

## ANTITRUST AS AN INSTRUMENT OF DEMOCRACY

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### INTRODUCTION

In this moment of renewed political interest in antitrust, a widespread consensus has formed that antitrust law needs to be concerned not only with economic questions, but also with democratic ones.<sup>1</sup> Echoing earlier comments by Senator Elizabeth Warren that excessive concentration threatens democracy,<sup>2</sup> President Biden’s Executive Order on competition begins with the premise that “excessive market concentration threatens . . . democratic accountability.”<sup>3</sup> Former President Donald Trump similarly asserted that antitrust enforcement was necessary to prevent the destruction of democracy.<sup>4</sup> Think tanks across political spectrum have argued for more vigorous antitrust enforcement in defense of their democratic visions.<sup>5</sup> The

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1. Greg Ip, *Antitrust’s New Mission: Preserving Democracy, Not Efficiency*, WALL ST. J. (July 7, 2021, 11:07 AM), <https://www.wsj.com/articles/antitrusts-new-mission-preserving-democracy-not-efficiency-11625670424> [<https://perma.cc/WQJ7-CGPY>].

2. Press Release, Sen. Elizabeth Warren, Senator Elizabeth Warren Delivers Remarks on Reigniting Competition in the American Economy (June 29, 2016), [https://www.warren.senate.gov/?p=press\\_release&id=1169](https://www.warren.senate.gov/?p=press_release&id=1169) [<https://perma.cc/AAD7-HBHW>]; see also Brian Beutler, *How Democrats Can Wage War on Monopolies—And Win*, NEW REPUBLIC (Sept. 16, 2017), <https://newrepublic.com/article/144675/democrats-elizabeth-warren-can-wage-war-monopolies-and-win> [<https://perma.cc/R7JP-C9AH>] (describing the new focus on antitrust as a political issue and Senator Warren’s leadership of it).

3. Executive Order on Promoting Competition in the American Economy, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> [<https://perma.cc/R2QD-WHBE>].

4. Editorial, *Trump’s Comments Create a Lose-Lose Position for Justice*, WASH. POST (Nov. 13, 2017), [https://www.washingtonpost.com/opinions/trumps-comments-create-a-lose-lose-position-for-justice/2017/11/13/6fd7b28e-c596-11e7-aae0-cb18a8c29c65\\_story.html](https://www.washingtonpost.com/opinions/trumps-comments-create-a-lose-lose-position-for-justice/2017/11/13/6fd7b28e-c596-11e7-aae0-cb18a8c29c65_story.html) (asserting that allowing AT&T and Time Warner to merge would “destroy democracy”).

5. See, e.g., *Democracy & Monopoly*, OPEN MARKETS, <https://openmarketsinstitute.org/explainer/democracy-and-monopoly/> [<https://perma.cc/Y7J7-3X6B>] (arguing that democracy and freedom can flourish only where excess economic consolidation is avoided); Clara Hendrickson & William A. Galston, *Big Technology Firms Challenge Traditional Assumptions About Antitrust Enforcement*, BROOKINGS INST.: TECHTANK (Dec. 6, 2017), <https://www.brookings.edu/blog/techtank/2017/12/06/big-technology-firms-challenge-traditional-assumptions-about-antitrust-enforcement/> [<https://perma.cc/5GDX-SMNV>] (noting the importance of preventing consolidation of political power in American antitrust legislative history); Kara Frederick, *Combating Big*

leadership of the Justice Department's Antitrust Division and the Federal Trade Commission have pledged to reorient antitrust toward preserving democracy.<sup>6</sup>

But if there is widespread agreement that antitrust law should serve as an instrument of democracy, there is little consensus on what that means or how it should happen. To the contrary, the idea of antitrust as a democratic instrument is easily deployed in service of opposing visions for both antitrust and democracy. For instance, then-President Donald Trump asserted the importance of antitrust as democracy-preserving to justify the Justice Department's unsuccessful lawsuit to block AT&T's acquisition of Time Warner, which included the CNN news network that was sharply critical of the President.<sup>7</sup> Critics asserted that the President was misusing antitrust enforcement against his political adversaries, just as Richard Nixon had done a half-century before.<sup>8</sup> Similarly, critics on the left have reacted with suspicion to the Republican Party's newfound affinity for antitrust reinvigoration, suspecting it of being a "Trojan horse" deployed to "attack democracy" rather than preserve it.<sup>9</sup> Conversely, voices on the political right like Senator Mike Lee have described the FTC's newfound aggressiveness as a "progressive putsch to consolidate power and burden American businesses."<sup>10</sup>

In sum, those in the political elite seem to agree that there is a strong connection between antitrust and democracy but stake widely different claims about what that nexus should be and what sorts of policies or legal reforms are necessary to accomplish it. In light of this indeterminacy and contestability about what it means for antitrust to

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*Tech's Totalitarianism: A Road Map*, HERITAGE FOUND. (Feb. 7, 2022) <https://www.heritage.org/technology/report/combating-big-techs-totalitarianism-road-map> [<https://perma.cc/FC4F-FZYU>] (arguing for the use of modern antitrust law to prevent the erosion of individual liberties and self-governance).

6. Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines, DOJ (Jan. 18, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines> [<https://perma.cc/GE7H-Y4V6>] ("The FTC and DOJ are fighting on the front lines to preserve competitive markets, which are essential to a vibrant and healthy democracy.").

7. Editorial, *supra* note 4.

8. Heidi Przybyla & Pete Williams, *Former DOJ Officials Raise Trump AT&T Interference Concerns*, NBC (March 9, 2018), <https://www.nbcnews.com/politics/justice-department/top-attorneys-try-help-t-challenge-potential-trump-interference-n855036> [<https://perma.cc/59T3-E8AT>].

