

ANTITRUST AND DEMOCRACY

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Like the competition law regimes in the United States and much of Latin America, Chile's antitrust regime is focused on prohibiting anticompetitive acts that harm competition, economic efficiency, and consumer welfare.¹ However, with a renewed political focus on antitrust law enforcement in the U.S. and other parts of the world, the question arises as to whether certain "non-economic" values also should be taken into account in antitrust enforcement. As former FTC chair Bob Pitofsky wrote in his landmark essay in 1979, antitrust law has, and probably always will have, some "political content"². An important question for consideration in every competition law regime is what that political content should, and should not, be.

In broad brush terms, it is clear what the political content should *not* be. In the U.S. experience, there have been instances when presidents—mostly notoriously Richard Nixon—used control over the Justice Department to extort political favors or campaign contributions³. More recently, critics have asserted that the Justice Department's challenge to the AT&T/Time Warner vertical merger was motivated, at least in part, by President Trump's hostility toward CNN, a Time Warner property. Whether or not this accusation is correct as a factual matter (the Justice Department denies it), everyone should agree that political interference to advance interests other than those authorized by the antitrust statutes is illegitimate.

Identifying what the political content of antitrust law *should* be is more challenging. Recently, several U.S. scholars of antitrust law have renewed the idea that competition policy serves as a key instrument of democracy. Thus, for instance, a number of scholars—myself included—have recently studied the role that highly concentrated economic power through cartels and monopolies played in the rise of Nazism⁴. Eric Posner and Glen Weyl have argued that antitrust has a role to play in "preventing the excessive concentration of itical power" to the detriment of democracy⁵.

1 See, e.g., Francisco Agüero, "Chilean Antitrust Policy: Some Lessons Behind Its Success", *Law & Contemp. Problems* 79, (2016), 123-146 (discussing United States-Chile Free Trade Agreement, which provides that "[e]ach Party shall adopt or maintain competition laws that proscribe anti-competitive business conduct, with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct."); see also Ana María Alvarez y Pierre Horna, "Implementing Competition Law and Policy in Latin America: The Role of Technical Assistance", *Chi.-Kent L. Rev.* 83, (2008), 91, 99 (Table 1) (collecting statements of objective in various Latin American competition law statutes).

2 Robert Pitofsky, "The Political Content of Antitrust", *U. Pa. L. Rev.* 127, (1979), 1051.

3 Maurice Stucke and Allen P. Grunes, "Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in our Democracy", *Conn. L. Rev.* 42, N°193 (2009), 101-141 (reporting that "President Nixon used the antitrust laws as a sword of Damocles against the media networks. President Nixon in 1971 discussed intimidating the nation's three major television networks by keeping the constant threat of an antitrust suit hanging over them.").

4 Daniel A. Crane, "Fascism and Monopoly", *MICH. L. REV.* 118, (2020), 1315; Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (New York: Columbia Global Reports, 2018) 79-83; Jonathan Tepper with Denise Hearn, *The myth of capitalism: monopolies and the death of competition* (Hoboken NJ: Wiley, 2019) 137-66.

5 Eric A. Posner and E. Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* (Princeton: Princeton University Press, 2018), 203.

And Jonathan Baker provides a comprehensive assessment of the relationship between antitrust and democracy, focusing on the demise of a mid-twentieth century political bargain that allowed for efficient firm growth subject to antitrust and regulatory constraints⁶.

From a U.S. perspective, then, it seems that there is broad consensus that there is a necessary linkage between antitrust and democracy. Figuring out what all of the linkages are, and how they should factor into actual competition law decisions, is where there is less agreement. In this essay, I briefly analyze six touchpoints concerning the relationship between antitrust law and democracy: antitrust as justifying a market-oriented economy; antitrust as preventing corrosion of democracy; political sentiment as input into antitrust enforcement; antitrust enforcers as democratically accountable; the role of the judiciary; and citizens voting with their eyeballs.

