

# When Antitrust Comes to the Fork in the Road, Take It!

*Bill Baer\**

Thanks to Spencer Weber Waller and to the Loyola University Chicago School of Law for the opportunity to Zoom into the 21<sup>st</sup> Annual Loyola Antitrust Colloquium. This is such an important annual event. We are all glad you found a way to make it happen in these challenging times.

And that is my starting point: this is “no ordinary time,” as Doris Kearns Goodwin once wrote, for antitrust and competition policy.<sup>1</sup> There has been more debate inside and outside of the antitrust echo chamber than at any time in recent memory—indeed, in my lifetime.

We antitrust nerds discuss this stuff all the time. But today’s conversation about the adequacy of our current approach to competition policy has gone mainstream. It includes intense congressional interest, unprecedented press focus, a spirited debate over Biden-Harris nominations to key posts, and a spotlight on developments around the world.

Much of the discussion focuses on the dominant role that four successful tech companies play in our daily lives. But the debate—and the concerns being expressed—are much broader than that. It involves, to name just a few:

- Increasing concentration in markets of all sizes and shapes;
- The role antitrust enforcement should play in addressing social and economic inequality, job loss, monopsony power, and employer power in labor markets;
- Renewed interest in the duties of a dominant firm to deal with others;
- Concern with the behavior of those with intellectual property rights that have become standard-essential; and

---

\* Revised remarks prepared for the 2021 Loyola Antitrust Symposium from April 14 to 15. These remarks were updated in September 2021 to reflect subsequent legislative and judicial developments, and the author would like to thank Caitlin Chin, research analyst at the Brookings Institution, for her assistance in this effort. Bill Baer served as the assistant attorney general for antitrust under President Obama and the director of the FTC’s Bureau of Competition under President Clinton. He is a visiting fellow in Governance Studies at the Brookings Institution.

1. DORIS KEARNS GOODWIN, *NO ORDINARY TIME: FRANKLIN & ELEANOR ROOSEVELT: THE HOME FRONT IN WORLD WAR II* (1994).

- Questions as to whether the conservative Chicago School approach to antitrust<sup>2</sup> leaves way too much consumer injury on the table.

The discussion on Capitol Hill increasingly reflects bipartisan concern that there are problems with the current state of U.S. competition policy, if not agreement on what should be done.

Some refer to this debate as an inflection point or a pivotal moment. I prefer the framing of the people's philosopher, Yogi Berra, who once opined, "when you come to a fork in the road, take it."<sup>3</sup>

In my view, we have three travel options for competition policy: 1) we can maintain our current path, anchored to the Chicago School and its narrow definition of what constitutes harm to consumers and competition; 2) we can try to convince the courts to rethink their embrace of Chicago School orthodoxy and expand the reach of our antitrust laws to better address harms to competition and consumers; or 3) we can call on Congress to amend those laws to get us to a different, and arguably better, place.

Today, I will talk about these three options and discuss the pros and cons of pursuing each.

Path One involves maintaining the status quo. Many will argue for continuing the direction we have been headed in for forty-some years: the Chicago School approach, with its emphasis on price impact on buyers to the exclusion of other public policy considerations. This holds the consumer welfare standard as the touchstone, requires demonstrable price effects on consumers as the burden that must be met, and celebrates Judges Robert Bork and Frank Easterbrook as the patron saints of the religion.

The Chicago School framework doesn't trust enforcers to get it right. Its mantra is, when in doubt, underenforce. In its view, the government is more often wrong than right when it intervenes.<sup>4</sup> So, courts should resolve all doubt against enforcement.<sup>5</sup>

2. The Chicago School of Antitrust is a framework that emerged in the 1970s and 1980s to analyze competition law. In particular, it advocates embrace a narrow view of the consumer welfare standard tied to demonstrable monetary harm, as well as a preference not to challenge anti-competitive conduct unless proof of harm to competition and consumers is overwhelming. *See generally* ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

3. Nate Scott, *The 50 Greatest Yogi Berra Quotes*, USA TODAY: FOR THE WIN (Mar. 28, 2019, 8:00 AM), <https://ftw.usatoday.com/2019/03/the-50-greatest-yogi-berra-quotes> [<https://perma.cc/EVX3-D6JJ>].

