

ANTITRUST AND COMPETITION SERIES

Plumbers, Populists, and the Role of Public Opinion in Antitrust

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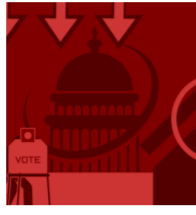
Sean Sullivan holds the Jon and Sarah Fister Chair in Law & Economics at the University of Iowa College of Law. Prior to joining the faculty at Iowa, he served as an attorney for the Federal Trade Commission. His research involves core questions in antitrust law and evidence—questions like why market shares tell us anything about market power and what it means for a jury to find the truth of a disputed fact. He also studies markets, negotiations, and small-sample statistical methods as an experimental economist.

Sean Sullivan discusses the role public opinion should play in setting antitrust policy and what should be left to the expert economists.

This article is part of a symposium that explores the relationship between democracy and antitrust. In theory, Congress passes laws, the antitrust agencies implement them through rules and policies, and the courts assure these rules and policies accord with the relevant statutes and Constitution. In practice, Congress is catatonic, the agencies are commonly left to reinterpret the means and ends implied in decades old laws and apply them to an entirely different world, and the courts have historically shown their own willingness to interpret and reinterpret the meaning of the laws, belying the impression that there is always an obvious and objective singular understanding and application of the antitrust laws. Can the agencies make the case for reinterpretation by testing the limits of their rulemaking? Is that bad enforcement or a legitimate form of governance that acknowledges that the creation of new rules and interpretation of old laws are a messy and tortuous process? Often lost in all of this is a meaningful connection between policy and public opinion. Is there a legitimate place for more direct public engagement with antitrust, and what would that look like? Commentators often pit the desires of the public against the expertise of the government bureaucracy. What is the role—and democratic limits—of bureaucrats in setting the antitrust agenda and its goals? You can read the symposium articles from Barak Orbach, Sean Sullivan, Erik Peinert, Yunsig Kim, and Reed Showalter as they are published here.

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It's late, and you're returning home from a long and tiring trip away. You're happy to be back. Home means a needed, normal night. But even as you open the door, you sense that something is wrong. The air is heavy, and there's a strange smell. It's too humid. You step inside and close the door. The smell is stronger. There's a sound you can't place. Almost a hiss.

The easy feeling is gone. Your stomach tightens as you check each room. The bedroom looks strange. With a start, you realize that the rug is wet beneath your feet. The floorboards leak under your weight. For a moment, you just stand and stare. The wall between the bedroom and the bathroom is dark and warping at the bottom. Water is pouring out at the baseboard.

What do you do next? In a panic, I suspect that most of us would call a friend or parent. Next, we would call an emergency plumber. Some of us might recall where the main shutoff valve is located. Fewer would be handy enough to start pulling down drywall to search for the problem, and even fewer would know how to spot the source of a leak. Fewer still would have the tools and skills to fix it.

No matter where you fall in this range of responses, I'd wager that your first reaction would not be to hit the streets in pursuit of the public's thoughts on the plumbing situation and what to do about it. Shoppers would not be interviewed outside local grocery stores. Opportunities for public comment would not be held. Partly, that is because the condition of your home is not a subject of public interest. Mostly, it is because we just don't care what the public thinks about plumbing issues.

This is not because contested issues do not exist in plumbing. Opinions about the choice between copper piping, chlorinated polyvinyl chloride piping, and cross-linked polyethylene piping can be a point of heated disagreement. The same goes for the use of ProPress or push fittings. Even reliance on the venerable Darcy-Weisbach equation for calculating head loss is sometimes challenged by advocates of the simpler Hazen-Williams equation. If you're unfamiliar with these debates, that's okay. The usual participants are industry experts, not laypeople.

Indeed, our disinterest in public opinions about plumbing stems from the unremarkable fact that the average person knows exactly squat about the subject. True, we are sensitive to the outcomes of plumbing work. (Remember that the bedroom floor is disintegrating beneath your feet.) But the vast majority of us simply lack the time and resources to develop anything close to expertise on plumbing matters.

In this way, plumbing is like carpentry, dentistry, internal medicine, IT support, electrical engineering, automotive repair, and accounting. It's a skillset that most of us value and that many will need exercised on our behalf at some point in our lives, but that few will ever possess. That's why we call a plumber when we have a leak. In many states, licensure as a plumber requires several years of apprenticeship (or equivalent training) under the supervision of a qualified expert or master plumber. The length of the training and the difficulty of the work go a long way in explaining the likely size of that emergency plumber bill.