I. ANTITRUST AS JUSTIFYING MARKET-ORIENTED ECONOMIES

The first touchpoint concerns the idea that antitrust is necessary to temper the political excesses of capitalism in order to prevent political demands from destroying free market systems entirely. In other words, antitrust is that which saves capitalism from itself. In the U.S., this idea was manifested in the legislative history of the Sherman Act of 1890, where the Act's framers articulated the political necessity of adopting corporate reforms in order to satiate the growing popular resentment against the Gilded Age trusts. Speaking on the Senate floor in 1890, Senator John Sherman had warned his brethren, many of whom were controlled by the trusts, that Congress "must heed [the public's] appeal or be ready for the socialist, the communist, and the nihilist"⁷. Sherman thus conceived of his eponymous antitrust statute as politically necessary to diffuse more radical political movements.

Jonathan Baker brings this sort of argument up to date in his book *The Antitrust Paradigm*. Baker sees antitrust as historically having solved a political problem arising from the growth of large business organizations due to industrialization: "how to organize markets to prevent exploitation while fostering the efficiencies that generate economic growth"⁸. The antitrust solution allows firms to pursue the efficiencies of large scale, but subject to antitrust rules against abuse or exploitation of market power⁹. As Baker sees it, the Chicago School successes of the 1970s unwound the grand political bargain struck in the mid-20th century by refocusing antitrust solely on consumer welfare and economic efficiency¹⁰. Now, as the fruits of the Chicago School's overly laissez-faire antitrust prescriptions are appearing in the form of the "market power paroxysm," Baker argues that the political bargain is reaching a tipping point—either antitrust must be strengthened, or command-and-control governmental regulation will be politically demanded¹¹.

6 Jonathan B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Massachusetts: Harvard University Press, 2019).

7 John Sherman, Congressional Record 21, 2460 (1890).

8 Baker, *The Antitrust Paradigm*, 43-62.

9 Baker, *The Antitrust Paradigm*, 38-32.

10 Baker, *The Antitrust Paradigm*, 43-46.

11 Baker, *The Antitrust Paradigm*, 48-52.

A similar dynamic may have characterized Chile's adoption of antitrust law. Chile adopted an antitrust law in 1959, but the National Economic Prosecutor did little to enforce the antitrust laws during its early years¹². Both the Unidad Popular and Socialist government of Salvador Allende of the late 1960s and early 1970s critiqued Chile's economy as monopolistic and capitalist, and turned to expropriations and nationalization of privately owned firms¹³. The Military Junta that came into power by coup d'état in 1973 recognized the importance of establishing competitive markets in order to stave off pressures to eliminate the capitalist system. Rejecting price controls and central planning, the Junta stated: "it is [the State's] mission ... to adopt the measures that effectively ensure competition [policy] and the necessary control of private parties, to avoid any form of abuse or monopoly"¹⁴. Antitrust thus arose as a serious force in Chile at least in part to hold back the pressures in favor of economic and political radicalism and to defend the market-based system of economic organization.

Observe that while this political rationale for antitrust law tells us that competitive markets are important to liberal democracy, it does not tell us what kind or degree of antitrust enforcement is necessary to support this value. Different people can believe that antitrust enforcement is important to the political survival of market-based economics and support more or less vigorous antitrust enforcement.

II. ANTITRUST AS PREVENTING CORROSION OF DEMOCRACY

A second component of the democracy/antitrust nexus is the concern that there is something deeply corrosive to democracy about highly concentrated economic power. Although this component appears to overlap with the first, it is distinct in important ways. During the formative period of U.S. antitrust law, Senator John Sherman argued that antitrust was needed lest popular dissatisfaction with the trusts create headwinds leading towards political radicalism. Several generations later, in the wake of the Second World War, the framers of the Celler-Kefauver Act, which strengthened the prohibition on anticompetitive mergers and acquisitions, argued that arresting the rising tide of industrial concentration through antitrust reforms would stave off movements toward the concentration of political power in either fascism or Stalinism¹⁵. The anti-merger policy of the 1950s-70s reflected, at its core, a concern that excessive concentration of economic power threatens the continued vitality of democracy.