9. Vashuda Desikan, *Republicans Are Using Antitrust Reform as a Trojan Horse to Attack Democracy*, TRUTHOUT (July 22, 2021), <https://truthout.org/articles/republicans-are-using-anti-trust-reform-as-a-trojan-horse-to-attack-democracy/> [<https://perma.cc/A6UG-DPXF>].

10. Press Release, Sen. Mike Lee, Sen. Mike Lee Urges FTC to Change Course (July 27, 2021), <https://www.lee.senate.gov/2021/7/sen-lee-urges-ftc-to-change-course> [<https://perma.cc/L92Z-D8ZQ>].

serve as an instrument of democracy, there is a tendency to dismiss democracy talk as vacuous rhetoric or window dressing. This sentiment is particularly acute among those in the “antitrust establishment” who would just as well be left alone to sort things out without external or political interference. This Essay contests that tendency. As Robert Pitofsky argued in his landmark article *The Political Content of Antitrust*,<sup>11</sup> antitrust law has always had a political content. As a positive matter, it is unavoidable that antitrust will be considered in democratic terms, at least during periods when antitrust is politically salient. The history of antitrust law and policy shows that antitrust is never far removed from democratic concerns. As a normative matter, as will be argued further below, antitrust does have an important role to play in bolstering democracy. The challenge is to specify antitrust’s democracy-reinforcing role in a way that has genuine content and furthers, rather than hinders, antitrust’s mission.

To that end, this Essay offers four senses—structures, channels, processes, and norms—in which antitrust law might play a democracy-reinforcing role and analyzes the democracy considerations in each of them. While acknowledging the importance of explaining and structuring antitrust law to preserve and advance democratic values, it also cautions against incorporating expressly political questions into antitrust analysis itself. A well-functioning antitrust system serves as an instrument of democracy without antitrust decision-makers directly attempting to promote democracy in the way that other political and legal actors (*i.e.*, voting, civil rights, or education officials) might do. Explicit democratic considerations belong in antitrust’s mission and structure but not usually in its day-to-day operations.

The remainder of this Essay proceeds through the four dimensions of the antitrust-democracy nexus in roughly descending order from direct to more attenuated connection. Part I considers how antitrust law promotes democratic structures—particularly unconcentrated markets that prevent the aggregation of undue economic power that can lead to excessive concentration of political power and literally threaten the preservation of the democratic order and its replacement with autocracy. Part II analyzes arguments that antitrust law has a special role to play in keeping open channels of political discourse and participation, such as news media or online platforms. Part III considers antitrust’s relevance to governmental processes—both antitrust processes (like the operations of the antitrust agencies or the

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11. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

courts) and state regulatory processes (where federal antitrust sometimes plays a preemptive role). Finally, Part IV discusses claims that antitrust law should be involved in creating democratic social and economic norms, such as anti-domination, worker countervailing power, or small business or consumer autonomy. As to all four dimensions, this Essay argues for considering democracy in how antitrust is structured without asking explicitly political questions in the granular implementation of antitrust law and policy.

## I. DEMOCRATIC STRUCTURES

The strongest nexus between antitrust and democracy arises from the historical record of undue concentration of economic power contributing to the literal destruction of democracy, in the sense of the replacement of elected representative government with autocracy. This sense of democratic mission is evidently behind some of the current Administration's thinking on competition policy. Professor Tim Wu, who currently coordinates the Biden Administration's technology and competition policy on the National Economic Council, has argued that "extreme economic concentration yields gross inequality and material suffering, feeding an appetite for nationalistic and extremist leadership."<sup>12</sup> The claim on the table is that a society characterized by grossly concentrated economic power will tend away from democracy and toward authoritarianism, autocracy, or oligarchy—perhaps not deterministically, but in combination with other causes.

The rise of Nazism provides the leading example of the deleterious consequences that highly concentrated economic power can have for liberal democracy.<sup>13</sup> The German economy underwent a dramatic increase in concentration from the time of Bismarck through the Weimar period, proceeding from cartelization, to merger, to monopoly control in most important industries.<sup>14</sup> Through a variety of mechanisms, the heavily concentrated structure of the German economy facilitated Hitler's ascension and consolidation of power and

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12. TIM WU, *THE CURSE OF BIGNESS IN THE NEW GILDED AGE* 14 (2018).

13. See Daniel A. Crane, *Fascism and Monopoly*, 118 MICH. L. REV. 1315 (2020) (arguing that the highly concentrated structure of the German economy during the Weimar period facilitated Hitler's rise to power); JONATHAN TEPPER WITH DENISE HEARN, *THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION* 137–53 (2019) ("It is difficult to understate the importance of concentrated industry to the Nazi rise."); WU, *supra* note 12, at 80 (arguing that industrial concentration facilitated Hitler's rise to power).

