
Baker’s central thesis in *Preserving a Political Bargain* builds on earlier work concerning competition policy as an implicit political bargain that was reached during the 1940s between the more extreme positions of laissez-faire on the one hand and regulation on the other. The new piece tries to explain what Baker describes as the “non-interventionist” critique of monopolization enforcement within this framework. The piece is motivated, at least in part, by the Section 2 Report debates. Baker’s basic story is fairly straightforward. Under Baker’s account, competition policy is the outcome of the political bargaining process described above. The “competition policy bargain” was then successfully modified in the 1980s in response to the Chicago School critique. According to Baker, during the 1970s and 80s, “the Supreme Court revised many if not most of aspects of antitrust law along the lines suggested by legal and economic commentators loosely associated with the University of Chicago,” though this revolution changed the antitrust laws “dramatically but not fundamentally” and reflected a “bipartisan consensus in favor of reforming antitrust rules to enhance the efficiency gains arising from competition policy.”

Baker applies his “political bargain” framework to argue that the “modern non-interventionist critique,” unlike the successful attempt to modify the “terms” of the bargain in the 1980s, is highly likely to fail. Baker defines the non-interventionist critique as relying on a particular series of legal and economic arguments. For example, Baker describes the economic arguments deployed by the non-interventionists as that “markets are self-correcting,” “monopoly fosters economic growth,” “there is a single monopoly profit,” “excluded fringe rivals may not matter competitively,” “courts cannot reliably identify monopolization,” and so on. Animated by the Section 2 Hearings, Report, its withdrawal, and the subsequent controversy, Baker begins from the assumption the non-interventionists are trying to modify an existing bargain, since non-interventionists are “the primary source of recent criticism of monopolization standards.” From there, Baker argues that this concerted effort to modify the competition bargain in favor of less intervention is unlikely to succeed because such an attempted modification is unlikely to mobilize broader political support in the current social environment.

Let me start by saying that I agree entirely with the ultimate conclusion in so far as I don’t think there is any doubt that, in the current environment, it is unlikely that the implicit
“policy bargain” will be modified in a way that makes it more difficult for monopolization plaintiffs. I have much more trouble with the premise of the exercise, and on how one knows a deviation from the current policy bargain when he sees one, and so will focus my critique on those issues.

Baker paints the picture of a dramatic and fundamental attack by non-interventionists on monopolization enforcement. My response to the premise of the paper was: “What non-interventionist effort to further relax monopolization standards?” To be sure, there are plenty of folks who have cautioned against expansive use of Section 2. It strikes me that the fundamental weakness in Baker’s analysis is that his starting point – the “terms” of the current political bargain — derives from assumptions that don’t seem to square with reality. In other words, rather than envisioning the current debates around Section 2 as an assault by non-interventionists, there is a much more compelling case that it is the interventionists attempting to “deviate” from whatever implicit political bargain exists with respect to competition policy. Christine Varney’s declaration that there is “no such thing as a false positive” – the presence of such being a seminal observation since The Limits of Antitrust (in 1984, no less) immediately leaps to mind. I will turn to making the case that it is the interventionists making the offer for modification below.

But first note that Baker leaves out of his list of “economic arguments” against Section 2 both error costs and that there is little empirical evidence that aggressive monopolization enforcement generates consumer benefits. This is, in my view, an important omission since Baker makes the point that all of the other economic arguments have attracted rebuttals. If there has been a rebuttal of the argument that the empirical evidence suggests that instances of anticompetitive exclusive dealing, RPM, tying and vertical integration are quite rare, or an empirical demonstration that monopolization enforcement has generated consumer welfare gains bet of error and administrative costs, I’d like to see it. Further, note that the original Chicago School argument, a la Director & Levi, against monopolization enforcement was not that anticompetitive exclusion was impossible, but rather that it was sufficiently rare in the world as an empirical matter as to be irrelevant to policy formation. Baker ignores this empirical, evidence-based non-interventionist critique, which, for example, has been the core of the position taken by modern academic skeptics of monopolization enforcement like myself, Dan Crane, Tim Muris, Bruce Kobayashi, Luke Froeb, and David Evans.

**What is the evidence that there is a non-interventionist attack on the current competition policy bargain as it exists with respect to monopolization?** Not much. The first is that the non-interventionists are the “source of criticism of recent monopolization standards.” In parts of the paper, Baker equates the non-interventionists with business interests. But under that formulation, there is not much evidence to support this proposition. If anything, and as Baker readily acknowledges in a footnote, the headlines seem to tell a story of AMD, Google, Microsoft, Adobe and others expending resources to instigate antitrust enforcement against rivals not to restrict the scope of Section 2.

Baker cites more generally the recent monopolization controversy as driven by the non-
interventionist attempt to deviate from the status quo. But this part of the analysis reads to me as driven entirely by assertion that the competition policy preferences that Baker appears to prefer are in the “political bargain” and deeming opposition to those (interventionist) policies attempted “deviations.” Perhaps this is a problem of hammers and nails. Baker’s more interventionist than I and so sees obstacles between his ideal vision of antitrust law and reality as caused by non-interventionists. But I’ve got a different hammer and see different nails. For example, I read the Section 2 Report as largely (but not entirely) limited to a description of Section 2 law as it exists and the vigorously dissenting voices coming from the interventionist crowd. As George Priest has put it:

It’s fair enough for a succeeding administration to reject policies of its predecessor. But the Justice Department report was not authored by John Yoo or Alberto Gonzales. It was the work of a year-long study that considered recommendations from 29 panels and 119 witnesses, most of them critical of the minimalist Chicago School approach to antitrust law. The report’s conclusions basically track Supreme Court law with modest extensions in areas where the Supreme Court has not ruled. Ms. Varney denounced the report in its entirety.

