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California's push to rein in Big Tech falters with BASED Act defeat

California's BASED Act died in a Senate committee after a 3-3 vote in April, sinking a proposal to bar dominant tech platforms from favoring their own products.

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California's latest bid to regulate Big Tech has stalled. The "Blocking Anticompetitive Self-preferencing by Entrenched Dominant Platforms Act"—or the BASED Act–failed to advance out of the Senate Privacy, Digital Technologies and Consumer Protection Committee after a 3-3 vote on April 20.

Authored by Sen. Scott Wiener, the bill targeted the world's largest digital platforms–those with $1 trillion in market capitalization and at least 100 million monthly active U.S. users. Like the American Innovation and Choice Online Act that failed to pass through Congress in 2022 due to bipartisan opposition, the BASED Act broadly sought to prohibit these platforms from preferencing their own products and services over those of other businesses that operate on the platform. Proponents championed the bill as a necessary measure to loosen large platforms' alleged grip on digital markets.

But problems with the bill drew a wide range of opponents, and for good reason. The bill would have deemed several capacious categories of conduct presumptively unlawful, from "conditioning platform access" on "the purchase or use of other products or services" to "restrict[ing] a consumer from voluntarily providing data through a covered platform to a third party." These restrictions could have been read to condemn ubiquitous and popular features of the digital economy. For example, the BASED Act threatened an e-commerce's platform's ability to guarantee fast shipping for its own products, a smartphone maker's ability to preinstall popular apps or deploy security measures that stop scams, and a search engine's ability to link search results to integrated maps and business pages. Perhaps most dramatically, the BASED Act sought to make such practices unlawful without any proof of harm to competition–a stark departure from the way federal and state antitrust laws have generally worked for over a century.

Empirical research does not support sweeping presumptive prohibitions like the ones proposed by the BASED Act. In the European Union, for example, the Digital Markets Act has imposed similar restrictions on so-called "gatekeepers." This has led many companies to withdraw or abandon features, including Google's removal of certain clickable maps in search results. A recent study showed that this did not enhance competition as proponents of legislation like the BASED Act predict. Rather, users are simply searching more frequently for "maps" and "google maps," with no appreciable change in user traffic moving toward competing mapping services.

For all its faults, the BASED Act is emblematic of a broader political movement in many states to rework their antitrust laws. Legislators from New York to California have increasingly cited perceived shortfalls of federal antitrust enforcement to propose overhauls to longstanding state law. While the BASED Act's failure illustrates that crafting new competition standards is easier said than done, these challenges do not appear to have dampened state legislatures' enthusiasm: In just the last two years, California has passed a new law for reviewing mergers, increased the penalties for existing state law and enacted new prohibitions on certain kinds of algorithmic pricing.

Here in California, the most significant changes may still be yet to come. In 2022, the California Law Revision Commission began a study to consider broad-based changes to state antitrust law. That commission decided against proposing a bill targeted at large technology companies, like the BASED ACT. But legislators are moving forward with proposals for multiple changes to antitrust law: Chief among them, the State Assembly is considering a bill, the COMPETE Act, which would introduce new prohibitions for all businesses that are more aggressive and far-reaching than federal law, which, for the first time, may subject even mom-and-pop stores and other small businesses to competition law prohibitions.

Legislative proposals like these threaten to balkanize antitrust enforcement. Over the past several decades, federal antitrust law crystallized many predictable rules grounded in economics. Courts generally adopted those standards for parallel state laws too. If bills like the BASED and COMPETE Acts are successful, however, courts will be asked to apply untested standards to a host of novel claims, while businesses large and small risk are forced to navigate a patchwork of obligations. Businesses, suppliers, consumers and workers would all lose out on the virtues of national uniformity, accumulated precedent, administrable standards and a focus on outlawing conduct only once it is proven to have actual anticompetitive effects. If the goal is durable competition law, the best path will be one that is disciplined, evidence-based and not at war with federal law.

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