14. Crane, *supra* note 13, at 1336.

then his wars of conquest in Europe.<sup>15</sup> Monopoly firms lent critical financial and material support to the regime in exchange for economic privileges; provided organizational structure, industry-wide mobilization, and the dissemination of propaganda; and extended the regime's political control domestically and abroad through cartel agreements.<sup>16</sup> At the end of the war, the U.S. Office of Military Government set up a special "Decartelization Branch" to study the economic factors that facilitated the Third Reich and to de-Nazify Germany by deconcentrating it.<sup>17</sup> Largely staffed by American antitrust lawyers seconded to the War Department, the Branch considered its mission to "make every effort to teach the German people that political democracy cannot long survive the disappearance of economic democracy."<sup>18</sup>

Although the decartelization project was shuttered in 1949 without much success in deconcentrating the German economy,<sup>19</sup> it exerted a significant political influence back in the United States, particularly on the Celler-Kefauver Act of 1950, which significantly invigorated merger policy for the next several decades.<sup>20</sup> Both of the bill's namesakes attributed Hitler's rise to the monopolization of the German economy.<sup>21</sup> Senator Celler argued that "[t]he monopolies soon got control of Germany, brought Hitler to power and forced virtually the whole world into war."<sup>22</sup> Reflecting the shift from a fear of fascism at the end of the war to the advent of the Red Scare by 1950, Senator Kefauver warned that a monopolized economy "either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state."<sup>23</sup> The anti-merger enthusiasm of the 1950s–1970s was born in part of the belief that monopoly represented a threat to democratic government in a literal and immediate sense.

The linkage between monopoly and autocracy is not limited to Germany nor to the Axis powers more generally. Franco's fascist regime in Spain and Salazar's quasi-fascist Estado Novo in Portugal

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15. *Id.* at 1355–64.

16. *Id.*

17. Daniel A. Crane, *De-Nazifying by De-Cartelizing: The Legacy of the American Decartelization Project in Germany*, in *DEMOCRACY AND ANTI-MONOPOLY* (Daniel A. Crane & William Novak, eds., forthcoming 2022 Oxford University Press).

18. Crane, *supra* note 13, at 1316.

19. Crane, *supra* note 17.

20. Crane, *supra* note 13, at 1324–25.

21. *Id.*

22. 95 CONG. REC. 11,486 (1949).

23. 96 CONG. REC. 16,452 (1950).

were similarly characterized by high degrees of economic concentration that bolstered political autocracy.<sup>24</sup> Nor are concerns that extremely concentrated economic power may threaten democracy merely ghosts of the mid-twentieth century. As of this writing, autocratic Russia has invaded Ukraine and apparently seeks to replace its democratic government with a puppet regime. It should not escape attention that the Russian economy is dominated by a handful of oligarchs who control an overwhelming share of GDP and employment,<sup>25</sup> that the Russian economy is very highly concentrated,<sup>26</sup> and that small businesses, which account for nearly half of the economy in many industrialized countries,<sup>27</sup> account for merely twenty percent of the Russian economy.<sup>28</sup> The highly concentrated oligarchic structure of the Russian economy may contribute to the Putin regime's autocratic character and its geopolitical implications.

Of course, it would be far too simplistic to reduce the replacement of democracy with autocracy to extreme economic concentration or any other single factor. Democracies can withstand and have withstood high degrees of economic concentration, at least for a time. (On the other hand, it is questionable whether modern autocracies could long withstand a vibrantly competitive market with widely diffused economic power.) But letting an economy slip into extreme

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24. André Costa, Alexandre Ruiz Feases & Daniel A. Crane, *Market Concentration and Fascism in Spain and Portugal: Lessons for the Theory of Democracy and Anti-Monopoly*, in CAMBRIDGE HANDBOOK ON THE THEORETICAL FOUNDATIONS OF ANTITRUST AND COMPETITION LAW (forthcoming) (on file with authors).

25. F. Joseph Dresen, *The Piratization of Russia: Russian Reform Goes Awry*, WILSON CTR., <https://www.wilsoncenter.org/publication/the-piratization-russia-russian-reform-goes-awry> [<https://perma.cc/75MT-FU6S>] (reporting that Russian economic liberalization resulted in replacement of state monopolies with private monopolies); Sergei Guriev & Andrei Rachinsky, *The Role of Oligarchs in Russian Capitalism*, 19 J. ECON. PERSP. 131, 133 (2005) (reporting that 33 oligarchs control 42% of employment and 39% of GDP).

26. Oleg Shibanov, *Russia: Increasing Concentration of the Economy and Low Investment*, FREE (Oct. 12, 2015), <https://freepolicybriefs.org/2015/10/12/russia-increasing-concentration-of-the-economy-and-low-investment/> [<https://perma.cc/JNA4-FJ97>] (“High concentration of both sales and profits in a few companies means that a small group of managers undertakes investment and production decisions for the large part of the economy.”).

27. Press Release, Off. of Advocacy, Small Businesses Generate 44 Percent of U.S. Economic Activity (Jan. 30, 2019), <https://advocacy.sba.gov/2019/01/30/small-businesses-generate-44-percent-of-u-s-economic-activity/> [<https://perma.cc/SKC8-U55Q>] (reporting that small businesses generate 44% of U.S. GDP); Georgina Hutton & Matthew Ward, *Business Statistics*, HOUSE OF COMMONS LIBR. 12 (December 21, 2021), <https://researchbriefings.files.parliament.uk/documents/SN06152/SN06152.pdf> [<https://perma.cc/3EZH-U94F>] (reporting that small and medium businesses account for 49% of British turnover).

28. See *Russia's Small Businesses Contribute Just 20% of Economy*, MOSCOW TIMES (Jan. 28, 2020), <https://www.themoscowtimes.com/2020/01/28/russias-small-businesses-contribute-20-percent-russia-economy-a69063> [<https://perma.cc/M89L-ZJKX>].

monopolization can contribute to a slide toward autocracy. It therefore follows that a competition policy that prevents such a slip helps to bolster democracy.