4. *See generally* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

5. *See generally* *Proposals to Strengthen the Antitrust Laws and Restore Competition Online: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. 2 (2020) [hereinafter *Proposals to Strengthen the Antitrust Laws*] (statement of Bill Baer, Visiting Fellow, Governance Stud., Brookings Inst.).

I understand the arguments in favor of that.<sup>6</sup> Some of the jurisprudence in the 1950s and 1960s could not be reconciled with microeconomic industrial organization (IO) learning.<sup>7</sup> This is best summarized in Justice Stewart’s quip in the 1966 *Von’s Grocery* case: “The sole consistency that I can find is that in litigation under [Section 7 of the Clayton Act], the Government always wins.”<sup>8</sup>

Applying a narrow consumer welfare framework to antitrust decision-making did offer a certain consistency. It held government and private plaintiffs to a demanding level of proof. And it avoided Type 1 errors of overenforcement.<sup>9</sup>

But the question being asked today in our public discourse is, at what cost? What is the overall legacy of forty years of Chicago School jurisprudence? Carl Shapiro’s recent paper in connection with the American Bar Association’s Antitrust Section Spring Meeting program summarizes that legacy. And it is troubling. He cites a series of “pro-defendant doctrinal assumptions that are unsupported by the research findings of IO Economics.”<sup>10</sup> They include:

- The assertion that predatory pricing is rarely profitable, justifying a legal standard that makes proving predatory behavior close to impossible;<sup>11</sup>
- Bork’s unqualified claim in *The Antitrust Paradox* that “vertical mergers are a means of creating efficiency, not of injuring competition,” ignoring foreclosure effects and presuming efficiencies result when they often are not realized;<sup>12</sup>
- Judge Easterbrook’s unsupported assertion that monopolies do not last over time;<sup>13</sup>
- The claim that the Philadelphia National Bank structural presumption is baseless when, as Shapiro and his co-author, Herb Hovenkamp, detail in a 2018 Yale Law Journal article, “economic theory and a wide range of economic evidence support the conclusion that horizontal mergers that significantly increase market concentration are likely to lessen

---

6. See generally Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, ANTITRUST, Summer 2021, at 33, 33.

7. Industrial Organization (IO) Economics refers to the analysis of industry behavior, market competition, and antitrust enforcement.

8. *United States v. Von’s Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

9. *Proposals to Strengthen the Antitrust Laws*, *supra* note 5, at 3.

10. Shapiro, *supra* note 6, at 36.

11. *Id.*

12. *Id.* at 36–37 (quoting BORK, *supra* note 2, at 226).

13. *Id.* at 37 (citing Easterbrook, *supra* note 4, at 2 (“Monopoly is self-destructive. Monopoly prices eventually attract entry.”)).

competition and harm consumers by raising prices, reducing output, or limiting product quality or innovation”;<sup>14</sup> and

- A restricted view of potential competition that pretty much allows a dominant firm to acquire any and all nascent competitors.<sup>15</sup>

This view includes the embrace by many courts of the notion that exclusionary conduct by a monopolist is invariably benign and often procompetitive. Chicago’s very own Judge Diane Wood, in a recent essay for *CPI Antitrust Chronicle*, questioned that part of Chicago School orthodoxy and argued we need to examine more closely the behavior of dominant firms that excludes competitors. As she puts it, “Size matters, at least when it leads not just to the power to raise prices and reduce output, but also to the muscle to push other competitors out of the market.”<sup>16</sup> She does not dispute the oft-stated Supreme Court refrain that the antitrust laws were passed for the protection of competition, not competitors. But she also observes, wryly but accurately, that “it is impossible to have competition without competitors.”<sup>17</sup> Judge Wood’s common-sense thought underlies much of the concern with dominant firm behavior today and with ongoing consolidation that increases market concentration.

These are but a few examples causing us to question whether continuing to travel on the Chicago School superhighway will get us to a desirable destination. If you are satisfied with the state of antitrust enforcement today (as many are) that is where you want to be. You want to continue to err on the side of underenforcement. But many of us think that leaves antitrust falling short of what Congress intended when it enacted these laws and leaves real consumer injury unchallenged.

And that leads me to Path Two. So, what about taking the fork with the sign that says, “Let’s bring cases that challenge the entrenched school of antitrust thought and get the courts to expand the consumer welfare standard to embrace more than just price effects, to look more critically and less sympathetically at dominant firm exclusionary and predatory behavior, to challenge vertical integration where efficiencies seem

14. Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2006 (2018).