The curious case of antitrust populism

Now, a question: why, when we are so quick to call plumbers for help with plumbing problems, do many of us refuse to call economists for help with antitrust and competition problems?

The analogy is hardly subtle. In antitrust matters, the home to which we are returning is a segment of our economy. The water soaking into the rug is the poor performance of that segment of trade (rising prices, declining quality, dwindling options and opportunities). The leak somewhere in the wall is the uncertain causal source of those performance problems (possibly some form of anticompetitive conduct). And the plumber is the impressively trained and experienced economist.

Yet while we waste no time dialing the plumber when our wall starts leaking, the need for economic expertise in the guidance and handling of challenging antitrust issues has been denied throughout much of antitrust law's history—as it is being denied again today.

The most recent program to limit the influence of economists in antitrust law seeks to replace economic theory with lay reasoning and public opinion. This program is evident throughout recent antitrust writing and policy work. In a speech delivered at the Stigler Center a few years back, former Assistant Attorney General Jonathan Kanter encapsulated the thesis of this program:

For too long we have cloaked the antitrust laws in technocratic language. We must use the language of the people and the markets to empower participation in the Antitrust enterprise. [...] When we issue guidelines and speak only of small but significant non-transitory increases in price, or of how vertical effects derive from the elimination of double marginalization, we exclude these people from the antitrust dialogue. This language boxes the public and the courts out of a critical discourse about how their economy is structured.

Unlike plumbing issues, the structure of the economy apparently *is* a subject upon which we need to hit the streets in search of public opinion and folk wisdom.

For the past several years, antitrust populists have embraced this reasoning. Non-expert opinions were expressly sought on the content of the United States merger guidelines. Revisions aspired to make those guidelines more accessible to the public. Deemphasizing economic analysis in the 2023 guidelines has been widely noted and sometimes celebrated. Commentators proclaim that long reliance on economics in antitrust law has come to an end. Conferences ask whether technocratic antitrust has a future, and how far popular opinion can replace economics in dictating the scope and structure of antitrust law.

What gives? Why do we defer to plumbers on leaks in the wall, but not to economists on matters concerning the structure and manipulation of markets, the meaning and identification of anticompetitive conduct, or the crafting of policies and remedies? The respective people skills of each profession are about the same, in my experience, so the answer must lie elsewhere. But what *is* the answer? What explains this preference for public opinion over economic expertise in the handling of antitrust matters?

The short reach of common sense

We might start by addressing an unlikely possibility: that economists are not needed because, unlike plumbing, the subject matter of antitrust law is one of general comprehension and understanding. The evidence against this is overwhelming.

Considering training alone, one struggles to see how economic expertise could be disregarded. Long apprenticeship periods for plumbers are, if anything, shorter than the average sentence in an economics PhD program. The understanding of fluid dynamics and the mechanical skills of the plumbing profession are hard earned, to be sure, but so are the mathematical, statistical, and computational skills commanded by modern economists.

The rigors of this training reflect the difficulty of the subject. Celebrated contributions to economic theory are often unintuitive. This is especially true for the aspects of economic theory best suited to antitrust issues.

Important results simply do not come naturally to those without economic training. Useful "markets" for antitrust purposes seldom match lay intuition. Agreements to collude are rarely sufficient, and sometimes not necessary, for collusion to occur. Competitive "concentration" is surprisingly difficult to measure and usually has narrow and complicated significance in understanding competitive performance; severely anticompetitive behavior can arise in small and seemingly unconcentrated markets. In some cases, more competitors can mean worse competitive outcomes. Monopolies may sometimes be socially preferable to cartels, and cartels may in principle be preferable to imperfect competition.

Each of the previous results is subject to caveats, maintained assumptions, and limitations. But that only proves the point that competition is a complicated subject that takes more than common sense and intuition to understand. If we need plumbers to help us deal with the difficulties and complexities of plumbing issues, it seems we would at least want economists to help us understand the difficulties and complexities of competition issues.

The easiness of easy answers

These difficulties lead to the next possible explanation for hostility to economics: that modern economics is too complicated to be of use in antitrust enforcement and litigation, where we need simpler rules and easier answers. Again, however, the logic of the critique crumbles under inspection.

