

## SEPARATION OF POWERS AND ANTITRUST

Separation of powers and antitrust deal with power and occupy center stage in our challenging times, but their interactions have not yet been analyzed. This timely and groundbreaking book provides an innovative cross-disciplinary analysis of the potential convergence of these two fields. Notably, Vincent Martenet examines the concentration of politico-economic power in the hands of a few digital firms that have adopted private regulation, impacting an entire industry and society at large. He combines doctrinal method with historical developments, case studies, assessment of legislative proposals, and observations on the functioning of digital markets and democracy in the digital and artificial intelligence era. This book sketches important new axes of the separation of powers and suggests that antitrust may contribute, albeit in a limited way, to greater trust in both society and democracy. *Antitrust for trust*, or the ultimate apparent antitrust paradox.

Vincent Martenet is the Dean of the Faculty of Law, Criminal Sciences, and Public Administration at the University of Lausanne where he teaches Swiss and comparative constitutional law, as well as competition law. He has occupied various positions at the Swiss Competition Commission, which he chaired from July 2010 until December 2017, and is currently Deputy Justice at the Supreme Court of Switzerland. His fields of interest include constitutional law, comparative public law, and competition law.

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# Separation of Powers and Antitrust

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To Patricia, Arnaud, and Cassandre

From the earliest years of our nation, Americans have understood that too great a concentration of economic power is fatal to democracy.

Jack M. Balkin, review of *The Anti-Oligarchy Constitution*

Competition is the most remarkable and ingenious instrument for reducing power known in history.

Franz Böhm, “Democracy and Economic Power,” 279

The laws of circumstances are abolished by new circumstances.

Napoléon Bonaparte, *Maximes et pensées*, 110 (translation)

A monopoly is an autocracy in business clothes.

Dave Eggers, *The Every*, 354 (words of a fictional U.S. politician  
“running for small business. For free enterprise.  
For freedom. For president.”)

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## Preface

This book investigates whether separation of powers and antitrust are – at least partly – based on common ground from a historical, comparative, and prospective point of view. Are we ultimately witnessing some actual or potential convergence between them? Both separation of powers and antitrust occupy center stage in our challenging, digital times, but their interactions have never been analyzed. Even though one relates first and foremost to state power and the other to economic power, they may interact with one another, especially in an era of unprecedented accumulation of economic and political power by a few firms in the digital and artificial intelligence era.

Both separation of powers and antitrust indeed deal with *power*. This timely book breaks new ground notably by examining the concentration of politico-economic power in the hands of a few firms which adopt private regulation that affects an entire industry and society at large, which are part of the digital infrastructure of democracy and which may exercise a significant influence on public decision-makers. It combines doctrinal method with historical developments, assessment of legislative proposals, case studies, and observations on the concrete functioning of digital markets and democracy in the digital and artificial intelligence era.

The approach followed in this book helps one to arrive at the tenet of some reinforced separation between political and economic powers or, put another way and actually more accurately, between governmental and platform powers. The book sketches new axes of the separation of powers – some of them involving antitrust – and concludes that the latter may contribute to trust within society and in democracy.

This book includes interdisciplinary and multidisciplinary perspectives, showing how constitutional and antitrust principles can interact. It provides readers with the keys to understanding the need for regulatory and antitrust reform to address the concentration of politico-economic power by a few digital platforms. It is aimed at being concise and, at the same time, insightful, as well as thought-provoking.

On a more personal note, this book represents the unique chance to combine my two main fields of interest and expertise, both as an academic and a public servant.

It has accompanied me for many years. Initially, I intended to write an article, but David J. Gerber encouraged me to develop the subject matter in a wider context and to write a monography. I have thought about it and decided to abide by his suggestion! I would like to thank him warmly for having convinced me to launch this adventure, as well as him and his co-editor, Mortimer Sellers, for having accepted to publish my book in the ASCL Studies in Comparative Law at Cambridge University Press. My deepest thanks also go to Tom Randall and Marianne Nield, former and current Commissioning Editors at Cambridge University Press, respectively, who followed this project in a very professional and supportive way.

I had the opportunity to discuss parts of the book with various colleagues whom I greatly respect and who have given me very useful feedback. In this regard, I am indebted to Odile Ammann, Marc Amstutz, Bruce J. Caldwell, Vikram Chand, Boi Faltings, Dana Foarta, David J. Gerber, Inge Graef, Andreas Heinemann, Martin Jaggi, Shaheez Lalani, Catherine Larrère, Thierry Ménissier, Sylvain Métille, Jan-Werner Müller, Luka Nenadic, Kazuaki Nishioka, Peter Georg Picht, Edgar Philippin, Dominique Schnapper, and Heike Schweitzer for their helpful comments. I thank Clémence Demay, Julia Kamhi, Natalia Pérez, and Stéphanie Tumini from the University of Lausanne for their excellent research assistance, Derek Heath for his extremely valuable proofreading as well as Doriana Ferreira for her meticulous review of the bibliography and the index.

Finally, this book is dedicated to my wife and our children for illuminating my life.