15. MAJORITY STAFF OF THE SUBCOMM. ON ANTITRUST, COM., AND ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 44, 387, 394 (Comm. Print 2020) [hereinafter MAJORITY STAFF], [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf?utm\\_campaign=4493-519](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519) [https://perma.cc/4X8D-K78H].

16. Diane P. Wood, *The Necessary Revival of Sherman Act Section 2*, COMPETITION POL’Y INT’L (Feb. 8, 2021), <https://www.competitionpolicyinternational.com/the-necessary-revival-of-sherman-act-section-2/> [https://perma.cc/GA8M-LAAD].

17. *Id.*

modest and competition at one or more levels is less than robust, to block what I call Pac-Man acquisitions—the gobbling up of nascent competitors by dominant firms, and to embrace challenges to hold-up by standard essential patents holders”?

The underlying premise in seeking a judicial midcourse correction is that is how we traditionally evolve legal principles in our common law system. There is precedent for following that path in the antitrust world and some success to applaud.

Let’s start with horizontal mergers. Over time, the various iterations of the Horizontal Merger Guidelines came to shape, in meaningful terms, how courts viewed acquisitions of close competitors in concentrated markets; how courts eventually came to appreciate that *theoretical* market entry is not the same as “timely, likely, and sufficient” entry;<sup>18</sup> and how market definition is but a means to an end—and just one tool for assessing the likelihood of a merger causing competitive harm—and not an often insurmountable and unnecessary hurdle for an antitrust plaintiff.

Hospital merger enforcement is another hard-earned success story. Due to admirable persistence, the Federal Trade Commission (FTC), after a long string of losses in the 1990s and 2000s, began to convince skeptical courts that hospital consolidation in concentrated markets had caused, and would likely continue to cause, economic injury.<sup>19</sup>

Similarly, the FTC’s stubborn insistence that pharma “pay for delay” settlements were just what the term suggests eventually resulted in a decisive win at the Supreme Court in 2013.<sup>20</sup>

So, advocates of Path Two argue we should respectfully but persistently seek to change antitrust jurisprudence and ask courts to be more sympathetic to challenges to behavior that has produced or threatens to produce injury to competition and consumers. That approach also involves getting courts to expand their notion of cognizable harm to include effects on innovation, product quality, and harms associated with buyer power.

---

18. In their Horizontal Merger Guidelines, the FTC and Justice Department explain how these agencies assess various factors regarding proposed mergers, including whether entry into the relevant market is so easy that a merger is unlikely to enhance the entity’s market power. The latest guidelines say market entry for entrants is that easy “if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.” U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 29 (Aug. 19, 2010), [https://www.ftc.gov/system/files/documents/public\\_statements/804291/100819hmg.pdf](https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf) [<https://perma.cc/Y6RG-YRP5>].

19. Jonathan Nuechterlein, Gen. Couns., Fed. Trade Comm’n, Prepared Remarks for the Administrative Law Review Annual Symposium at American University Washington College of Law, How the FTC Works: Lessons from the Commission’s Supreme Court Trifecta 3–5 (Mar. 20, 2015), [https://www.ftc.gov/system/files/documents/public\\_statements/632081/150320adminlawreview.pdf](https://www.ftc.gov/system/files/documents/public_statements/632081/150320adminlawreview.pdf) [<https://perma.cc/D7NC-6NYX>].

20. *FTC v. Actavis, Inc.*, 570 U.S. 136, 141 (2013).

Indeed, that is going on today with Section Two enforcement: challenges brought by the FTC and state attorneys general against Facebook<sup>21</sup> and by the Department of Justice (DOJ) and state attorneys general against Google<sup>22</sup> share the common goals of challenging conduct that entrenches single firm dominance and calling on federal courts to better appreciate the harms associated with dominant firms' exclusionary conduct. They are working hard to move the antitrust needle towards more critical scrutiny of dominant firm behavior.

But let's be candid. This path takes a lot of time with no guarantee of success. Look at the timelines associated with the successes I just mentioned. Yes, courts eventually began to accept DOJ and FTC arguments that hospital consolidation had indeed raised prices and reduced quality.<sup>23</sup> The key case was *FTC v. Evanston Hospital*.<sup>24</sup> But that was a 2004 challenge to a consummated 2000 acquisition that was not resolved by the Commission until 2007.<sup>25</sup> Although the Commission initially sought divestiture as a remedy, it ultimately conceded, eight years after the acquisition, that divestiture was not a realistic option.<sup>26</sup>

Yes, the precedent was established and the factual and economic evidence the Commission evinced in that case set the stage for success in challenging more recent hospital consolidation attempts. But what about the *in terrorem* consumer harm over the years? What about the loss of structural relief as a viable option?