True, modern economics is far more complex than many in the antitrust world might prefer. In the 1950s and 1960s, antitrust opinions sought to identify monopoly power and anticompetitive mergers on the basis of nothing more than market share statistics. But economic modeling has advanced significantly since the middle of the previous century, and singular focus on market shares has given way to the recognition that many possible determinants may contribute to an accurate understanding of competitive performance. In a modern economic model of oligopolistic competition, for example, important considerations could include the specification of demand curves (which may be different for each competitor), the specification of marginal cost curves (typically not directly observable), the identification of competitive action-spaces (competitors in pricing or production decisions), the consideration of dynamic strategies (competitors conditioning actions on past conduct), and the identification of an appropriate time horizon over which to consider competitive interaction (immediate, finite, or infinitely-repeated play). Predicted behavior can vary dramatically between different combinations of these parameters.

This complexity places modern economic models beyond the reach of the untrained public. The average person on the street probably does not have a strong opinion about the proper strategy for estimating nested logit demand models or the relative justifications for different Nash equilibrium refinements. The difference between Cournot and Bertrand competition is simply not a subject of conversation in most households.

But why is any of this a problem? Modern commerce is unimaginably complex. It would be shocking indeed if all its intricacy could be boiled down into something as trivial as a readily measurable market share. The fact that the complexity of modern economics places its methods beyond the reach of laypeople would seem like an argument for deferring to economic expertise, not an argument for rejecting this expertise. The diagnosis and treatment of medical conditions involves a variety of complex tests and procedures today, but I hear no comparable clamoring to make every diagnosis turn on nothing but a simple blood-pressure reading.

Other unimpressive possibilities

We could march through other possible justifications for the program to displace economics with public opinion, but they wouldn't fare much better.

Are economists consistently unwilling to enforce antitrust law aggressively? Even a cursory glance at the work of prominent antitrust economists obliterates this theory.

Are economic models too indeterminate—too capable of supporting opposing interpretations of the evidence—to aid in the litigation of antitrust cases? Litigation is nothing if not an opportunity for opposing parties to develop conflicting interpretations of the evidence.

Is economic theory too nearsighted in looking primarily at price and quantity measures? Markets can be designed and manipulated to further whatever outcomes policymakers want. If economic theory is not yet developed enough to guide the pursuit of a given goal, this is both an opportunity for new research and a hint about the likely non-obviousness of the relationship between competition and the targeted goal.

The division of labor in antitrust

While arguments for rejecting economic expertise are unpersuasive, I concede that there is a fundamental sense in which public opinion deserves a commanding role in antitrust law and policy. It is the same sense in which the person who calls for a plumber gets to decide what work the plumber will do.

A violation of this division of labor would be something like the conduct at issue in *National Society of Professional Engineers v. United States*. To make the relevant reasoning concrete, suppose that a small town has announced a request for design proposals to build a bridge across a local river. The National Society of Professional Engineers argued, in this case, that unrestricted competition among the engineers submitting proposals for this project would lead to the provision and selection of low quality and unsafe bridge designs—and thus that a restricted form of competition was more appropriate. Rejecting this argument, the Supreme Court effectively held that it was for the public, not the engineers, to decide what ends competition among the engineers should further. If the public wanted to prioritize price over quality when selecting a bridge design, that was the public's decision to make.

Public opinion is no less authoritative when it comes to the broader purposes and priorities of antitrust law. Economists can and should have opinions about what ends competition and antitrust law should aim to serve. But economists are only some of the many voices who may legitimately contribute to the public debate about what social goals and community objectives antitrust law ought to pursue. Expert economists are no better equipped than professional engineers to deny this public right of choice. Subject to the reality that tradeoffs between conflicting goals will need to be resolved, nothing limits public opinion from demanding that antitrust law address whatever concerns the public prioritizes.

But there is another violation of this division of labor to keep in mind. Just as it was for the public, not the engineers, to decide what ends competition would serve in *Professional Engineers*, it was for the expert engineers, not the public, to submit the requested bridge designs. The Court had no reason to comment on this division of responsibilities, but the point follows logically from other aspects of the opinion. Bridge design is a complex task. It demands appropriate expertise. Even if we are willing to allow free competition to whittle away some degree of quality in bridge engineering, we are not so disinterested in safety as to award a project to someone without the slightest qualification for the job. Public opinion sets the goals for the project; it does not supply the blueprint.

Public opinion is similarly ill-equipped to supply us with implementation details in antitrust law. The challenge of directing competition to the achievement of desired ends is a task that benefits from training, experience, and expertise beyond the public ken. Just as confidence and good intentions do not transform a layperson into an expert plumber or engineer, we should not treat raw public opinion as a useful source of direction on how antitrust law can best achieve its desired ends. We award bridge design to expert engineers, we call plumbers when our pipes start leaking, and we should be willing to rely heavily on economic expertise in helping us implement effective antitrust rules and policies.

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