because Congress didn't like the way the courts were interpreting the old ones, the courts then screwed up the new ones and sometimes it took decades. So Congress passes the Clayton Act in 1914 and enhanced anti merger provision because they were worried about the close decision in the Northern securities case five to four homes saying, oh no, it's fine to have these two railroads merge. So they passed this bill and so what do the courts do? They interpret it narrowly because they're hostile and this goes on until 1950 until Congress finally says enough already, and they amend section seven. Same thing with section five, the federal trade commission act, which was interpreted narrowly until 1935, 1936.

Harry First ([31:41](https://www.rev.com/transcript-editor/Edit?token=tK6hLofK4qEDnYR1yyHgPR5gxaLeDJMTnYsq4kIs9LH7n_88U1l6XhyBk0HPXLE47gchn6aqy7ytLHmfE-2z686__9k&loadFrom=DocumentDeeplink&ts=1901.61)):

Congress passes the Wheeler-Lea Act to make sure that this provision about unfair or deceptive acts or practices, which is what they added, could protect consumers, not just businesses. That's how it had been interpreted. There had been a whole fight over that change. So we can expect fights about what this we legislation will mean, whatever it is, and in conservative courts. Our courts today have... It's not 1950 if this gets passed. So it gets to the Supreme court in 19... Sorry, 2020 whatever '25, '26. So who's on the bench and they've got law that's now sort of a firm road of rather conservative views about what the antitrust laws are about. Are they going to say, oh fine. You've changed it all. We're with you guys.

Harry First ([32:43](https://www.rev.com/transcript-editor/Edit?token=bPmEzipBi5l4V0jiSwemJHi6JtJHmciZ47ujOvWkxTD2QBI6R6k8FMlYZcTKIjsmk74D67Xpk_qFFeXfT1ZCl9ARV0c&loadFrom=DocumentDeeplink&ts=1963.49)):

I don't think so. I think it'll be a fight in the courts to get whatever legislation is passed to get it interpreted in a friendly manner. So the courts are a big issue, but it turns out judges are conservative. I mean, that's sort of a general... They're supposed to follow... Well, sometimes I wish they were more conservative. They're supposed to follow precedent, supposed to have a stable system. They're not appointed when they're four years out of, well, not so far, four years out of law school. They're further into their careers and have some fixed and maybe more conservative views and often, they then fit into that role even more so. So maybe it's a little hard to predict, but at the moment, certainly the Supreme court is not all that favorably disposed towards antitrust cases, but that can change.

Harry First ([33:47](https://www.rev.com/transcript-editor/Edit?token=ZbOwkX2N079Lu51fvXqeYmP_-BoXvsKjHmwZPvOzQAY3yKwBjfIcb8ckzwECuKRhCFgEt6-q_CYYs2uLx4625ozVTus&loadFrom=DocumentDeeplink&ts=2027.15)):

We remember the Schwinn case, which said that all vertical distribution agreements on price or customers or territories... Well, it was then customers and territories were per se unlawful. 10 years later, it was overruled. So American Express was decided in 2018, was it? So I'm looking for 2028 and have that overruled. So we don't know exactly how all of that will go, but at the moment, the courts are pretty conservative. We'll see if there is legislation, what they do with what are probably going to be vague and undefined terms in the best of cases. If it's abusive dominance, if that were language chosen, maybe it wouldn't be so bad. There'd be other decisions to look to as to what that language means, but we'll see about how that might go in the courts.

Jeff Shinder ([34:46](https://www.rev.com/transcript-editor/Edit?token=A5AZXUz6hzJXcpbCUyQysvMlHJQiTY6-1Ifa7UMclzitdrXUuK9L_LcfQN1oPQRfXWZLR0Wj5NATz0E2y-NBKuirYmc&loadFrom=DocumentDeeplink&ts=2086.65)):

So I'm going to put you on the spot. We're at one final question, consistent with the theme of this podcast and you being our inaugural first guest. So antitrust matters, it matters a lot today and you've talked to us quite a bit about why today. So if it were up to you and if you had to pick one thing that you could do, one case, one legislative change, one company, one industry to make antitrust matter, get the most bang for your buck in terms of making antitrust matter, what would it be?

Harry First ([35:31](https://www.rev.com/transcript-editor/Edit?token=uKf7pwGY5PeZeIsWJ-TMBwAv7kDtrHVoAYKzfHR4wBj0oIlGojQfKiPkb2y4Yi-NvXMB0DGG9GXAgaNaupgHDD99mXQ&loadFrom=DocumentDeeplink&ts=2131.22)):

So I think it'd have to be, I would think of statutory change. So there are two polls on this. One is the easiest general statute to pass would be to give the agencies and the state AGs more money and to give to the federal government the power to impose civil fines. People always laugh at what's a five billion fine to Facebook? I don't know, five billion dollars? So those are, I think, two readily achievable things. The others are harder. So I would do those two things and I would change the standard on single firm behavior to abusive dominance, frankly, and in effect, put aside the law that's been built up over monopolization.