A similar story can be told about pharma and "pay for delay." Those settlement agreements between brand-name and would-be low-cost generic competitors became prevalent in the mid-1990s, and the FTC—I was there at the time—promptly began to challenge them. But it was not until sixteen years later that the Supreme Court agreed those settlements were problematic under the antitrust laws.<sup>27</sup> Once again, think about the

---

21. Complaint at 1–9, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590 (D.D.C. Jan. 13, 2021); Complaint at 1–9, *New York v. Facebook, Inc.*, No. 1:20-cv-03589 (D.D.C. Dec. 9, 2020).

22. Complaint at 1–7, *U.S. Dep't of Just. v. Google, L.L.C.*, No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020); Complaint at 1–9, *Colorado v. Google, L.L.C.*, No. 1:20-cv-03715 (D.D.C. Dec. 17, 2020); Complaint at 1–8, *Texas v. Google, L.L.C.*, No. 4:20-cv-00957 (E.D. Tex. Dec. 16, 2020).

23. Nuechterlein, *supra* note 19, at 4–5 (describing several cases in which the Commission successfully challenged healthcare mergers).

24. *See In re Evanston Northwestern Healthcare Corp.*, No. 9315, 2005 WL 2845790, \*179–193 (F.T.C. Oct. 20, 2005) (finding hospital merger violated Section 7 of the Clayton Act and ordering divestiture).

25. *See In re Evanston Northwestern Healthcare Corp.*, No. 9315, 2007 WL 2286195, \*72 (F.T.C. Aug. 6, 2007) (affirming ALJ's determination that merger's anticompetitive effects violated Section 7 of Clayton Act).

26. *See In re Evanston Northwestern Healthcare Corp.*, No. 9315, 2007 WL 2286196, \*1 (F.T.C. Aug. 6, 2007) (vacating ALJ's divestiture order).

27. *FTC v. Actavis, Inc.*, 570 U.S. 136, 141 (2013); *see also* Nuechterlein, *supra* note 19, at 5, 7 (identifying the *Actavis* holding's challenge to the pharmaceutical industry's reverse-payment arrangements as anticompetitive behavior).

consumer harm that largely went unremedied while the courts, for years, mostly rejected the FTC's concerns. And while consumers and competition continue to benefit from the Court's *Actavis* decision—look at the Fifth Circuit's recent decision in the Impax-Endo litigation<sup>28</sup>—it has taken forever and a day for us to get to this point.

The uncertainty involved and time required to secure substantive change to antitrust precedent suggests we need to curb our enthusiasm in looking at the ground-breaking Google and Facebook cases. I applaud those lawsuits. But we must ask: How long will it take to get to a resolution? Look at the DOJ and state attorneys general challenge to Google. It cites anticompetitive exclusivity agreements going back years. Yet the complaint, filed in October 2020, is not even tentatively set for trial until September 2023. Who knows when the district court will rule or how long it will take after that ruling before appeals are resolved?<sup>29</sup>

The Facebook cases confront comparable time issues: the FTC and state attorneys general complaints filed in late 2020 challenge, among other things, the acquisitions of Instagram in 2012 and WhatsApp in 2014. In June 2021, a federal judge dismissed the states' complaint for this very reason—the length of time that had elapsed before challenging the acquisitions.<sup>30</sup> The judge additionally compelled the FTC to submit an amended complaint with additional data, further delaying the judicial process.<sup>31</sup> It is not difficult to envision scenarios where the FTC's challenge takes many more years to resolve, and where, even if successful, antitrust enforcers, as in *Evanston*, find conduct relief the only realistic outcome.

The bottom-line question for those who advocate exclusive pursuit of this second path is whether it is likely to succeed: Will it address at all—and, if so, in timely fashion—the competition policy challenges the United States economy faces today?