In a recently published article, I provided a case study of this effect from the history of German fascism. I showed that the highly concentrated and cartelized structure of German industry during the Weimar period facilitated Hitler's rise to power and consolidation of control, not because popular dissatisfaction with big business gave Hitler a political opening, but because the very structure of radically concentrated economic power facilitated the creation of heavily concentrated political power¹⁶. Surveying German economic history, I identified several mechanisms by which the monopolized and cartelized structure of the German economy contributed to the rise of the Third Reich. First, the monopolies engaged in a Faustian bargain in which Hitler essentially promised them a privileged place in the Nazi economy in exchange for material support to the Nazi party. Second, the monopolies were able to lend Hitler organizational, bureaucratic, and logistical support

12 Agüero, "Chilean Antitrust Policy", 124.

13 Agüero, "Chilean Antitrust Policy", 124-25.

14 Agüero, "Chilean Antitrust Policy".

15 Crane, "Fascism and Monopoly".

16 Crane, "Fascism and Monopoly".

in achieving control over Germany in a way that would not have been possible in a more decentralized economy. Third, the highly cartelized structure of the German economy enabled the Nazis to obtain quick control over even smaller and more local firms in the market. Fourth, the Nazis used dominant German firms as national champions to neutralize foreign firms from developing war-sensitive technologies. Finally, as the Nazis centralized political power nationally, their collaborator firms similarly centralized power internally by eliminating intra-firm democracy (for example, by eliminating shareholder and managerial power), which in turn allowed the monopoly firms to support the regime without internal opposition or constraint.

Despite the temptation to generalize from the German experience, it is difficult to create a general model of what degree and kind of economic concentration creates what kind of threat to democracy. Japan and Italy—both also members of the Axis powers—followed very different paths towards fascism. Spain and Portugal also fell under the sway of fascist or strongly authoritarian governments, but also followed a separate economic course from Germany (and never joined the Axis). Meanwhile, the most durable totalitarian governments of the twentieth century—those that followed the Bolshevik Revolution of 1917—did not arise from industrialization, much less monopoly capitalism. Extreme concentration of economic power is neither a necessary nor sufficient condition for extreme concentration of political power—it is merely a contributing factor. Nonetheless, the German experience provides a stern cautionary lesson about what can happen to democratic institutions when economic power becomes extremely concentrated in a few hands.

III. POLITICAL SENTIMENT AS INPUT INTO ANTITRUST ENFORCEMENT

A third sense of the relationship between antitrust and democracy concerns the extent to which antitrust and anti-monopoly policy more broadly are part of popular politics, or are instead administered technocratically by a coterie of experts. Writing in 1966, the American historian Richard Hofstadter explained the demise of U.S. antitrust as a “movement” by noting that antitrust had “ceas[ed] to be largely an ideology and [had become] largely a technique” administered by “a small group of influential and deeply concerned specialists” in “differentiated, specialized, and bureaucratized” administrative institutions¹⁷. What Hofstadter observed at the height of post-War antitrust enforcement has accelerated in the intervening years. Until recently, antitrust assumed a low profile in political discourse and was largely administered technocratically by expert lawyers and economists¹⁸. The Chicago School revolution was not accomplished through a popular political movement, but rather by converting the small cadre of elite judges, regulators, lawyers, economists that run the antitrust system. Antitrust was and is part of the work of democracy, but in recent decades it has been carried out without much popular political salience.

Over the last two or three years, that has changed considerably in the United States. For the first time in a generation, antitrust has become politically salient again. Presidential candidates and other leading politicians have raised antitrust reform to a high profile on the national agenda. Journalists are increasingly giving antitrust stories prominent treatment. The House of Representatives Judiciary Committee has released a lengthy report detailing the ostensible failings of antitrust enforcement in recent decades and recommending legislative reforms¹⁹. Recently filed cases against Google and Facebook by the Justice

17 Richard Hofstadter, “What Happened to the Antitrust Movement?”, in *Paranoid Style in American Politics and Other Essays 188*, (Massachusetts: Harvard University Press, 1996), 235.

18 Daniel A. Crane, “Technocracy and Antitrust” 86, *TEX. L. REV.* (2008), 1159.

19 Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

Department and Federal Trade Commission have fed popular demand for greater corporate accountability. Antitrust is back as a popular issue.