Harry First ([36:29](https://www.rev.com/transcript-editor/Edit?token=I2GEvBwCFFo_Lnv_su-TkLFMwb3cLE7xs7ufVlejipKm0RHtgdxCNL-UP0eA3Ers9SMbTVxETKaBhnbQKJ-EN3-EG48&loadFrom=DocumentDeeplink&ts=2189.96)):

And this would allow the courts and the agencies to think more about what you might think of a exploitation and give, expand the notion from monopoly to dominance, which would then open up the possibility of thinking beyond the single firm to it's Facebook and Google, but I think as a realistic matter, digital advertising is very expensive. Entrepreneurs all over the world pay a lot of money to be on these platforms. It's a duopoly. Now, we don't have the tool under section two to deal with this. Open it up to dominance and start developing a theory of collective dominance where you could go after these companies which have broad reach in lots of areas.

Harry First ([37:27](https://www.rev.com/transcript-editor/Edit?token=8tAfsGtga3oUnj7tWmjtHY1WsFf5rMPQLoPQzKn3m0p5TKds_jBBR7EpFafPAa049frlAm_yKHPgXDHtGLeav0cqpFo&loadFrom=DocumentDeeplink&ts=2247)):

So I would give them more money. Money's a great thing to get enforcement going. It did it for the states many years ago. There was seed money for state enforcement made a difference and I would, if I could, this is not on the achievable end. I would move away from monopolization on a statutory basis to abusive dominance and open up the lens of what US antitrust law could reach. It's not going to reach all the things people wish it will and it may be that we'll need some sort of a regulatory response for some of these companies because some of the issues are, I mean, they're hard.

Jeff Shinder ([38:10](https://www.rev.com/transcript-editor/Edit?token=91j8WiW8riXJEpPSOsG9zUPf2CupzBAAzEHncq4irIbH7ipb01ggh7MFDpqDSQejiAigXLgrLjzyJgGaUKbaWw7UA9I&loadFrom=DocumentDeeplink&ts=2290.54)):

Okay. I mean, I could probably ask you another hour.

Harry First ([38:14](https://www.rev.com/transcript-editor/Edit?token=Re42Xq4Go7lQcH2AprIzBoCQwBQ5LosMZ184o5RBMjbCk1siWCST5VD7LWhzlVuPOforMMG5T22ImxTJM8nSahA-RQk&loadFrom=DocumentDeeplink&ts=2294.6)):

Yeah. And I could probably talk for two more hours, so let's not do it because it's just...

Jeff Shinder ([38:20](https://www.rev.com/transcript-editor/Edit?token=4iKnlH0mNA-6sNcsm4yy6lnJiD_MJ1DYP3klPhpR9bc-jRO--UHv1t6RqOsJ4HQxetH1bRHd8cf_dfRabei1GhRQhO0&loadFrom=DocumentDeeplink&ts=2300.36)):

And so could Taline.

Harry First ([38:20](https://www.rev.com/transcript-editor/Edit?token=j06WOmSSSs_u0JaYSTLdtXWuK5RtaGXtzatiSiLfU4zwsN4nMpjQH-Hnyw5D8Me5VeOq_r2P0DbagWPlXk4_HaCSS8c&loadFrom=DocumentDeeplink&ts=2300.97)):

Right. Yeah.

Jeff Shinder ([38:22](https://www.rev.com/transcript-editor/Edit?token=s9Pfs3aaP481uK285TMPgAL59kwALK2010wZxEaxDxnwDs4nW0yK-xZz-6yzu-Fl0OfZGy4QmugocPB_jQF5WbNdgUg&loadFrom=DocumentDeeplink&ts=2302.74)):

Keep us here for four hours. So we'll wrap it here. We may have to have you back.

Harry First ([38:27](https://www.rev.com/transcript-editor/Edit?token=aaPxxYTnJmwE2qdQzCFjVigGaZmypllUB6hK5AmAdWRHb5Z-o094RoPM845UaA3fu_TunrTFEqgGoZX05EGyESvXjaQ&loadFrom=DocumentDeeplink&ts=2307.41)):

Okay.

Jeff Shinder ([38:28](https://www.rev.com/transcript-editor/Edit?token=WXpmZlpAx6pZJ1n1Xm8Qgl4De3X_0G-sxlMKM1KGfBN723XNg09vZahl_u1hpHyjOE8gHwozV2K2iP8CKweIN3iK2zc&loadFrom=DocumentDeeplink&ts=2308.49)):

But I want to thank you. You have been as always interesting, thoughtful-

Harry First ([38:35](https://www.rev.com/transcript-editor/Edit?token=752wrcf2h6vlMSHt5ct2tgX6F5t3XjdlYvRAv5ZaaEIjobn_lp33pb56lqz-B1jmiQTXLlHaUM6nu_DMgYugsqe1rrA&loadFrom=DocumentDeeplink&ts=2315.2)):

Thank you, Jeff. Thank you, Taline.

Jeff Shinder ([38:35](https://www.rev.com/transcript-editor/Edit?token=J9Ko34Lud_7TKWc8mR4un36pFWr80UFh-k-grLlDEQ2OEgTuB2PkyozHoxpMulzdWPAeaRLv8dRHQCkag4ZswKojkSQ&loadFrom=DocumentDeeplink&ts=2315.82)):

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