28. Brendan Pierson, *5th Circuit Upholds FTC Ruling Against Impax, Endo in Reverse-Payment Case*, REUTERS (Apr. 13, 2021, 7:35 PM), <https://www.reuters.com/article/health-impax-idUSL1N2M701K> [<https://perma.cc/7DWM-HRMZ>]; see also Complaint at 1–3, *FTC v. Endo Pharm., Inc.*, 1:21-cv-00217 (D.D.C. Jan. 25, 2021) (alleging Endo and Impax, the only pharmaceutical companies that produce oxymorphone ER, conspired to eliminate competition for production of the drug in violation of the FTC Act).

29. Bill Baer, *Assessing the DOJ Lawsuit Against Google*, BROOKINGS INST. (Oct. 21, 2020), <https://www.brookings.edu/blog/techtank/2020/10/21/assessing-the-doj-lawsuit-against-google/> [<https://perma.cc/L4SG-HAT9>].

30. *New York v. Facebook, Inc.*, No. 20-3589, 2021 WL 2643724, at \*13 (D.D.C. June 28, 2021).

31. Press Release, Fed. Trade Comm'n, *FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate* (Aug. 19, 2021), <https://www.ftc.gov/news-events/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush> [<https://perma.cc/GCC9-MXMH>].

What about the third option I mentioned at the top, the call for Congress to enact legislation that updates our view—some would say restates the original congressional intent—of what constitutes actionable misconduct under our antitrust laws? A review of congressional testimony over the past two years by respected academic scholars suggests considerable mainstream support for amending our basic antitrust statutes to redirect courts and enforcement agencies toward a more assertive and less cautious approach.<sup>32</sup>

Congressional direction to courts to go back to basics is not without recent precedent. Judge Wood's recent testimony before the House Antitrust Subcommittee cites two examples where Congress acted because courts were ignoring congressional intent. The first involved Supreme Court decisions Congress thought undermined the Americans with Disabilities Act (ADA) of 1990, and the second addressed judicial decisions denying on timeliness grounds otherwise meritorious claims of sex discrimination in employment.<sup>33</sup> In each instance, Congress acted, amending the ADA in 2008 and passing the Lilly Ledbetter Fair Pay Act of 2009.<sup>34</sup>

Admittedly, amending our antitrust laws for the first time in more than a generation requires bipartisan agreement in Congress, a term in our current political environment that has increasingly taken on an oxymoronic quality.

But there are signs that this is not a pipe dream. In the House, the October 2020 Antitrust Subcommittee report by the majority staff detailed concerns with behavior by tech platforms that unfairly entrenched their dominance and outlined a menu of changes to update our antitrust laws.<sup>35</sup> In spring 2021, the full Judiciary Committee adopted the staff report.<sup>36</sup> Yes, that action involved a straight party-line vote.

But that does not sound the death knell for bipartisan progress. In October 2020, as the majority staff report was issued, the Republican

---

32. JONATHAN B. BAKER ET AL., JOINT RESPONSE TO THE HOUSE JUDICIARY COMMITTEE ON THE STATE OF ANTITRUST LAW AND IMPLICATIONS FOR PROTECTING COMPETITION IN DIGITAL MARKETS (Apr. 30, 2020), [https://judiciary.house.gov/uploadedfiles/joint\\_submission\\_from\\_michael\\_kades\\_and\\_antitrust\\_expert\\_coalition.pdf](https://judiciary.house.gov/uploadedfiles/joint_submission_from_michael_kades_and_antitrust_expert_coalition.pdf) [<https://perma.cc/J3UF-VU3E>]; *Competition Policy for the Twenty-First Century: The Case for Antitrust Reform: Hearing Before the Subcomm. on Antitrust, Consumer Prot., and Consumer Rts. of the S. Comm. on the Judiciary*, 117th Cong. 4–6 (2021) (statement of Nancy L. Rose, Professor of Econ. at M.I.T.).

33. *See generally Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power: Hearing Before the Subcomm. on Antitrust, Com., and Admin. L. of the H. Comm. on the Judiciary*, 117th Cong. 2 (Mar. 18, 2021) (statement of Hon. J. Diane P. Wood).