Those observations speak to the importance of antitrust as an instrument of democracy, but say very little about *how* antitrust law should function in practice. There is no recognized metric to identify a level of economy-wide concentration that threatens the demise of democratic institutions. It cannot be the case that any increase in market concentration threatens democracy or else the formation of every partnership, every merger of small firms, and every exit of a producer through bankruptcy or retirement puts the country on the road to fascism. It is also hard to see how this sense of antitrust as democracy-reinforcing could be implemented in legal doctrine or practice. The effect of economy-wide concentration on the consolidation of political power is systemic and cannot be isolated to any particular firm or discrete group of actors. It would be near-impossible for the government to satisfy ordinary standards of litigation proof in demonstrating that any individual merger or act of monopolization makes it likely that electoral government, the separation of powers, the rule of law, or other trappings of liberal democracy will fail.

Further, an economically-oriented antitrust policy that aims to keep market power in check and preserve a competitive economy has the effect of preventing the degrees of economic concentration that threaten destruction of the democratic order. To return to the Third Reich example, if Germany had been subject to a rigorous antitrust policy, its economy would not have achieved nearly the levels of concentration that allowed enormous monopolies to contribute to Germany's slide from democracy to autocracy.<sup>29</sup> Again, this is not to say that an economically oriented antitrust policy alone can save democracy, but it can combat a tendency toward economic consolidation that, along with other factors, tends toward consolidation of political power.

This structural dimension of antitrust as democracy-reinforcing is best left at the level of general policy decisions and not applied in individual enforcement actions. For instance, in 1950 the U.S. Congress felt that the "rising tide of concentration" in the U.S. economy justified amendments to Section 7 of the Clayton Act to bolster antitrust

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29. Crane, *supra* note 13, at 1321.

enforcement against mergers.<sup>30</sup> That led to a dramatic increase in anti-merger activity in the following decades, but no individual enforcement decision could be framed in democracy-reinforcing terms. By the same token today, there are any number of policy levers available to increase the effectiveness of antitrust (and other anti-monopoly tools) in reducing concentration and monopoly, including increasing the funding of the antitrust agencies, revising the antitrust statutes, appointing more aggressive enforcement personnel, or selecting judges with a different set of perspectives. Such interventions may help to disperse economic power and hence bolster democracy without entailing a clumsy effort to write democracy-enhancement criteria into the operations of antitrust law.

## II. DEMOCRATIC CHANNELS

A second dimension of the antitrust-democracy nexus concerns economic channels that may be particularly important to healthy democratic functioning because they facilitate the communication of news or the interchange of ideas. In older times, one would have thought of newspapers, radio, and television in these terms. Today, the focus has shifted to Big Tech platforms like Google, Facebook, and Twitter that moderate (or fail to moderate) the dissemination of ideas. One view, associated with Professor Jack Balkin, considers the Big Tech platforms “information fiduciaries” who should, or do, owe special duties to their users.<sup>31</sup> An opposing view, proposed by now-FTC Chair Lina Khan and Professor David Pozen, holds that regulating Big Tech as information fiduciaries fails to address the fundamental problems associated with online dominance—Big Tech’s “outsized market share and business models built on pervasive surveillance”—and “enervate[s] complacency toward online platforms’ structural power.”<sup>32</sup> Here is where the democratic issue comes back to antitrust.

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30. *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962) (“The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.”).

31. See generally Jack M. Balkin, Lecture, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016) (advancing the idea of information fiduciaries to categorize Big Tech companies).

32. Lina M. Khan & David Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 498 (2019).

Breaking the platforms' "structural power" entails structural antitrust interventions in service of democracy.<sup>33</sup>

While such themes appear across the political spectrum, they have become especially pronounced on the right because of the perception that Big Tech "leans left" and disfavors conservative political speech, as epitomized by Facebook and Twitter's removal of former President Trump over the spread of disinformation regarding the 2020 election.<sup>34</sup> A recent report of the conservative Heritage Foundation argues that "the growing symbiosis between Big Tech and government gives companies undue influence over Americans' daily lives and undermines their rights."<sup>35</sup> It asserts that a "handful of Big Tech corporations now manipulate the flow of information in such an expansive way as to fundamentally reshape the public discourse. The past year demonstrated that suppression of conservative viewpoints by technology companies can materially impact the body politic."<sup>36</sup> The Heritage Foundation report concludes with calls for aggressive antitrust enforcement against the Big Tech platforms in service of rebalancing democracy.

The democratic nexus may be somewhat more attenuated here than in the structural category because the claim under consideration is not that a failure of antitrust and consequent monopolization of information channels necessarily entails the literal destruction of democratic institutions. This is not to say that the monopolization of information channels could not contribute to the literal demise of democratic government, but, rather, that such an extreme version of the antitrust-democracy nexus is not a necessary implication of the argument. It is enough that monopolization of information channels can contribute to making democracy work less effectively, as measured by the system's ostensible goals of translating popular preferences into law, improving collective decision-making, galvanizing citizen participation, instilling a sense of legitimacy in political outcomes, and encouraging mutual respect and tolerance. Antitrust could thus serve

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33. See also Executive Order on Competition, *supra* note 3 (asserting that "many local newspapers have shuttered or downsized, in part due to the Internet platforms' dominance in advertising markets").

34. See Nick Clegg, Meta (Facebook) VP of Global Affairs, *In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated if Conditions Permit*, META (June 4, 2021), <https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump/> [<https://perma.cc/844P-4WT7>] (explaining that the Facebook Oversight Board "upheld Facebook's suspension of former US President Donald Trump's Facebook and Instagram accounts following his praise for people engaged in violence at the Capitol on January 6").

35. Frederick, *supra* note 5.

36. *Id.*

as an instrument of democracy by dispersing control over information channels to improve the performance of democratic government.