Finding the evidence lacking of some strong non-interventionist attempt to impose dramatic change on Section 2 that deviates from the current political bargain, I offer an alternative hypothesis: it is the interventionists that are attempting to deviate from the current political bargain and propose change.

For starters, I think that Baker and I would agree that there actually is a “stable” competition policy bargain with respect to monopolization that has drawn bipartisan over the last twenty years – at least in the courts. Note that even restricting attention to decisions during the George W. Bush administration from 2004-08, the total vote count of these decisions was 86-9, with 7 of 11 decisions decided unanimously, and only *Leegin* attracted more than two votes of dissent (and more likely, as others have pointed out, for its implications with respect to abortion jurisprudence than anything to do with the antitrust analysis of vertical restraints!). The monopolization-related decisions of the modern era, including *Trinko, Linkline, Credit Suisse*, and *Brooke Group* have all made lift more difficult for plaintiffs in one way or another. But as I’ve written on this blog over and over again, the error-cost analysis embedded in these decisions is a key feature of modern Section 2 jurisprudence that is part of the current bargain. So as I understand it, these decisions must be part of the current bargain. It would be difficult, in fact, to find another area of law in which the Court has articulated principles with such overriding unanimity despite persistent attempts by some scholars to advocate for an alternate overarching legal framework. I think there is a much more compelling story – and one backed by greater evidence than Baker’s narrative — to tell about the modern attempt of the interventionists to renegotiate terms. Let’s discuss some of the evidence.
For starters, the strongly-toned dissents from the Section 2 Report from both Agencies after Hearings with witnesses and testimony from all possible sides of debate — even the parts that merely describe the law — suggest dissatisfaction with the terms of the modern bargain Baker describes and that are represented by the monopolization case law created over the past several decades by supermajority Supreme Court decisions. It is AAG Varney who recently, as Baker acknowledges in the paper, minimized the importance of Trinko under Section 2 in favor of “tried and true” cases like Aspen Skiing. This is, of course, to say nothing of AAG Varney’s endorsement of an antitrust policy free of error-cost considerations.

Further, it is the interventionists at the Federal Trade Commission that have turned to an expanded vision of Section 5 to evade the constraints imposed by Section 2. In fact, the Commission has explicitly announced that it does not think that the constraints imposed on plaintiffs under Section 2 should apply to the antitrust agencies! If this is not an attempt to deviate from the existing political bargain in an interventionist direction, I’m not sure what is. Put another way, interventionists are currently attempting to re-write existing Section 2 law - the “political bargain” - through Section 5. Given the Complaint in Intel and promised use of Section 5 in broad circumstances previously covered under the Section 2 law envisioned under the “stable” bargain that Baker describes as generating bipartisan support from Democrats and Republicans, surely this is an attempt to deviate from the prior bargain.

It is the interventionists that have provided new economic arguments in favor of greater antitrust enforcement. For example, the recent trend towards reliance on behavioral economics endorsed by the agencies emerges out of dissatisfaction with Chicago and Post-Chicago School theories that adopt rational actor models and, presumably, inability to get substantial traction in the federal courts from existing interventionist models provided by the Post-Chicago School.

The interventionist assault on the current implicit competition policy bargain goes further than the agencies though. Congress currently has in front of it pending legislation to take out of the courts the development of a rule of reason standard for minimum RPM, a Twombly-repeater, legislation to make reverse payments in pharmaceutical patent settlements illegal, and legislation to regulate interchange fees. Every one of these proposals represents an interventionist reaction attempting to overturn a judicial application of current competition law and suggest that perhaps the interventionists do not trust the courts to oversee the political bargain.

The premise of Baker’s analysis (that the non-interventionists are strongly challenging the current status quo) is either false to begin with or practically irrelevant in light of the much more important interventionist challenge. Note again that Baker’s claim is that the non-interventionists would fail in any attempt to reduce the scope of monopolization enforcement because they will not be able to generate more broad political support in the current environment. No doubt that is true. But what about the interventionists chances for success? Baker’s analysis provides a very interesting lens to analysis evaluate questions
like whether the interventionists will be successful in renegotiating the terms of the competition policy bargain. At the moment, though things may be changing, they seem to have greater political support. I think the most interesting conflict arising out of Baker’s interesting conception of competition between stakeholders in antitrust policy is that it illuminates what might be a battle for supremacy in governing the bargain between agencies and courts. As Baker notes, the courts have been a critical part of establishing the terms of the bargain and adjudicating attempts to “re-negotiate” by private plaintiffs and agencies over time. Recently, interventionists have attempted to shift antitrust (and consumer protection) enforcement away from courts and towards administrative agencies, such as with Section 5 and the proposed CFPA. To me, these present more important and interesting policy questions than whether non-interventionists will be successful in further shrinking Section 2 law. I believe that the prediction emerging from Baker’s model depends on what happens with the political environment in the next few years.

My prediction, for what its worth, is that the current policy bargain will certainly hold together in the courts. The remarkable strength of the current Section 2 status quo is held together by a combination of the intuitive appeal of price theory for generalist judges relative to more interventionist Post-Chicago and Behavioral economic alternatives, the relative explanatory power of the so-called Chicago School theories relative to contenders. Nothing there has changed. I have less of a sense about the impact of Congressional changes, judicial nominations, and the rise of the EU as monopolization enforcer have on monopolization in the US.

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