Does antitrust become more democratic when subject to greater political scrutiny and less democratic when it becomes more technocratic? Perhaps that is true at some level, but it would be unwise to suggest that the democratic legitimacy of antitrust enforcement depends on its political salience. To the contrary, heightened political attention to antitrust may lead enforcers to make “splashy” enforcement decisions to appease popular appetites, even when those cases do not have as much merit as less “splashy” cases that are not being brought. For instance, in the current environment, it was nearly impossible for the antitrust agencies to avoid bringing cases against Google and Facebook, even though many of the current complaints against those companies—self-preferencing in search by Google and the Instagram and WhatsApp acquisitions by Facebook—were vetted and dismissed by the antitrust agencies several years ago²⁰. Time will tell whether the courts find the current complaints by the federal agencies and state attorneys general meritorious. If those cases eventually fail, it will be interesting to look back and ask whether this “democratic” response in fact served the public interest.

And that perhaps is the important point. Not everything that enhances political attention to antitrust enforcement necessarily serves the public interest. One of the things that the historian Hofstadter observed in the 1960s was that, in U.S. history, there had been an inverse correlation between the political saliency of antitrust—the “antitrust movement”—and actual antitrust enforcement. In the early decades of the twentieth century, there was an antitrust movement with relatively little enforcement. Following the Second World War, the antitrust movement subsided, but actual antitrust enforcement increased. Thus, it may be the case that the kind of effective antitrust enforcement necessary to prevent concentrations of economic power that threaten democracy (as noted in the previous section) may be most likely when antitrust is not popularly “democratized.”

IV. ANTITRUST ENFORCERS AS DEMOCRATICALLY ACCOUNTABLE

A fourth and related, but distinct, sense of the relationship between antitrust and democracy concerns political accountability for antitrust enforcement decisions. In the U.S., the Federal Trade Commission was designed to be technocratic and insulated from popular politics²¹, but antitrust enforcement by the Justice Department was, for much of the 20th century, expressly political insofar as the President took an active and conspicuous role in directing specific cases, as with Theodore Roosevelt against Standard Oil, Franklin Roosevelt against the steel industry, and Gerald Ford against AT&T²². Cultural-political expectations began to change after the Watergate scandal, when President Nixon allegedly interfered in an Antitrust

20 Federal Trade Commission, “Statement of the Federal Trade Commission Regarding Google’s Search Practices, In the Matter of Google, Inc.”, *FTC File No. 111-0163* (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf (“In sum, we find that the evidence presented at this time does not support the allegation that Google’s display of its own vertical content at or near the top of its search results page was a product design change undertaken without a legitimate business justification. Rather, we conclude that Google’s display of its own content could plausibly be viewed as an improvement in the overall quality of Google’s search product.”); “Facebook Says WhatsApp deal cleared by FTC”, *Reuters* (April 10, 2014), <https://www.reuters.com/article/us-facebook-whatsapp/facebook-says-whatsapp-deal-cleared-by-ftc-idUSBREA391VA20140410>; “FTC Closes Its Investigation into Facebook’s Proposed Acquisition of Instagram Photo Sharing Platform”, *FTC* (Aug. 22, 2012), <https://www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition>.

21 Daniel A. Crane, “Debunking Humphrey’s Executor”, *Geo. Wash. L. Rev.* 83 (2015), 1835-1843.

22 Crane, “Technocracy and Antitrust” 1172-73 (collecting citations).

Division prosecution of ITT in exchange for campaign donations²³. In the past several decades, Presidents have disclaimed any direct involvement in antitrust enforcement decisions, labeling them law enforcement matters in which political interference would be inappropriate²⁴. President Trump's ostensible involvement in particular antitrust decisions (particularly AT&T/Time Warner) challenged the post-Watergate practice, with questions again raised about institutional structure and democratic legitimacy.

It is my understanding that Chilean competition law has undergone similar questions over time as its institutional organization has been recalibrated in the direction of greater insulation of antitrust officials from direct political supervision. At the birth of modern Chilean antitrust, Junta decree No. 211 of 1973 created a series of regional Preventive Commissions and a national Resolutive Commission that worked in tandem with the National Economic Prosecutor's Office ("NEPO") to investigate potential antitrust abuses²⁵. These offices were not fully independent from political authorities²⁶. This system was perceived as subject to undue political control of competition law officials. In 2003, a member of the Resolutive Commission appointed by the Executive voted against a proposal of a telecommunications company, and then resigned after being "subjected to strong verbal pressures from the Chilean government"²⁷. In 2003, reform legislation eliminated both the Preventive Commissions and the Resolutive Commission and created an independent Tribunal de Defensa de la Libre Competencia or Competition Tribunal ("TDLC"), staffed by both economists and lawyers. The Competition Tribunal has independence from both the NEPO and political actors.