But should antitrust law explicitly take speech and viewpoint plurality into consideration in order to play a democracy-reinforcing role? Casting antitrust enforcement in these democratic terms risks a counter-effect—antitrust’s constitutionalization. The First Amendment’s long shadow complicates potential efforts to directly regulate Big Tech as channels of speech and political expression, which is part of antitrust’s attraction as a content-neutral form of regulation.<sup>37</sup> If the antitrust agencies began explaining or structuring their enforcement actions against Big Tech platforms in explicitly speech-oriented terms, the courts might react by constitutionalizing antitrust in ways that could significantly limit enforcement.

This risk of constitutionalizing antitrust enforcement against dominant media and speech platforms is not new. The Supreme Court’s seminal *Associated Press v. United States*<sup>38</sup> decision in 1945 involved such a set of questions. The case grew out of the political rivalry between Robert McCormick’s conservative, anti-New Deal, and isolationist *Chicago Tribune* and Marshall Field’s upstart, pro-New Deal, and foreign policy interventionist *Chicago Sun*, which was unable to join the Associated Press (“AP”) because of a bylaw granting each member the power to block local newspaper rivals from joining the AP.<sup>39</sup> The Justice Department’s challenge to the bylaw case exposed three contending viewpoints about the relationship between antitrust and the First Amendment. The first view, espoused by McCormick, the AP, and Justice Roberts, cast the First Amendment in classical liberal terms—as freedom from governmental intervention.<sup>40</sup> McCormick and the AP argued that freedom of the press entailed organizational

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37. See Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2426 (2020) (“Even the United States, hamstrung in directly regulating content and privacy by First Amendment concerns, has turned to discussions of antitrust regulation to break up the ‘monopolies’ of big tech as well as an empowered Federal Communications Commission (FCC) to levy fines for user-privacy violations.”).

38. *Associated Press v. United States*, 326 U.S. 1 (1945).

39. See Daniel A. Crane, *Collaboration and Competition in Information and News During Antitrust’s Formative Era*, KNIGHT FIRST AMEND. INST., <https://knightcolumbia.org/content/collaboration-and-competition-in-information-and-news-during-antitrusts-formative-era> [<https://perma.cc/C5WP-4QYW>]; SAM LEBOVIC, *FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA* 77 (2016); John Henry Lewin, *The Associated Press Decision—An Extension of the Sherman Act?*, 13 U. CHI. L. REV. 247, 251 (1946).

40. Margaret A. Blanchard, *The Associated Press Suit: A Philosophical Clash over Ownership of First Amendment Rights*, 61 BUS. HIST. REV. 43–44 (1987).

freedom to manage a news association's operations free from governmental restraint, including antitrust. The second view, propagated by Field and the Justice Department, adopted by Judge Learned Hand for a three-judge district court panel, and endorsed on the Supreme Court by Justice Frankfurter, viewed the First Amendment as a guarantee of "not just classical speech rights, but some kind of positive flow of information to the public."<sup>41</sup> In this view, antitrust law had a special and urgent role to play in keeping open informational channels that served democracy. The third view, adopted by Justice Hugo Black for the Supreme Court majority, rejected both the argument that the First Amendment stood as an obstacle to antitrust regulation of news media and the opposing view that First Amendment values fortified the antitrust case. As a proponent of strong antitrust enforcement but also a First Amendment absolutist, Black rejected Hand's view that a special interest in promoting a free and diverse press was necessary or available to sustain the government's case. The Court struck down the AP bylaw but took pains to emphasize that it did so under ordinary principles of antitrust law equally applicable to cases involving "tiles, or enameled ironware, or lumber, or women's clothes, or motion pictures."<sup>42</sup>

*Associated Press* stands broadly for the proposition that antitrust law regulates economics rather than politics, even if its economic interventions also serve democratic interests. Casting antitrust enforcement as to information channels in explicitly democracy-reinforcing terms risks constitutionalizing and, therefore, complicating enforcement in just the way Justice Roberts proposed and Justice Black avoided. This could be especially true of the current Supreme Court, which has shown an interest in expanding the political rights of corporations as against governmental regulation.<sup>43</sup> As with the democratic structures nexus, antitrust has the capacity to promote democracy by preventing the monopolization of information channels without importing political criteria into antitrust decision making.

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41. LEBOVIC, *supra* note 39, at 80. *See generally* United States v. Associated Press, 52 F. Supp. 362 (1943) (recognizing the importance of the flow of news and information to the public and the threat that consolidation poses to it).

42. *Associated Press*, 326 U.S. at 18–19 (citations omitted).

43. *See, e.g.*, Citizens United v. FEC, 200 U.S. 321 (2010) (invalidating corporate campaign finance restrictions on First Amendment grounds).

## III. DEMOCRATIC PROCESSES

A third dimension in which democracy and antitrust interact concerns the democratic legitimacy or integrity of governmental processes and the outcomes they produce. This category can be further subdivided into (1) concerns about democratic control over antitrust processes and (2) antitrust interventions in other governmental processes in order to optimize their democratic orientation or accountability. Antitrust can both *be democratic* in the sense of channeling popular will in the outcomes of the antitrust system and *serve democracy* in the sense of pushing other branches of law and politics to channel democratically-legitimate popular will.

The first of these two categories has received considerable attention in recent years. Spencer Waller and Harry First have written of antitrust's "democracy deficit," by which they mean that the antitrust enterprise has shifted toward management by "unaccountable and nontransparent technocratic institutions far removed from democratic (or national) control."<sup>44</sup> The worry is that "the antitrust system [has become] captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability."<sup>45</sup> Making antitrust law more democratic in this process sense might require adjustments to antitrust law's institutional arrangements, including the administrative functioning of the antitrust agencies, the respective roles of the executive, legislative, and judicial branches, and the participation of non-federal actors, including state Attorneys General and private enforcers.<sup>46</sup> It might also entail more popular citizen participation in the formulation of antitrust standards. The Antitrust Division's leadership has made clear that it views as popular consultation with a "diverse group of stakeholders," including "consumers, workers, innovators, and others on the ground," as critical to the legitimacy and efficacy of its project to reframe the merger guidelines.<sup>47</sup>

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44. Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2545 (2013).