34. *Id.*

35. MAJORITY STAFF, *supra* note 15, at 19–21.

36. Diane Bartz, *U.S. House Committee Approves Blueprint for Big Tech Crackdown*, REUTERS (Apr. 15, 2021, 9:16 AM), <https://www.reuters.com/business/us-house-committee-approves-blueprint-big-tech-crackdown-2021-04-15/> [<https://perma.cc/Z2B7-QCX5>].

minority report authored by Congressman Ken Buck (R-Colo.) agreed wholeheartedly with the underlying concerns, stating, “The majority staff accurately portrays how Apple, Amazon, Google, and Facebook have used their monopoly power to act as gatekeepers to the marketplace, undermine potential competition, and pick winners and losers . . . .”<sup>37</sup>

And, in addition to supporting increased funding for antitrust enforcement, the minority report endorsed congressional legislation. Significantly, Congressman Buck’s call for legislative action was not limited to the tech platforms. He advocates congressional action “reinforcing presumptions that certain behaviors are likely to reduce competition, lowering evidentiary burdens in litigated cases, and emphasizing that anticompetitive effects are not limited to price effects and include innovation competition, quality, output, and consumer choice.”<sup>38</sup>

This bipartisan dissatisfaction with the status quo and skepticism that today’s federal judiciary will be receptive to arguments that it rethink its approach is evident as well in the Senate. At the time of my remarks before the Loyola Antitrust Symposium in April 2021, Senator Amy Klobuchar (D-Minn.) had recently proposed omnibus legislation that would address funding challenges but also correct for the shortcomings in the way the courts currently apply the Sherman, Clayton, and FTC Acts.<sup>39</sup> Since then, activity on Capitol Hill further suggests Congress is seriously considering some significant changes to antitrust laws.

Between May and June 2021, a bipartisan coalition of members of Congress, led by Congressman David Cicilline (D-R.I.) and Congressman Ken Buck (R-Colo.), introduced six bills in the House Judiciary Committee.<sup>40</sup> This legislation would shift the current scope of

---

37. REP. KEN BUCK, SUBCOMM. ON ANTITRUST, COMM., AND ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, *THE THIRD WAY* 3 (2020), [https://buck.house.gov/sites/buck.house.gov/files/wysiwyg\\_uploaded/Buck%20Report.pdf](https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf) [https://perma.cc/6XWY-KUF9].

38. *Id.* at 5.

39. Bill Baer, *How Senator Klobuchar’s Proposals Will Move the Antitrust Debate Forward*, BROOKINGS INST. (Feb. 8, 2021), <https://www.brookings.edu/blog/techtank/2021/02/08/how-senator-klobuchars-proposals-will-move-the-antitrust-debate-forward/> [https://perma.cc/M3TT-ML4Q].

40. *Rep. Buck Introduces the State Antitrust Enforcement Venue Act*, KEN BUCK (May 21, 2021), <https://buck.house.gov/media-center/press-releases/rep-buck-introduces-state-antitrust-enforcement-venue-act> [https://perma.cc/8VFC-QV4R] (announcing the introduction of H.R. 3460, the “State Antitrust Enforcement Venue Act of 2021”); *House Lawmakers Release Anti-Monopoly Agenda for “A Stronger Online Economy: Opportunity, Innovation, Choice”*, CONGRESSMAN DAVID CICILLINE (June 11, 2021), <https://cicilline.house.gov/press-release/house-lawmakers-release-anti-monopoly-agenda-stronger-online-economy-opportunity> [https://perma.cc/J6HJ-72S4] (announcing the introduction of five bipartisan bills: the “American Innovation and Choice Online Act,” the “Platform Competition and Opportunity Act,” the “Ending Platform Monopolies Act,”

antitrust law by, among other things, prohibiting platforms from engaging in certain anticompetitive activities, preventing acquisitions that could cement market power; and assigning the burden of proof to dominant platforms to show that their acquisitions are lawful. The committee voted to advance all six bills, and the Senate has already passed one of them—a measure to increase funding for federal antitrust enforcers, in part through higher filing fees for large mergers under the Hart-Scott-Rodino Act.

Seeking legislation from a divided Congress is, in most situations, a path of last resort. And a long shot. But here it may not be. What I see emerging is real potential for bipartisan consensus that the status quo is just unacceptable and that we need to act now to better protect consumers and competition.

That is quite an indictment of where forty years of Chicago School orthodoxy has taken our antitrust jurisprudence. Antitrust enforcers should continue to pursue efforts to get the courts to move away from that overly cautious approach. But, as I noted, there is no guarantee pursuing that course will get us to a better place in timely fashion.

Path Three—the congressional fork in the road—is staring us in the face. I think it is time to take it.

---

the “Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act,” and the “Merger Filing Fee Modernization Act”).