The NEPO also enjoys significant independence. It is headed by the National Economic Prosecutor ("NEP"), who is appointed by the President through a selection process of senior public officials. He or she holds office for four years, may be re-appointed only once, and can only be removed by order of the President, with the approval of the Supreme Court, upon request of the Ministry of Economy, Development and Tourism. The Supreme Court may only order removal in a plenary, specially convened session.

Both the Chilean and U.S. systems raise important questions about the institutional relationship between democracy and antitrust. If curtailing monopoly is critical to sustaining democracy, then shouldn't the constitutionally ordained chief executive of the democracy take responsibility for enforcement decisions? Or, on the contrary, do democratic rule of law values require separating enforcement decisions from direct political control in order to prevent corruption or undue influence?

Of course, there are ways to promote democratic antitrust enforcement other than making antitrust enforcers more directly accountable to democratically elected officials. The NEPO has taken steps to ensure transparency for its decision-making, such as posting most of its decisions for public review and reporting on meetings with lobbyists²⁸. Similarly, the TDLC has made its decision available to the public on its website since 2006, and updated its website to facilitate public access to its files in 2015²⁹. Transparency, disclosure, and public access can create a kind of democratic accountability for antitrust enforcers who are otherwise insulated from hierarchical political pressures.

23 Arthur Austin, "Antitrust Reaction to the Merger Wave: The Revolution vs. the Counterrevolution", *N.C. L. REV.* 66, N°69 (1988), 931-940. See also Peter L. Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch", *COLUM. L. REV.* 84, N°198 (1984), 573-621.

24 See Crane, "Technocracy and Antitrust", 1173-74.

25 Agüero, "Chilean Antitrust Policy", 127-28.

26 Agüero, "Chilean Antitrust Policy", 127-28.

27 Agüero, "Chilean Antitrust Policy", 129.

28 Agüero, "Chilean Antitrust Policy", 142.

29 Agüero, "Chilean Antitrust Policy", 142.

V. THE ROLE OF THE JUDICIARY

Thus far, we have considered elected officials in the legislative and executive branches as key democratic actors in the antitrust system, but judges may be even more important to the day-to-day operation of antitrust enforcement. This is particularly true in the Anglo-American system, where judges tend to wield considerable common law powers, even in statutory domains like antitrust. In the U.S., federal antitrust law is typically described a species of statutory common law in which the foundational statutes provide general parameters, but the hard work of creating and adapting economic and legal policies remains largely delegated to the federal judiciary through a common law process³⁰. The U.S. Supreme Court has described the Sherman Act as a delegation of common law powers to the courts: “From the beginning the Court has treated the Sherman Act as a common-law statute.... Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibition on ‘restraint[s] of trade’ evolve to meet the dynamics of present economic conditions”³¹. However, in a forthcoming article³² I show that this story is only half true: while the federal antitrust statutes are often open-ended and indeterminate, even when the statutes have a clear meaning the federal courts have frequently chosen to ignore their plain meaning and legislative purpose.

The reasons for this historically persistent judicial insubordination to the will of the elected branches of government are complex but, a minimum, they raise difficult questions of democratic process. Following Montesquieu, we typically assume that democracy means that legislatures make laws, executives enforce them, and judges interpret them. For unelected judges to be openly making law, perhaps even in contravention to the expressed will of the legislature, seems formally anti-democratic. But if the system works and achieves broad acceptance over time, perhaps we need a more functional than formal understanding of democracy.

The role of the judiciary in interpreting and applying antitrust law varies greatly by jurisdiction. In Chile, the debates about the role of the courts appears to have centered on the nature of Supreme Court review of TDLC decisions on law, facts, and remedies³³. Those debates also raise complex issues about the democratic nature of antitrust enforcement—particularly given that the NEPO, TDLC, and Supreme Court are all to some degree insulated from direct electoral supervision. There are no simple answers to what it means for an antitrust system as a whole to reflect democratic values, taking into account its many moving pieces.