45. *Id.* at 2544.

46. See generally Spencer Weber Waller, *Antitrust and Democracy*, 46 FLA. ST. L. REV. 807 (2019) (examining the main institutions involved in antitrust enforcement and how they affect democratic values).

47. Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines, DOJ (Jan. 18, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines> [<https://perma.cc/QCQ9-R2K6>]; see also Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement, FTC (Jan. 18, 2022) [hereinafter *Remarks of Chair Lina M. Khan*] ("I want to . . .

Although it is doubtlessly important that antitrust's processes and outcomes be democratically legitimate, attention to antitrust's democratic functioning does not necessarily make antitrust distinctively an instrument of democracy, or, at least, does not distinguish antitrust from any other manifestation of state power. A democracy should strive for political legitimacy and popular accountability in all its functions—from dog catching to nuclear power plant regulation. That does not mean that we should think of dog catching as an instrument of democracy—its point is to manage dogs, not the *demos*. All exercises of state power should be democratic, but it would dilute the category to think of all exercises of state power as equal instruments of democracy. Some exercises of state power lie closer to the good functioning of the democratic order than others.

That said, if antitrust is otherwise an important instrument of democracy—because it prevents consolidations of economic power that foment autocracy or lubricates the channels of democratic expression, as discussed in the prior two sections—then perhaps there is a special imperative to ensure democratic superintendence of antitrust processes. Perhaps the shift toward technocracy that occurred in U.S. antitrust law over the past several decades<sup>48</sup> has inhibited antitrust from serving its democracy-reinforcing functions by vesting policy decision making in actors who did not have those functions in view or did not care about them. In this perspective, democratizing antitrust processes might improve antitrust's democratic performance.

The difficulty with this view is that democratizing antitrust processes is vacuous in generality and contestable in specificity. For instance, critics of Robert Bork's consumer welfare standard often charge Bork with intentionally thwarting a democratic vision for antitrust.<sup>49</sup> Barry Lynn, an influential advocate of the neo-Brandeisian school, argues that Bork “achieved . . . an overthrow of a system” of “democracy that integrates everybody, that gives everybody a say.”<sup>50</sup> But Bork believed that he was doing just the opposite—saving

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encourage those beyond the antitrust community . . . to share feedback and evidence. The quality of our review and any subsequent revisions to the guidelines will depend on robust public participation, and we are especially eager to hear from a broad set of market participants.”)

48. See generally Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159 (2008) (celebrating the technocratic shift in antitrust and arguing it should go even further).

49. Federalist Society Panel, *A New Approach to Antitrust Law: Transparency*, 45 U. DAYTON L. REV. 35, 55 (2020).

50. *More than money: Defining American antitrust law, from Bork to Khan*, WBUR ON POINT (Feb. 17, 2022), <https://www.wbur.org/onpoint/2022/02/17/more-than-money-antitrust-monopolies-are-defined-from-bork-to-khan> [<https://perma.cc/S7WN-MA2G>].

democracy from “an unelected, somewhat elitist, and undemocratic judicial institution”<sup>51</sup> that saw “antitrust [as] . . . a cornucopia of social values, all of them rather vague and undefined but infinitely attractive.”<sup>52</sup> Far from opposing democracy, Bork understood his project as saving the “liberal, democratic, and capitalist social order”<sup>53</sup> by assigning antitrust an objectively testable standard that diminished the influence of judicial ideology and enhanced public accountability. Bork’s critics contest his claim to objectivity, arguing that “[m]arkets [c]annot be [d]ivorced from [p]olitics” and that all choices with respect to the goals and content of antitrust law are political.<sup>54</sup> Of course, these debates are about questions much broader than antitrust; they go to fundamental concepts about the nature of liberal democratic order that are unlikely to be resolved within the confines of antitrust policy.

There is a second—more limited and more concrete—sense in which antitrust connects to democratic process, and that is in antitrust’s scrutiny of state or local regulations that stifle competition. As a general rule, federal antitrust law does not preempt anticompetitive state actions due to state action immunity doctrine, which holds that states are free to regulate in anticompetitive ways despite the Sherman Act’s pro-competition policy.<sup>55</sup> However, state action immunity only applies if the anticompetitive policy is “clearly articulated and affirmatively expressed as state policy” and actively supervised by agents of the state.<sup>56</sup> State regulations that fail this test are preempted by the federal Sherman Act. This preemption scheme is implicitly grounded in a democratic representation reinforcement model.<sup>57</sup> States may impose anticompetitive schemes on their citizens but only if they

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51. Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. (PAPERS & PROC.) 242, 243 (1967).

52. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 50 (1978).

53. *Id.* at 418.

54. Sandeep Vaheesan, *The Twilight of the Technocrats’ Monopoly on Antitrust*, 127 YALE L. J. FORUM (June 4, 2018), <https://www.yalelawjournal.org/forum/the-twilight-of-the-technocrats-monopoly-on-antitrust> [<https://perma.cc/7NQL-BWR3>].

55. *See generally* Parker v. Brown, 317 U.S. 341 (1943) (holding that antitrust liability does not attach to state action); Daniel A. Crane & Adam Hester, *State Action Immunity and Section 5 of the FTC Act*, 115 MICH. L. REV. 365 (2016) (explaining the history and workings of the state action immunity doctrine).

56. *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

57. Crane & Hester, *supra* note 55, at 373; *see generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing for a theory of judicial review that respects majority governance and legislative choices while standing in to protect individual or minority rights).

make conspicuous the state's own responsibility for anticompetitive market outcomes, thus giving dissatisfied citizens a clear target in subsequent elections. Antitrust law thus plays a role in generating democratic accountability for state and local officials exercising regulatory authority that may harm competition.

Antitrust's regard for democratic process in this second sense is relatively small bore. As scholars have noted, the state action immunity doctrine only makes public officials accountable at the ballot box in the limited circumstance where the costs of anticompetitive regulations are internalized in the official's political district and with sufficient negative impact on voters to generate electoral reaction.<sup>58</sup> However, in many instances the costs of anticompetitive regulations are externalized outside of the officials' political district or are so diffused across the population that they do not generate electoral reaction.<sup>59</sup> While antitrust's role could be increased—for example, by stripping state action immunity when a large share of regulatory costs are externalized outside the regulating official's electoral district<sup>60</sup>—current doctrine affords antitrust a limited role in democratizing regulatory processes.

#### IV. DEMOCRATIC NORMS

A final nexus between antitrust and democracy concerns democratic norms rather than the functioning of democratic government. Here, the argument is not so much that undue concentration of market power causes democratic institutions to fail in the sense that they are replaced by autocracy. The argument does not necessarily contemplate that monopoly makes democratic government function poorly. Rather, the claim is that democracy implies a set of social and political relations that should hold even outside of the operations of government. Thus, for example, a corporation that unduly dominates its employees' work and lives may be inconsistent

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58. Crane & Hester, *supra* note 55, at 374; Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1207 (1997); Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 499–500 (1987).

59. Crane & Hester, *supra* note 55, at 374.

60. See Inman & Rubinfeld, *supra* note 58, at 1207.

with democratic norms, even if the workers have complete agency and freedom to vote against the corporation's interests at the polls.<sup>61</sup>

Writing in the Brandeisian tradition, Lina Khan and Zephyr Teachout have proposed a vision for antitrust law as a democracy-reinforcing anti-domination regime.<sup>62</sup> They begin with the premise that “[m]arket structure is deeply political,” by which they mean not only that market power can affect the operations of government but also that “corporate structure is . . . political because it inscribes what we can and cannot do, and hence imposes on citizens a form of private governance unaccountable to the public.”<sup>63</sup> They argue that “in highly concentrated markets a few dominant companies can assume enough power to restrain, and even control, the actions of others,” which violates democratic norms whether or not it translates into distortions of governmental processes.<sup>64</sup> Khan and Teachout create a taxonomy of forms of anti-democratic private governance through market power. The first set concerns distortions of governmental processes through such mechanisms as campaign funding, staffing and recruiting from government, creating information, directing the politics of employees and contractors, and “too big to fail.”<sup>65</sup> A second set concerns regulatory power that emanates from corporate bigness, including the power to regulate and tax and also a “domination” catchall drawing on Justice Brandeis’s conception of domination and restraint.<sup>66</sup> Khan and Teachout argue that when economic power is unduly concentrated, it causes citizens to be unduly dominated in ways that inhibit them from “exhibiting and modeling the vibrant sense of self that is required for true self-government.”<sup>67</sup>

Khan and Teachout’s democratic blueprint for anti-domination antitrust policy seems to undergird much of the current Administration’s thinking about antitrust reform, in no small part because Khan is now chair of the FTC. In particular, the emphasis on anti-domination shows up in the Administration’s push for antitrust

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61. See generally, K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017) (arguing for a more democratic approach to economic governance based on breaking the power of large corporations over ordinary citizens).

62. See generally Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 *DUKE J. CONST. L. & PUB. POL’Y* 37 (2014) (arguing for a deployment of antitrust law to shape and control market power when it threatens to undermine the political system).

63. *Id.* at 37.

64. *Id.*

65. *Id.* at 43–52.

66. *Id.* at 53–60.

67. *Id.* at 60.

enforcement to combat employer power over employees. While labor monopsony effects can be described in conventional microeconomic terms,<sup>68</sup> the antitrust agencies have signaled an interest in a broader range of considerations than “wages, salaries, and financial compensation.”<sup>69</sup> The Justice Department has taken the unprecedented step of bringing criminal enforcement actions against employers who enter into collusive no-poach agreements, signaling that the Division views employee freedom as a moral—not merely economic—matter.<sup>70</sup> Beyond labor questions, the Biden Administration has also emphasized the importance of antitrust law in protecting small businesses, farmers, and racial minorities.<sup>71</sup>

Anti-monopoly as anti-domination is not a new thought. In addition to its resonances in Brandeisian ideology, anti-domination is the core principle of the post-War German Ordoliberal school which held that “[t]he economic problems of the Weimar Republic and Nazi Germany were attributable in part to the inability of the legal system to control and, if necessary, to disperse private economic power.”<sup>72</sup> Like many critics of the antitrust status quo today, the Ordoliberals believed that “economic thought gradually had become isolated, and economists had lost sight of both the political and social contexts of economic issues.”<sup>73</sup> The Ordoliberals argued that a liberal democratic state required a competition policy that ensured individual liberty, as defined by the absence of arbitrary control by other economic actors.<sup>74</sup> Ordoliberalism exerted a profound influence on European Union competition policy that continues to undergird conceptual differences

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68. See Executive Order on Competition, *supra* note 3 (“Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions.”); see generally ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS (2021) (documenting how consolidation has harmed workers and the lack of use of antitrust law to fix it).