30 Phillip E. Areeda and Herbert Hovenkamp, “Antitrust Law” 62 (3d ed. 2006) (stating that the Sherman Act “invest[ed] the federal courts with a jurisdiction to create and develop an ‘antitrust law’ in the manner of the common law courts”); William F. Baxter, “Separation of Powers, Prosecutorial Discretion, and the ‘Common Law’ Nature of Antitrust Law”, *TEX. L. REV.* 60, (1982), 661-663 (“Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.”); Thomas W. Merrill, “The Common Law Powers of Federal Courts”, *U. CHI. L. REV.* 52, (1985), 44-45 (describing antitrust statutes as delegating to courts power to develop common law of antitrust); Frank H. Easterbrook, “Statutes’ Domains”, *U. CHI. L. REV.* 50, (1983), 533-544 (“The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law.”); Frank H. Easterbrook, “Workable Antitrust Policy”, *MICH. L. REV.* 84, (1986) 1696-1705 (“The Sherman Act set up a common law system in antitrust.”).

31 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (alteration in original); see also *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (“The legislative history makes it perfectly clear that it expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732-33 (1988) (describing Sherman Act adjudication as a common-law process, drawing on pre-Sherman Act common law precedents and dynamic common law).

32 Daniel A. Crane, “Antitrust Antitextualism”, *forthcoming Notre Dame L. Rev.*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561870.

33 Agüero, “Chilean Antitrust Policy”, 141-42.

VI. CITIZENS VOTING WITH THEIR EYEBALLS

A final set of questions concerns the role of grass roots citizen democracy in the digital ecosystems that are the targets of so much antitrust scrutiny today. Companies like Google, Facebook, Amazon, and Apple are popularly painted as the monopoly Robber Barons of our generation, but the fact remains that millions or billions of consumers continue to use those services voluntarily despite their public villainization.

For example, consider the Facebook-Cambridge Analytica scandal that broke in 2018, where it became known that Cambridge Analytica had used millions of Facebook users' personal data without their consent, principally for purposes of political advertising. In addition to enormous fines imposed by regulators worldwide, a popular movement arose to "Delete Facebook," with the aim of boycotting Facebook and breaking its social network monopoly. In survey responses, overwhelming majorities of Facebook users purported to be very concerned about misuses of their data. Surely, public sentiment would tame the dragon.

As one would expect, the market quickly punished Facebook, with the company losing 24% of its value--\$134 billion—within about a week. Within two months, however, the company had fully recouped those market share losses. Why? Despite all of the public furor, regulatory fines, and calls for boycotts, very few people actually stopped using Facebook. There are several hundred million more Facebook users worldwide today than there were at the time of the Cambridge Analytica scandal. Whatever the political criticisms of the company, retail users continue to flock to the platform.

A similar story could be told for Google, Amazon, and Apple. Despite immense public criticism, retail users continue to frequent those companies. And it is not that consumers don't have a choice. It's easy to switch to a different search engine, buy from a different online retail platform, or chose a different brand of smartphone. As Google is fond of saying, competition is always "one click away." Consumers arguably buy from these platforms because they prefer them.

If vast majorities of consumers—who also happen to be citizens—voluntarily keep coming back to the major digital platforms, sharing their personal data, and lending their eyeballs for sale to advertisers, does it make any sense to turn the antitrust screws on the platforms in the name of democracy? What weight should be given to citizens' reveal preferences (as opposed to what they may tell surveyors or pollsters)? Does defending democracy require telling millions of consumers that they can't have some of the things that they want or think they want? Is that consistent with consumer welfare? Are consumer welfare and democracy in some tension? Again, we come to the point that democracy and antitrust are both concepts with many internal components and contradictions, and that when we mesh the two concepts, a range of challenging issues arise.

VII. CONCLUSION

To my mind, these are the most interesting and important questions presented by the current antitrust moment, and they have not been given comprehensive or satisfactory answers—at least in the United States. Everyone seems to be for antitrust, everyone seems to be for democracy, and everyone seems to think that more antitrust is good for democracy, but few have given much thought to many of the political, legal, and institutional tensions in the relationship between democracy and antitrust. Perhaps this moment of putative antitrust crisis will provide clarification on these important questions—or maybe we will just muddle through as usual.



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