69. Remarks of Chair Lina M. Khan, *supra* note 47.

70. See *Four Individuals Indicted on Wage Fixing and Labor Market Allocation Charges*, DOJ (Jan. 28, 2022), <https://www.justice.gov/opa/pr/four-individuals-indicted-wage-fixing-and-labor-market-allocation-charges> [<https://perma.cc/7HNN-2AYN>].

71. Executive Order on Competition, *supra* note 3 (emphasizing the benefits of more aggressive antitrust enforcement for “small businesses and farmers” and racial minorities).

72. RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 22 (9th ed. 2018); see also DANIEL A. CRANE & HERBERT HOVENKAMP, THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES 252–54 (2013).

73. DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 237 (1998).

74. Crane, *supra* note 13, at 1330.

between U.S. and EU law.<sup>75</sup> With many antitrust reform advocates believing that U.S. antitrust law should move in a European direction, proposed legislation adopting explicitly European terminology,<sup>76</sup> and the FTC's leadership committed to antitrust as anti-dominance, U.S. antitrust law may move in this direction.

It is likely to encounter headwinds. On one hand, antitrust principles may be applied uncontroversially to resist market power as a form of economic domination. To the extent that workers, small businesses, farmers, or other classes have become subject to excessive market power because of lax antitrust enforcement—as the Biden Executive Order on Competition claims—then reinvigoration of antitrust enforcement will reduce domination, increase freedom, and bolster democratic values. On the other hand, any effort to apply the antitrust laws to resist “domination” apart from market power in an economic sense would entail not just a shift toward a more aggressive antitrust policy or a shift toward Europe but a wholesale reformulation of U.S. antitrust law and policy.

To illustrate this important distinction, consider a merger that will adversely affect the interests of workers. Whether the merger entails conventional antitrust concerns depends entirely on the mechanism by which worker interests are harmed. If the merging firms obtain monopsony power that allows them to suppress wages or other conditions of employment, then the merger can be challenged on traditional antitrust grounds.<sup>77</sup> But if the merger involves layoffs that do not reflect a reduction in competition or the exercise of market power (for example, because the merging parties plan to close an old and inefficient factory), then it cannot be policed by current antitrust principles.<sup>78</sup> Antitrust law is limited to resisting dominance and hence bolstering democratic values when the dominance arises from an

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75. James Keyte, *Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge*, 33 ANTITRUST 113, 114 (2018).

76. See, e.g., S933A, 2021 Leg., Reg. Sess. (N.Y. 2021) (prohibiting abuse of a dominant position, in line with Article 102 of the Treaty on the Functioning of the European Union).

77. See *Concurring Statement of Commissioner Rebecca Kelly Slaughter and Chair Lina M. Khan Regarding FTC and State of Rhode Island v. Lifespan Corporation and Care New England Health System*, FTC (Jan. 17, 2022).

78. Eleanor M. Fox, *Antitrust, Competitiveness, and the World Arena: Efficiencies and Failing Firms in Perspective*, 64 ANTITRUST L.J. 725, 732 (1996) (arguing that it “would be incongruous to suggest that layoffs should disqualify mergers under the antitrust law”); Joseph F. Brodley, *Proof of Efficiencies in Mergers and Joint Ventures*, 64 ANTITRUST L.J. 575, 582–83 (1996) (examining the difference between layoffs caused by exercise of market power, which would be actionable, and those not caused by the exercise of market power, which would not be).

impairment of competition that also harms conventional economic interests, such as efficiency and market performance.

Of course, that is a statement about what is, not what should be. U.S. antitrust law could be reformulated to consider a set of concerns other than the creation or exercise of market power. However, doing so would come at a price. The Ordoliberals conceded that achieving their conception of freedom necessarily entailed a loss of economic efficiency.<sup>79</sup> Further, application of antitrust principles to create economic liberty unmoored from considerations of market power can have paradoxical effects. For example, prohibitions on manufacturer vertical restraints on downstream sellers, which were considered important to preserving dealer freedom, induced manufacturers to integrate forward into distribution, thus eliminating independent dealers altogether.<sup>80</sup> A policy meant to protect dealers may have eliminated them. It was in light of such unintended consequences that the Supreme Court observed that “an antitrust policy divorced from market considerations would lack any objective benchmarks.”<sup>81</sup> Antitrust law can play a constructive role in protecting individual autonomy and personal freedom but within a framework that asks measurable economic questions.

This is not to say that present antitrust standards have identified the complete or correct set of relevant questions. There is surely much work to be done to update the analytical tools necessary to identify the causes of market power and antitrust responses in an age of fundamental economic and technological change, particularly against a backdrop of recent decades in which many feel antitrust has failed to keep up. Such efforts should redound to the benefit of democratic anti-domination norms. But that does not have to mean that antitrust law needs to be expressed as an anti-domination tool in its doctrinal or functional operations.

#### CONCLUSION

Democracy talk is cheap, so there is an impulse to dismiss it. As applied to antitrust law, such dismissal would be unfortunate. There is a legitimate public appetite to understand antitrust’s mission in democratic terms, and there is much that the antitrust enterprise has done and can do to bolster and preserve the democratic order.

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79. CRANE & HOVENKAMP, *supra* note 72, at 253 (“If we want freedom, we have no option but to sacrifice some advantage which we could obtain only by employing concentrated power.”).

80. *See* Continental T.V., Inc. v. GTC Sylvania, Inc., 433 U.S. 36, 57 n.26 (1977).

81. *Id.* at 53, n.21.

However, that does not mean that antitrust can or should become a self-conscious instrument of democracy in its doctrines or operations. An antitrust policy focused on mitigating market power and preserving competition is more helpful to the democratic cause.